

# **HUDDY ON AUTOMOBILES**

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**SIXTH EDITION**

**1922**



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THE LAW  
OF  
AUTOMOBILES

BY  
XENOPHON P. HUDDY, LL. B.  
OF THE NEW YORK BAR

SIXTH EDITION

BY  
ARTHUR F. CURTIS  
Of the Delhi, N. Y., Bar. Author of "The Law of Electricity" and Co-editor  
of "Street Railway Reports," "Chattel Mortgages and  
Conditional Sales," etc.



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1922

Made in U. S. A.

*First Edition*

TO

MY WIFE

WHO IS

MY GREATEST AND WISEST COUNSELOR

686235



## PREFACE

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SIXTH EDITION

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Since the publication of the Fifth Edition of HUDDY on AUTOMOBILES, the progressive increase from year to year in the number of automobile decisions has continued. Each year adds an increasing number of new decisions to this branch of the law. The profession requires the latest decisions to keep abreast with the law on the subject. With a view of assisting the labors of an overworked profession, a new edition of this work has been deemed desirable.

When preparing a new edition, it has been thought wise to insert a new chapter relating to the forfeiture of vehicles unlawfully carrying intoxicating liquors. This branch of the law is in an early period of development and many contrary decisions have been rendered in the various jurisdictions. It is a subject of peculiar interest, and it is hoped that the chapter will be found of use.

ARTHUR F. CURTIS.

Delhi, N. Y., April 3, 1922.





## PREFACE

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### FIFTH EDITION

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The common knowledge of the legal profession as to the increasing bulk of judicial decisions on AUTOMOBILE LAW renders unnecessary any apology or excuse for the presentation of a Fifth Edition of Mr. Huddy's work.

Mr. Huddy was a pioneer author in the law pertaining to motor vehicles. In the first edition published in 1906, he built a path when but few adjudicated cases marked the way, and he built it well. Despite the amazing development of the motor carriage, his outline of the subject made a framework which was sufficient for four editions published at various times during a decade.

But the decisions on this branch of the law increased faster, and ever faster. A lawyer would have passed the recognized bounds of ordinary common sense had he predicted in 1906 the mass of judicial authority now to be found in the reports. To a certain extent the framework constructed by Mr. Huddy has collapsed under the bulk of court decisions. It has, therefore, been deemed advisable to re-arrange and re-write the major part of the book. Questions, such as, for example, the liability of the owner for the acts of his chauffeur, which formerly constituted but a part of a chapter, have, in the course of the development of the law, assumed such importance, that now they are entitled to an entire chapter.

It is with some trepidation that the editor of this edition has assumed to make fundamental changes in the arrangement of the material. But care has been observed to avoid the escape of all valuable material in the earlier editions.

With the hope that the new edition will be of equal service as its predecessors and will be as appreciatively received by the profession, it is respectfully submitted.

ARTHUR F. CURTIS

Delhi, N. Y., October 1, 1919.



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# THE LAW OF AUTOMOBILES

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## SIXTH EDITION

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### CHAPTER I.

#### DEFINITIONS AND GENERAL CONSIDERATIONS.

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#### Sec. 1. Automobile defined.

The term automobile is the generic name which has been adopted by popular approval for all forms of self-propelling vehicles for use upon highways and streets for general freight and passenger service. This definition should not include such self-propelling machines as steam road rollers or traction engines designed for hauling loaded trucks or vans in trains.

nor such vehicles as require tracks for operation,<sup>1</sup> but does include motor trucks.<sup>1a</sup>

1. "**Automobile**" defined.—The New International Encyclopedia, vol. II, pp. 271, 272.

A hybrid adjective—substantive (from Greek *auto*, stem of *autos*, "self," and Latin *mobilis*, "movable"), adopted as a generic term for self-propelled vehicles adapted to run and be steered on common roads and to carry either articles or passengers other than exclusively for their own use or guidance. The word is quite commonly abbreviated to "auto" simply; while a devotee of the new mode of locomotion is very frequently styled an "autoist." It is sometimes employed also in its original adjective of "self-movable" to form self-explaining compounds, such as "automobile boat," and the like. *Int. Motor Cyc.*, p. 37.

Primarily the word means a vehicle designed mainly for transportation of persons on highways, equipped with an internal combustion, hydrocarbon vapor engine, which furnishes the motive power and forms a structural portion of the vehicle. Secondly, it is used as synonymous with "motor vehicle," denoting a vehicle moved by inanimate power of any description, generated or stored within it, and intended for the transportation of either goods or persons on common highways. *Americana*.

**Traction engine included under New Hampshire law.**—*Emerson Troy Granite Co. v. Pearson*, 74 N. H. 22, 64 Atl. 582.

"An automobile is not a work of art, nor a machine about which there can be any very peculiar fancy or taste, but it is not a common, gross thing, like a road wagon or an ox cart." *Walker v. Brout Bros. Automobile Co.*, 124 Mo. App. 623, 642, 102 S. W. 25.

**Automobilism.**—The science which treats of automobiles and their struc-

ture, operation and applications, and of other matters pertaining directly and indirectly thereto. *Int. Motor Cyc.*, p. 45.

**Washing automobile—domestic use of water.**—Water supplied and used by a man for washing a motor car and for other purposes in connection therewith, the motor car being used by him for the purpose of his profession or the business of a physician and surgeon, is water supplied for domestic purposes within the meaning of English Waterworks Law. *Harrogate Corporation v. McKay*, 2 L. Rep. K. B. Div. 1907.

**Automobiles as household effects.**—See *Hillhouse v. United States*, 152 Fed. 163, 81 C. C. A. 415. In this case a decision was rendered by the United States Circuit Court of Appeals on January 14, 1909, holding that American owners of foreign touring cars returning to this country must pay duty upon their machines. The court's decision reverses the judgment of the lower courts and the action of the general appraisers. It was rendered in a case involving the importation of an automobile which had been repaired abroad. The practice had been to admit the automobiles of returning tourists free of duty as household effects. The decision held that an automobile is not a household effect within the meaning of the law, and that for so much of the machine as was a new manufacture and had been used abroad for the period required duty should be exacted, but not so much as had been used for the requisite time. It was held in a latter case in the same court that it would be an unreasonable extension of the proposition here stated to hold that importations dutiable at some particular rate as completed articles may be constructively separated

The meaning of the word automobile is, containing means of propulsion within itself; self-propelling; as automobile car — an automobile vehicle or mechanism.<sup>2</sup> The automobile has been said to mean, "All motor traction vehicles capable of being propelled on ordinary roads. Specifically horseless carriages."<sup>3</sup> And it has been defined as "a vehicle for the carriage of passengers or freight propelled by its own motor."<sup>4</sup> In one case, the court speaks of motors and automobiles as the only words which represent the fashionable locomotives of the day.<sup>5</sup> The term "motor vehicles" is sufficiently comprehensive to include automobiles,<sup>6</sup> even *Fords*.<sup>7</sup>

## Sec. 2. Auto.

The term "auto" is an abbreviation of the word automobile, used as a prefix with the meaning of self-moving, self-propelling; as an autocar, an autocarriage, an autotruck, an automobile car, carriage, truck, etc.,<sup>8</sup> and is one which is frequently used in referring to such vehicles.

for duty purposes into parts subject to different classifications. So when an importer imports incomplete cars and tires separately by the same vessel and entered at the custom house at the same time, the parts are dutiable as a whole and not as separate entities. *United States v. Auto Import Co.*, 168 Fed. 242, 93 C. C. A. 456. And in another later case, under this same section 504, it is decided that by the use of the words "similar household effects" after the words "books, libraries, usual and reasonable furniture," Congress intended to do away with the exemption of household effects generally and to restrict it to such as should be like books, libraries, or household furniture and that automobiles cannot be said to be similar to either of these. *United States v. Grace & Co.*, 166 Fed. 748, 92 C. C. A. 536.

1a *Bethlehem Motors Corp. v. Flynt*, 178 N. C. 399, 100 S. E. 693.

2. Means of propulsion within itself. — *Web. Int. Dict., Supp.*, p. 19.

The term means "self-propelling; self-moving; applied especially to motor vehicles, such as carriages and cycles of those types usually or formerly propelled by horses or men. An autocar or horseless carriage." *Standard Dict. Addenda*.

3. See *English's Law Dict.*, p. 78. This definition was approved in *Diocese of Trenton v. Toman*, 74 N. J. Eq. 702, 70 Atl. 606.

4. *Bouvier's Law Dict.* (Ed. 1914), p. 294.

5. *Aerators Limited v. Tollit*, 86 L. T. (N. S.) (Eng.) 651, 50 W. R. 584, 71 L. J. Ch. 727, (1902) 2 Ch. 319.

6. *People v. Surace* (Ill.), 129 N. E. 504; *Schier v. State*, 96 Ohio. 245, 117 N. E. 229.

7. *People v. Falkovitch*, 280 Ill. 321, 117 N. E. 398.

8. *Web. Int. Dict. Supp.*, p. 19.

**Auto truck.**—It is said that an auto truck is a self-propelling or self-moving truck adapted for heavy grades. *Standard Dict. Addenda*. The term

**Sec. 3. Car.**

The term "car" is a common and popular expression designating the automobile, and when used in connection with other words of a written instrument, for example, which make it apparent what is referred to, there can be no question as to the interpretation. This frequent and generally accepted use of the word has made its application to the automobile correct and the courts are bound to take judicial notice of the custom. The terms "machine" and "motor car" are also frequently heard.<sup>9</sup>

**Sec. 4. Motor and motoring.**

The term "motor" is commonly used to designate the automobile as a whole, and the word "motoring" is also in common use as meaning operating or driving a motor vehicle. However, unless the contrary appears, the term "motor" may have a more limited application. Thus this word used in a statute empowering street railways, with the consent of the municipal authorities, to use electric or chemical motors as a propelling power of their cars, has been construed to mean the motion-producing contrivance of the car, and not to embrace the entire car, though the word is sometimes loosely used to designate a whole car.<sup>10</sup>

**Sec. 5. Joy riding.**

"When two or more persons voluntarily drive or ride an automobile upon a public highway at a dangerously high rate of speed merely for the purpose of enjoying the exhilarating

is more accurately applied to automobiles used for commercial purposes and the hauling of heavy loads, and is one which is frequently used in referring to such vehicles.

**9. Car.**—A general term for a vehicle of a type which, when horse drawn, is called a "carriage." *Int. Motor Cyc.*, p. 97.

An autocar may be said to be an automobile vehicle especially for street travel. *Standard Dict. Addenda.*

**10. State v. Inhabitants of City of Trenton**, 54 N. J. Law (25 Vroom) 92, 23 Atl. 231.

The word "motor" means a machine for transforming natural energy in various forms into mechanical work, the term in the modern sense embracing windmills, water-wheels, and turbines, steam engines, and steam turbines, the various kinds of gas engines, compressed-air motors, petroleum motors, electric motors, etc. Steam, hot

and pleasurable sensations incident to the swirl and dash of rapid transit, they may properly be said to be engaged in joy riding. Such joy riders not only assume the risks of danger attendant upon the sudden and violent movements of the car, but also such as arise from the inability of the driver, when traveling at a high rate of speed, to make short quick stops to avoid collisions, or defects in the street, or direct the car at bends or curves in the road so as to keep in the traveled way."<sup>11</sup>

### Sec. 6. Automobile line.

"Automobile line," "stage line," "railroad line" are expressions which are ordinarily understood to mean a regular line of vehicles for public use operated between distant points, or between different cities, and have been construed as not including hacks, stages, and automobiles which merely operate from point to point in one city for the transportation of the public.<sup>12</sup>

The term "automobile line," however, owing to the fact of the introduction of the "jitney" service in many cities, for the carriage of passengers over certain designated routes and between specified points within municipal limits may, it would seem, be properly used in such cases.

### Sec. 7. Automobile as a stage coach.

An automobile used in the place of a stage coach for the carriage of mails, freight or passengers, has been held to be a "stage coach" within the meaning of a statute regulating toll roads and prescribing the rates of toll to be charged for the use of turnpikes by "vehicles," "pleasure carriages or hackney coaches," "stage coaches" and "traction or other engines." It is immaterial that the automobile was unknown

air, gas, and petroleum motors together constitute the group of thermic motors, because in all of them the source of energy is heat. The Encyclopedia Americana, vol. X.

An **automotor** is a self-propelled machine (Standard Dict. Addenda), and

an automobile (Webster Int. Dict. Supp.).

11. *Winston's Adm'r v. City of Henderson*, 179 Ky. 220, 200 S. W. 230.

12. *Commonwealth v. Walton*, 31 Ky. L. Rep. 916, 104 S. W. 323.

at the time of the passage of the act as it is not the model or name of the vehicles but the purpose for which it is used which fixes the toll charge.<sup>13</sup>

### Sec. 8. Automobile as a vehicle.

A vehicle may be defined as "a carriage moving on land, either on wheels or runners; a conveyance; that which is used as an instrument of conveyance or communication." An automobile is clearly a "vehicle" as so defined.<sup>14</sup>

The term "vehicle" is expressly defined in some statutory enactments so as to include motor vehicles.<sup>15</sup> Thus, it has been held that an ordinance requiring the licensing of any "hackney coach, cab or other vehicle for the conveyance of passengers, for hire from place to place within the limits of the city" applied to taxicabs engaged in the business of conveying passengers for hire, it being the business of public conveyance in "vehicles" that was subject to the supervision of the city, without regard to the motive power used in propelling the vehicle.<sup>16</sup> Similarly it has been held that an automobile was

13. *Burton v. Monticello and Burnside Turnpike Co.*, 162 Ky. 787, 173 S. W. 144.

14. *Alabama*.—See *Davis v. Petrinovich*, 112 Ala. 654, 21 So. 344, 36 L. R. A. 615; *Mills v. Court of Com'rs*, 85 So. 564.

*District of Columbia*.—*Gassenheimer v. District of Columbia*, 26 App. Cas. (D. C.) 557; compare *Washington Electric Vehicle Transfer Co.*, 19 App. Cas. (D. C.) 462.

*Iowa*.—*Lames v. Armstrong*, 162 Iowa, 327, 144 N. W. 1, 49 L. R. A. (N. S.) 691n.

*Kentucky*.—*City of Henderson v. Lookett*, 157 Ky. 366, 163 S. W. 199.

*Massachusetts*.—*Foster v. Curtis*, 213 Mass. 79, 99 N. E. 961, Ann. Cas. 1913 E. 1116.

The automobile is a vehicle in common use for transporting both persons and merchandise upon the public ways, and its use is regulated by statute.

*Baker v. City of Fall River*, 187 Mass. 53, 72 N. E. 336.

**Automobile is a vehicle.**—An automobile is a "vehicle" within the meaning of a statute using that term. *Gassenheimer v. Dist. of Columbia*, 26 App. Cas. (D. C.) 557. But see *Washington Electric Vehicle Transfer Co. v. Dist. of Columbia*, 19 App. Cas. (D. C.) 462.

15. *Sterling v. Bowling Green*, 3 O. C. (N. S.) 217, 16 Cir. Dec. 581. See also, Gen. Stat. Conn. 1902, sec. 2038.

16. *State v. Dunklee*, 76 N. H. 439, 84 Atl. 40, Ann. Cas. 1915 B. 754. The court said, per Walker, J.: "The validity of the ordinance as applied to the business of transporting passengers in cabs or hackney coaches is not questioned, nor is it contended that the use of taxicabs as a public means of conveyance does not require for practical purposes the same supervision or regulation by the city as the use of hacks



included in the application of a statute providing that: "The driver of a carriage or other vehicle traveling in the same direction shall drive to the left of the middle of the travelled part of a bridge or way."<sup>17</sup> And an exemption law covering a "vehicle" has been deemed to include an automobile.<sup>18</sup> But exemption laws applying to vehicles which may be drawn by one or two horses, do not include motor vehicles.<sup>19</sup>

### Sec. 9. Automobile as a carriage.

Plainly, an automobile is within the meaning of the term "carriage," and it is so held by the courts under some circumstances.<sup>20</sup> Hence, in construing a covenant in a deed reserving a strip of land for a carriageway, it has been held that an

in the same business. The evident purpose of the ordinance, which was enacted in 1894 by virtue of authority granted to the city by section 10, c. 50, Public Statutes, was to regulate and supervise the business of public carriers of passengers upon the streets of the city, for the convenience and safety of the public. The license is required when one engages in that business, and not when he uses a hack, or a taxicab, or other vehicle for his own accommodation. The particular name or designation of the vehicle is not important, but the character of the business in which it is used is important, and determines the question whether a license is required under the ordinance. In other words, the ordinance does not purport to regulate or supervise the mechanism of vehicles that are allowed to use the streets, or to authorize the mayor and aldermen to determine the kind of motive power that may be used in the propulsion of carriages upon the public highways. It is only the business of public conveyance in vehicles of some kind that is subject to the supervision of the city."

17. *Foster v. Curtis*, 213 Mass. 79, 99 N. E. 961, Ann. Cas. 1913 E. 1116, Wherein it is said that: "A vehicle

is a means of conveyance and the term has not been restricted to horsedrawn carriages, but includes bicycles, motorcycles, automobiles, or a street car."

**Street car as a vehicle.**—A statute giving the right of way to vehicles coming from the right has no application to street cars. *Reed v. Public Service Ry. Co.*, 89 N. J. L. 431, 99 Atl. 100.

18. *Lames v. Armstrong*, 162 Iowa, 327, 144 N. W. 1, 49 L. R. A. (N. S.) 691n. See also, *Hart v. McClellan* (Iowa), 174 N. W. 691.

19. *Brown Laundry & Cleaning Co. v. Cameron* (Cal. App.), 179 Pac. 525. See also, *Prater v. Reichman*, 135 Tenn. 485, 187 S. W. 305.

20. *United States*.—*Patten v. Sturgeon*, 214 Fed. 65, 130 C. C. A. 505.

*Massachusetts*.—*Baker v. City of Fall River*, 187 Mass. 53, 72 N. E. 336. Compare *Doherty v. Town of Ayer*, 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 816n.

\* *New Jersey*.—*Diocese of Trenton v. Toman*, 74 N. J. Eq. 702, 70 Atl. 606.

*Pennsylvania*.—*Commonwealth v. Hawkins*, 14 Pa. Dist. R. 592; *Scranton v. Laurel Turnpike Co.*, 14 Luz. Leg. Rep. 97.

*Texas*.—*Hammond v. Pickett* (Tex.

automobile is a carriage.<sup>21</sup> So, too, under a statute exempting a carriage from levy under an execution, it has been held that an automobile is exempt.<sup>22</sup> But difficulty arises with reference to the construction of particular statutes using the word "carriage," and particularly is this so when the statute in question was enacted before the popular use of motor vehicles. Thus, it has been held that, under an old statute requiring towns to keep their roads and highways in reasonably safe repair and condition for the safety of carriages, the duty of the town was not extended to automobiles.<sup>23</sup> And, in construing a statute providing that "whoever \* \* \* with intent to cheat or defraud the owner thereof, \* \* \* refuses to pay for the use of a horse or carriage, the lawful hack or carriage fare established therefor by any city or town shall be punished" by fine or imprisonment, or both, it was held that automobiles were not included.<sup>24</sup> So, too, a statutory requirement that a forerunner must precede a carriage, vehicle or engine propelled by steam has been held to have no application to an automobile propelled by steam.<sup>25</sup>

Civ. App.), 158 S. W. 174; *Peevehouse v. Smith* (Tex. Civ. App.), 152 S. W. 1196.

21. *Diocese of Trenton v. Toman*, 74 N. J. Eq. 702, 70 Atl. 606.

22. *Hammond v. Pickett* (Tex. Civ. App.), 158 S. W. 174; *Peevehouse v. Smith* (Tex. Civ. App.), 152 S. W. 1196. See also, *Parker v. Sweet* (Tex. Civ. App.), 127 S. W. 881. *Compare* *Matter of Wilder*, 221 Fed. 476; *Crown Laundry & Cleaning Co. v. Cameron* (Cal. App.), 179 Pac. 525.

23. *Doherty v. Town of Ayer*, 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 816n. *Compare* *Baker v. Fall River*, 187 Mass. 53, 72 N. E. 336.

24. *Commonwealth v. Goldman*, 205 Mass. 400, 91 N. E. 392, wherein it was said: "It is certain that when this statute was originally enacted, the legislature, in using the word 'carriage' had no thought of a vehicle made up in large part of complicated machinery, and propelled by a powerful engine.

whose operation is similar to that of locomotive engines on railroads. While such a vehicle may be called a carriage in the broad sense that it is used to carry persons and property, it is not commonly referred to as a carriage, but is distinguished from carriages by another name to designate a vehicle of an entirely different character."

25. *Automobile not a carriage or vehicle*.—In the state of New York there is a law which makes it necessary for an owner of a vehicle propelled by steam to send ahead of the vehicle a person of mature age, at least one-eighth of a mile in advance, who shall notify and warn persons of the approach of the vehicle. This law would seem to apply to an automobile propelled by steam, and, it might be suggested that if the prosecuting authorities wished to do so the owners and drivers of automobiles propelled by steam could be prosecuted under the provisions of this statute. Such a

**Sec. 10. Automobile as a pleasure carriage.**

"A pleasure carriage is one for the more easy, convenient, and comfortable transportation of persons,"<sup>26</sup> and the term "pleasure carriage," as used in an act establishing a turnpike, includes a one-horse wagon with a spring seat and painted sides, which is not used for farming purposes or for carrying goods.<sup>27</sup> The automobile, being a "pleasure carriage," may use a toll road or turnpike upon paying reasonable fees for the privilege.<sup>28</sup>

**Sec. 11. Automobile as a wagon.**

It has been held that an automobile is not a "wagon" within the meaning of statutes passed prior to the use of motor vehicles. Thus, it has been held that an automobile was not exempt as a wagon.<sup>29</sup> And an act for the forfeiture of "wagons" used in introducing liquor into Indian countries, has been held inapplicable to automobiles so used.<sup>30</sup>

view, however, is erroneous, for it has been expressly held in *Nason v. West*, 31 Misc. R. (N. Y.) 583, 65 N. Y. Suppl. 651, that the provisions of the highway law, section 155, and of the Penal Code, section 640, subdivision 11 do not apply to . . . "automobiles, but are directed against the heavier engines; and the requirement that a forerunner must precede the steam carriage would have no value, and has no application." The New York statute is as follows: "The owner of a carriage, vehicle, or engine, propelled by steam, his servant or agent, shall not allow, permit or use the same to pass over, through or upon any public highway or street, except upon railroad tracks, unless such owners, or their agents or servants, shall send before the same a person of mature age at least one-eighth of a mile in advance, who shall notify and warn persons traveling or using such highway or

street, with horses or other domestic animals, of the approach of such carriage, vehicle, or engine; and at night such person shall carry a red light, except in incorporated villages and cities. This section shall not apply to any carriage or motor vehicle propelled by steam developing less than twenty-five horse power, other than a steam traction engine."

26. *Brendon v. Warley*, 8 Misc. (N. Y.) 253, 28 N. Y. Suppl. 557.

27. *Moss v. Moore*, 18 Johns. (N. Y.) 128.

28. *Seranton v. Laurel Run Turnpike Co.*, 14 Luz. Leg. Reg. Rep. 97. See also, section 52, as to the right to use toll roads.

29. *Prater v. Riechman*, 135 Tenn. 485, 187 S. W. 305.

30. *United States v. One Automobile*, 237 Fed. 891. And see section 541.

**Sec. 12. Automobile as an appurtenance.**

An automobile is not an "appurtenance" within the meaning of a statute authorizing police officers, in case of a violation of the liquor laws, to seize the "liquor, bars, furniture, fixtures, vessels, and appurtenances thereto belonging."<sup>31</sup> Other statutory provisions may give greater power over automobiles used in the unlawful traffic of liquor.<sup>32</sup>

**Sec. 13. Automobile as a tool or implement of trade.**

An automobile is not a "tool or implement of trade" within the meaning of homestead laws exempting such articles.<sup>33</sup>

**Sec. 14. Extrinsic evidence of meaning of terms.**

Extrinsic evidence as to the meaning of the various terms employed to designate the automobile would be admissible as explanatory of the language of any particular instrument or writing. In pleadings, however, especially in criminal proceedings, particular care should be exercised in using the proper and correct terms, especially where the definitions are to be found in a statute, which should be followed in the language of the act.<sup>34</sup>

**Sec. 15. Legislative definitions.**

Fearing that disputes in the future might arise concerning the meaning of the terms employed in automobile legislation

**31.** One Cadillac Automobile v. State (Okla.), 172 Pac. 62; Lebrecht v. State (Okla.), 172 Pac. 65; State v. One Packard Automobile (Okla.), 172 Pac. 66; One Moon Automobile v. State (Okla.), 172 Pac. 66; One Hudson Super-six Automobile v. State (Okla.), 173 Pac. 1136; State v. One Ford Automobile (Okla.), 174 Pac. 488; Bussey v. State (Okla.), 175 Pac. 226; Cooper v. State ex rel. Hardy (Okla.), 175 Pac. 551; Crossland v. State (Okla.), 176 Pac. 944; First Nat. Bank of Roff v. State (Okla.), 178 Pac. 670. And see section 941.

**32.** See U. S. v. Mincey (C. C. A.), 254 Fed. 287, 5 A. L. R. 211; Bern-

stein v. Higginbotham (Ga.), 96 S. E. 866; Phillips v. Stapleton, 23 Ga. App. 303, 97 S. E. 885; Martin v. English, 23 Ga. App. 484, 98 S. E. 504; Nesmith v. Martin, 149 Ga. 27, 98 S. E. 551; State v. Ralph, 184 Iowa, 28, 168 N. W. 258.

**33.** Eastern Mfg. Co. v. Thomas, 82 S. Car. 509, 64 S. E. 401. See also, Hart v. McClellan (Iowa), 174 N. W. 691.

**34.** "Judges have the general cognizance of other people as to the terms relating to the use of automobiles." Chamberlayne's Modern Law of Evidence, sec. 775.

to designate the automobile, in many of the States the terms "motor vehicle," "automobile," "motor car," and "motor cycle," have been expressly defined by the legislatures. Thus it is commonly provided that the term "motor vehicle" shall include all vehicles propelled by any power other than muscular, except road rollers, fire engines, traction engines, and such vehicles as run only upon rails or tracks. Cars of electric and steam railways are specifically excepted from the operation of the statutes and so are bicycles, tricycles, or such other vehicles propelled exclusively, or in part, by muscular pedal power. The term "motor vehicle" as used in legislation means motor vehicles having more than two wheels ordinarily. Automobile fire engines and such self-propelling vehicles as are used neither for the conveyance of persons for hire, pleasure, or business, nor for the transportation of freight are excepted from the provisions of some of the enactments. The term "machine" is also sometimes used in connection with other words to designate the automobile.<sup>35</sup>

The expression "motor car" in the English Motor Car Act of 1903, means the same as the expression "light locomotive" in the principal act as amended by the 1903 act, except that, for the purpose of the provisions of the law of 1903 with respect to the registration of motor cars, the term "motor car" does not include a vehicle drawn by an automobile.<sup>36</sup>

### **Sec. 16. Traction engine as automobile.**

A traction engine has been held to be an automobile within the meaning and construction of an automobile law providing that the terms "automobile" and "motor cycle" shall include all vehicles propelled by other than muscular power, except railroad and railway cars and motor vehicles running only

**35. Machine.**—An assemblage of inter-related movable parts, forming an appliance for transmitting and modifying forces and the motion produced by them. A force employed to move a machine is a "motor." The moving force in a machine is called the "power." The place of its appliance is the "point of application;" the line

in which such point tends to move is the "direction of the power;" the resistance to be overcome, the "weight;" and that part of the machine immediately applied to the resistance, the "working point." *Int. Motor Cyc.*, p. 295.

**36.** See sec. 20, subd. (1). *Eng. Motor Car Act 1903.*

upon rails of tracks and road rollers.<sup>37</sup> Traction engines are usually excluded from the definitions of the terms "automobile" and "motor vehicle," but in the act referred to this was apparently overlooked.

### Sec. 17. Bicycle as a vehicle.

The term "vehicle," as used in a statute, is generally construed to include a bicycle,<sup>38</sup> but a bicycle is not generally to be classed as a "motor vehicle."<sup>38a</sup>

### Sec. 18. Motorcycle as a motor vehicle.

If a bicycle is considered a "vehicle,"<sup>39</sup> a motorcycle should be considered a "motor vehicle." And the courts take this view.<sup>40</sup> Thus, it has been held that a "motor cycle" is a "vehicle of like character" with an automobile as that term

37. *Emerson Troy Granite Co. v. Pearson*, 74 N. H. 22, 64 Atl. 582.

38. *Alabama*.—*Davis v. Petrinovich*, 112 Ala. 564, 21 So. 344, 36 L. R. A. 615.

*Indiana*.—*Mercer v. Corbin*, 117 Ind. 450, 20 N. E. 132, 134, 3 L. R. A. 221. 10 Am. St. Rep. 76; *Holland v. Bartel*, 120 Ind. 46, 22 N. E. 83. 85. 16 Am. St. Rep. 307.

*Iowa*.—*Roberts v. Parker*, 117 Iowa, 389, 90 N. W. 744, 57 L. R. A. 764. 94 Am. St. Rep. 316.

*Massachusetts*.—*Foster v. Curtis*, 213 Mass. 79, 99 N. E. 961, Ann. Cas. 1913 E. 1116.

*Michigan*.—*Myers v. Hinds*, 110 Mich. 300, 68 N. W. 156, 157, 33 L. R. A. 356, 64 Am. St. Rep. 345.

*Minnesota*.—*Thomson v. Dodge*, 58 Minn. 555, 60 N. W. 545, 546, 28 L. R. A. 608, 49 Am. St. Rep. 532.

*North Dakota*.—*Gagnier v. City of Fargo*, 11 N. D. 73, 88 N. D. 1030, 1031, 95 Am. St. Rep. 705.

*Oklahoma*.—*Tulsa Ice Co. v. Wilkes*, 54 Okla. 519, 153 Pac. 1169.

*Pennsylvania*.—*Lacy v. Winn*, 4 Pa. Dist. Rep. 409, 412.

*Rhode Island*.—*State v. Collins*, 16

R. I. 371, 17 Atl. 131, 3 L. R. A. 394n.

*Texas*.—*Laredo Electric & Ry. Co. v. Hamilton*, 23 Tex. Civ. App. 480, 56 S. W. 998, 1000.

*Virginia*.—*Jones v. City of Williamsburg*, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294.

*Canada*.—*Reg. v. Juston*, 24 Ont. (Canada) 327.

38a. *Dice v. Johnson* (Iowa), 175 N. W. 38.

39. See section 17.

40. *People v. Smith*, 156 Mich. 173, 120 N. W. 581, 16 Ann. Cas. 607, 21 L. R. A. (N. S.) 41n.

*England*.—The term "motor car" includes a motor bicycle. *Webster v. Perry* (1914), 1 K. B. 51.

**Motor cycle.**—A two-wheeled or sometimes three or four-wheeled cycle driven by a motor and usually furnished with pedals. The motor drives the wheel by belt, chain or propeller shaft, or even directly by spur-wheels, and is usually started by the pedals or by a crank. There is usually but one speed, but sometimes two or three. Motor cycles carry but one person, the driver, although some makes produce

is used in a statute regulating "the running of automobiles, locomobiles and other vehicles and conveyances of like character."<sup>41</sup> Again, in construing a statute limiting the rate of speed at which an "automobile, or any other conveyance of a similar type or kind" may be driven and imposing certain other duties upon the driver thereof, it was thought that a motor cycle comes within the meaning of the words "or other conveyance of a similar type or kind."<sup>42</sup>

### Sec. 19. Motorcycle as a carriage.

In *England* it has been decided that a motor bicycle is a "carriage" for which a license is required within the mean-

arrangements for carrying another on an auxiliary framing, or in a forward seat converting the motor cycle into a trieycle. When furnished with four wheels it becomes a quadricycle or "quad." *Int. Motor Cyc.*, p. 326.

A boy's sled is not a motor vehicle. *Perrill v. Virginia Brewing Co.* (Minn.), 153 N. W. 136.

41. *Bonds v. State*, 16 Ga. App. 401, 85 S. E. 629, 631. It was said by the court in this case: "The danger to others which arises from the use of an automobile or vehicle of like character depends in part upon the rapid rate of speed at which such vehicles ordinarily travel, or of which they are at least generally capable, the noise usually accompanying their operation, which is calculated to frighten horses or other animals traveling along the public highways, and the difficulty with which they may be guided and controlled when running at a high rate of speed, so as to avoid collisions with persons or teams on the highways. It is a matter of common knowledge that a motor cycle propelled by gasoline is capable of as high or a higher rate of speed than may be attained by a four-wheeled automobile; and it is equally well-known that a motor cycle is even more noisy and is a more alarming

object to country-bred domestic animals than is a larger type of automobile. We may easily conclude that since the primary purpose of the legislature was to protect pedestrians and others on the highways, a motor cycle is a vehicle 'of like character' with an automobile, so far as the act of 1910 is concerned, as the use of a motor cycle on the public highways without check or regulation would bring about or produce the identical dangerous situations and possibilities that the use of the four-wheeled automobile might produce. It is immaterial, so far as frightening a horse on the roadway is concerned, whether the self-propelled machine which approaches at an unlawful rate of speed, wrapped in a cloud of smoke, emitting and accompanied by the vile smell of exploding gasoline, runs on two wheels or four, for it may not be imagined that a horse which would take fright at a four-wheeled vehicle would not be equally frightened at the too rapid approach of a two-wheeled vehicle of like character so far as its capacity for rapid movement, its noise, and its smell are concerned."

42. *Dunkelberger v. McFerren*, 149 Ill. App. 630.

ing of the Customs and Inland Revenue Act of 1888, as being a carriage drawn or propelled upon a road by mechanical power.<sup>43</sup> But it has been held that a bicycle is not a "carriage" within the meaning of a state statute requiring highways to be kept reasonably safe for "carriages."<sup>44</sup>

## Sec. 20. Automobilst.

An automobilist may be said to be one who rides in, or drives an automobile,<sup>45</sup> and may include either an owner, licensee, chauffeur or driver, provided he is familiar with the operation of a car.

## Sec. 21. Owner.

The word "owner" is defined as "The person in whom is vested the ownership, dominion, or title of property: proprietor."<sup>46</sup> "He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases,— even to spoil or destroy it, as far as the law permits unless he be prevented by some agreement or covenant which restrains his right."<sup>47</sup>

These definitions may be said to state in a general way the meaning of the word owner. The question, however, arises whether one who has purchased property under a conditional sale agreement by which title is reserved in the seller may be said to be the owner. In two cases in Canada — in which this question was considered it was held that the purchaser was the owner within the meaning of a statute respecting the liability of the "owner" of an automobile for personal injuries sustained by the mismanagement of the car while under his control.<sup>48</sup> In the Appellate Court it was said, "The word

43. *O'Donoghue v. Moon*, 90 Law T. (N. S.) 843, 68 J. P. 349.

A bicycle may be considered a carriage.—*Taylor v. Goodwin*, 4 Q. B. 223.

44. *Richardson v. Danvers*, 176 Mass. 413, 57 N. E. 688, 50 L. R. A. 127, 79 Ann. St. Rep. 330.

45. Automobilst. — Standard Dict. Addenda.

A person conversant with the struc-

ture and mechanism of an automobile and who is experienced in driving it. *Int. Motor Cyc.*, p. 45.

46. *Black's Law Dict.*, 2d Ed., p. 865.

47. *Bouvier's Law Dict.* (Ed. 1914), p. 2437.

48. *Wynne v. Dalby*, 16 Dom. Law Rep. 710, affirming *Wynne v. Dalby*, 13 Dom. Law Rep. 569, 29 Ont. Law



'owner' is an elastic term, and the meaning which must be given to it in a statutory enactment depends very much upon the object the enactment is designed to serve." And in line with this the court below remarked: "The legislators intended to reach the person who, having the control and management of the motor vehicle, and having an interest such as that of a *bona fide* purchaser, is concerned in securing a proper driver or operator, and who should, under the intention of the Act, be responsible for the acts of the person to whom, as servant, employee, or agent, he intrusts its operation. In the absence of an express interpretation of the word *owner*, and especially in view of what I take to be the object of passing sec. 19, of the Act, I can give no other meaning to the word than that in ordinary use and as defined above. If the legislators had intended it to have a wider or different meaning, they would no doubt have said so."

In a recent case in *Alabama* it is also decided that the expression "owners or custodians" does not extend to a mere servant or a person having only temporary control of an automobile under permission from the owner.<sup>49</sup> Under a statute making "the owner of a motor vehicle liable for any injury occasioned by the negligent operation by any person of such motor vehicle," the word "owner" has been held not to include a person who may be merely either mediately or immediately in possession of the vehicle but to refer to the real proprietor only.<sup>50</sup>

## Sec. 22. Riding and driving.

The words "ride" and "drive" are not confined to animals. They are not limited in any manner whatsoever. Anything

Rep. 62, 4 Ont. W. N. 1330. See also, section 888, as to right of conditional vendee to maintain an action for injuries to the machine.

49. *Armstrong v. Sellers*, 182 Ala. 582, 62 So. 28.

50. *Daugherty v. Thomas*, 174 Mich. 371, 140 N. W. 615, Ann. Cas. 1915 A. 1163, 45 L. R. A. (N. S.) 699n, holding the provision of the law to

this effect to be unconstitutional in that it rendered the owner of an automobile liable for negligent operation of the car by any person who obtained possession of it without his consent and without fault on his part such as mere trespassers and was therefore unconstitutional as depriving the owner of his property without due process of law. See also, *Mitchell v. Van Kenlen*

capable of being ridden or driven comes within the purview of those terms. They are apt words in the case of bicycles, motor cycles or automobiles, when ridden or driven.<sup>51</sup>

### Sec. 23. Automobile parts and accessories.

Definitions of automobile parts and accessories may be of great importance in the construction and interpretation of contracts. What is and what is not included within the meaning of certain terms used by parties may be the subject of dispute. For example, an automobile body is ordered from a manufacturer or dealer; what is the purchaser entitled to receive? Take also the purchase of an automobile. What goes with it for the price named? Are lamps, searchlights, tools, speedometer, clock, windshield, etc., to go with it, or are all or some of these articles to be treated as accessories and entailing extra expense? So far as lamps are concerned, it may be said that the automobile may be expected by the purchaser to be legally equipped for operation on the public highways, but this does not necessarily include extra searchlights. So also a horn or proper signal or warning device goes with the sale of an automobile without express mention. These may be said to come properly within the meaning of the term automobile or other word used in the contract of purchase. Chains, however, to prevent skidding, a speedometer and a clock, might not ordinarily be included. Custom and usage in the trade would control, of course, in the absence of express contractual provisions. Robes, goggles, clocks, speedometers, chains and similar accessories are not parts of an automobile, though quite necessary in the use of motor vehicles.<sup>52</sup>

& Winchester Lumber Co., 175 Mich. 75, 140 N. W. 973.

51. *State v. Smith*, 29 R. I. 245, 69 Atl. 1061; *State v. Thurston*, 28 R. I. 265, 66 Atl. 580.

52. **Engine.**—A piece of mechanism used to convert heat, or some other form of energy, into mechanical work; in other words, a machine for the development of power from some source of energy, such as coal, gas, oil, etc.

A gasoline engine is an internal combustion engine in which the fuel used is an inflammable vapor formed by a mixture of gasoline and air. *Int. Motor Cyc.*, pp. 177 and 178.

**Carburettor.**—An apparatus in which is effected the mixing of the fuel necessary for the operation of internal combustion motors. *Int. Motor Cyc.*, p. 98.

**Chassis.**—As applied to a motor car,

## Sec. 24. Highways.

Ways are either public or private. A way open to all people is a public highway. It will be noted that all the automobile regulations apply only when an automobile is operated on *public* avenues of travel. To drive a motor vehicle on a private way, it is not necessary to register the machine, nor need any specific statutory speed limit be complied with. The term highway is the generic name for all kinds of public ways, including county and township roads, streets and alleys, turnpikes and plank roads, railroads and tramways, bridges and ferries, canals and navigable rivers. Every public thoroughfare is a highway.<sup>53</sup> Thus, in one case, it was said: "It is not the amount of travel upon a highway which distinguishes it as a public instead of a private road. A private road might have the larger amount. It is the right to travel upon it by all the world, and not the exercise of the right which makes

the term "chassis" means the rectangular metal framework thereof, as distinguished from its body and seats, but including its accessories for propulsion, as the tanks, motor, generator, gear, springs, axles, wheels, tires, fan, and general running gear. *Kansas City Auto School Co. v. Holcker, etc., Mfg. Co. (Mo. App.)*, 182 S. W. 759.

The frame is that part of a motor vehicle which supports the carriage body, motor, and transmission, and to which, beneath, are attached the wheel axles. *Int. Motor Cye.*, p. 197.

**Transmission-gear.**—The gearing through which the power from the motor in an automobile is transmitted to the rear axle. *Int. Motor Cye.*, p. 477.

**Automobile engine not a brake.**—*Wilmott v. Southwell*. L. T. Rep., vol. XXV, No. 2, p. 22, Oct. 27, 1908.

<sup>53</sup>. *Schier v. State*, 96 Ohio, 245, 117 N. E. 229; *Elliott on Roads and Streets* (3d Ed.), pp. 1, 2.

For other definitions of highway, see the following cases:

*Arkansas*.—*Arkansas River Packet*

*Co. v. Sorrels*, 50 Ark. 466, 8 S. W. 683.

*Connecticut*.—*Lauffer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533.

*Georgia*.—*Hines v. Wilson (Ga. App.)*, 102 E. 646.

*Indiana*.—*Wild v. Deig*, 43 Ind. 455, 13 Am. Rep. 399.

*Massachusetts*.—*Commonwealth v. Inhabitants of Newbury*, 2 Pick. 51.

*Minnesota*.—*Northwestern Telephone Exch. Co. v. Minneapolis*, 81 Minn. 140, 86 N. W. 69, 53 L. R. A. 17.

*Missouri*.—*Jenkins v. Chicago & A. R. Co.*, 27 Mo. App. 578.

*North Carolina*.—*State v. Cowan*, 29 N. C. 239.

*Oklahoma*.—*Southern Kansas Railway Co. v. Oklahoma City*, 12 Okla. 82, 69 Pac. 1050.

*South Carolina*.—*Heyward v. Chisolm*, 11 Rich. L. 253.

*Wisconsin*.—*Town of Randall v. Rovelstad*, 105 Wis. 410, 81 N. W. 819.

*Canada*.—*Rideout v. Howlett*, 12 E. L. R. 527.

it a public highway.”<sup>54</sup> The term, “public highway,” while it may be construed in a limited sense as meaning a way for general travel which is wholly public, yet in a general and broader sense it may be construed as including toll roads, since in this sense it includes every common way for travel by persons on foot or in vehicles rightfully used on highways, which the public have the right to use either conditionally or unconditionally, and in construing this term it is decided that as used in a general law it should be regarded as having been used by the legislature in its general sense unless there is some efficient reason for believing it was used in the limited sense. So in one state it has been declared that a general law, regulating the operation of automobiles upon public highways in the interest of public safety rather suggests the use of the term in the general than the particular sense, since the danger of personal injury is quite as great and immunity therefrom is quite as important to travelers on the one as the other.<sup>55</sup>

And ways originally laid out as public highways still retain their character as public highways though the park commissioners in any city or town where such ways exist have acquired or have been vested with jurisdiction and control over them. So in *Massachusetts* it was decided that Commonwealth Avenue in the Brighton district in Boston was a public highway within the meaning of the words as used in an order of the *Massachusetts* highway commission requiring an automobile operated on a public highway to display its registered

**Destruction of sign posts.**—Wilfully defacing, injuring, or destroying any mile post, index board, sign post, bridge, or causeway constitutes a misdemeanor, even though the sign or post, as the case may be, was erected by private individuals. *Pullman v. State*, 88 Ala. 190, 7 So. 148.

A bridge may be a public highway. *City of Baraboo v. Dwyer*, 166 Wis. 372, 165 N. W. 297.

A schoolyard is not a highway. *Colliver v. McAuley (Canada)*, 46 D. L. R. 140.

In a particular statute, the expression “public highway of this state,” may be construed as meaning a public road outside of a city. *City of Windsor v. Bast (Mo. App.)*, 199 S. W. 722.

**54.** *Matter of Mayor of New York*, 135 N. Y. 253, 260, 31 N. E. 1033, 31 Am. St. Rep. 825.

**55.** *Weirich v. State*, 140 Wis. 93, 121 N. W. 652, 22 L. R. A. (N. S.) 1221, 17 Ann. Cas. 802. See also, *Seranton v. Laurel Run Turnpike Co.*, 225 Pa. St. 82, 73 Atl. 1063.

number thereon in a certain manner.<sup>56</sup> Under a statute giving redress to one injured by the negligent operation of an automobile upon or across "public highways, walks, streets, avenues, alleys, or places much used for travel,"<sup>57</sup> the phrase "places much used for travel" is to be construed as covering all other places which might not be covered by the specific words employed, and where a driveway was constantly used both by vehicles and pedestrians, there was held to be no error in requiring the jury to find that it was a public highway generally used for public travel, it not being necessary for them to find that it was much used for that purpose.<sup>58</sup>

### Sec. 25. Roads.

A road is a passage ground appropriated to public travel. The word "road" cannot, however, be said to be one of uniform meaning; it has been variously defined, and is often enlarged or restricted by the language with which it is associated. The meaning of the word in statutes is ascertainable from the context and purpose of the particular legislative enactment in which it is found.<sup>59</sup>

### Sec. 26. Streets.

A street is a road or public way in a city, town, or village. A way over land set apart for public travel in a town or city is a street, no matter by what name it may be called; it is the purpose for which it is laid out and the use made of it that determines its character. As the way is common and free to

56. *Commonwealth v. Butler*, 204 Mass. 11, 90 N. E. 360.

57. See Mo. Rev. St. 1909, § 8523.

58. *Hodges v. Chambers*, 171 Mo. App. 563, 154 S. W. 429. See also, *Denny v. Randall* (Mo. App.), 202 S. W. 602.

59. Elliott on Roads and Streets (3 Ed.), pp. 10, 11.

Roadway is defined in the ordinances for the city of New York as "that portion of any street which is included between the curbs or curb-lines thereof

and is designed for the use of vehicles."

**Pent roads.**—The term "highway," in the Vermont Rev. St., sections 3178, 3179, relieving owners of land from the duty of maintaining fences on the sides of the highways, does not include pent roads. *Carpenter v. Cook*, 67 Vt. 102, 30 Atl. 998, 999; *French v. Holt*, 53 Vt. 364; *Wolcott v. Whitcomb*, 40 Vt. 40, 41; *Bridgman v. Town of Hardwick*, 31 Atl. 33, 34, 67 Vt. 132. *Contra*, see *Town of Whitingham v. Bowen*, 22 Vt. 317.

all people, it is a highway, and it is proper to affirm that all streets are highways, although not all highways are streets. Streets resemble, in many particulars, ordinary public roads, but there are, nevertheless, very important differences between the two classes of public ways. The purpose for which they are established is primarily the same, that of public travel, but many uses may properly be made of streets which cannot rightfully be made of ordinary suburban roads. The rights of the public are much greater in streets than in the roads of the rural districts, and the methods of regulating their use, improvement, and repair are materially different. Where a statute uses the term street, and does so with reference to a town or city, and there are no limiting or explanatory words, it must be taken to mean a street in the true sense of the term. It is sometimes necessary to discriminate between the genus highways and the species streets, but when the species is designated there seldom can be any difficulty in determining what class of public ways is intended, although it will not do to conclude, in all cases where the term highway is employed, that streets are included.<sup>60</sup>

Under statutes regulating the operation of motor vehicles, the term "highways" has been construed as including "streets" in incorporated villages and cities.<sup>61</sup> In many of the automobile acts passed by the various states, the terms public highways, ways, streets, and other terms pertaining to highways have been defined.

60. Elliott on Roads and Streets (3d Ed.), pp. 21, *et seq.*

61. Ware v. Lamar, 16 Ga. App. 560, 85 S. E. 824; Forgy v. Rutledge, 167 Ky. 182, 180 S. W. 90; Burns v. Kendall, 96 S. C. 385, 80 S. E. 621.

"In view of the language of the act, we are of opinion that by the use of the words 'public highway' the legislature intended to include a street, where the public highway is spoken of as being within the corporate limits of a city or town. A public highway is not necessarily a street, but a street is necessarily a public highway, because

used for public travel, and a public highway cannot pass through a city or town without running over a street. When a public highway reaches the corporate boundary of a city or town and connects with a street thereof, in passing through the city or town, from such point of connection, it becomes a street of the municipality and subject to its authority, and continues a street and subject to such authority, until some other part of the corporate boundary of the city or town is reached, beyond which it again becomes a public highway other than a street. It may

**Sec. 27. Intersecting streets.**

A statute regulating the operating of motor vehicles at "intersecting streets" has been construed to apply to the situation where one street enters into another, but does not cross it.<sup>62</sup> A contrary conclusion, however, has been reached as to this question.<sup>63</sup> But the passage of a path across a highway and common does not make an intersection of highways.<sup>64</sup> But the intersection of two municipal streets is an "intersection of highways."<sup>65</sup>

further be remarked that, whenever the words 'public highway' appear in the act, they are immediately preceded by the word 'any,' the use of which is evidently to indicate that *any* kind of a highway lawfully dedicated to public use, whether it be a state road, county road, street, or alley, is a 'public highway' in the meaning of the act." *Forgy v. Rutledge*, 167 Ky. 182, 180 S. W. 90.

**62.** *Lawrence v. Goodwill* (Cal. App.), 186 Pac. 781; *Buckey v. White* (Md.), 111 Atl. 777; *Wales v. Harper*, 17 W. L. R. (Canada) 623. And see *Manly v. Abernathy*, 167 N. Car. 220, 83 S. E. 343, wherein it was said: "We are clearly of the opinion that the legislature intended to use the word in the sense of 'joining' or 'touching,' or

coming in contact with or 'entering into,' and did not intend that the word 'intersect' should be so restricted in its meaning as not to protect pedestrians and other persons using a public street, at a point or space where another street comes into it, although it does not cross it. We should therefore give the word its broader meaning, which will include all space made by the junction of streets, where accidents are just as likely to occur, as where the two streets cross each other."

**63.** *Sullivan v. Chauvenet* (Mo.), 222 S. W. 759.

**64.** *Aiken v. Metcalf*, 92 Vt. 57, 102 Atl. 330.

**65.** *Moye v. Reddick*, 20 Ga. App. 649, 93 S. E. 256.

## CHAPTER II.

### HISTORICAL.

- SECTION 28. Automobile vehicle of modern times.  
29. Development of motor carriage.  
30. Growth of law.  
31. Law keeps up with improvement and progress.  
32. Highways open to new uses.  
33. Tendencies in legislation.  
34. Tendencies in judicial decisions.

#### **Sec. 28. Automobile vehicle of modern times.**

The automobile is decidedly a vehicle of modern times. In 1899 there were but few automobiles in existence in the *United States*, while at the present time there are thousands of motor cars and the number is increasing from year to year. The modern automobile is a development of comparatively recent date, but its inception dates back to the early days of the steam engine. In 1680 Sir Isaac Newton proposed a steam carriage to be propelled by the reactive effect of a jet of steam issuing from a nozzle at the rear of the vehicle. In 1790 Nathan Read patented and constructed a model steam carriage in which two steam cylinders operated racks running in pinions on the driving shaft. In 1769-1770 Nicholas Joseph Cugnot, a Frenchman, built two steam carriages. The larger of these is still preserved in Paris, and was designed for the transportation of artillery. Murdock, an assistant of James Watt, constructed a model carriage operated by a grasshopper engine, and in 1786 Oliver Evans, of the *United States*, suggested the use of steam road wagons to the Lancaster Turnpike Company of Maryland. In 1802 Richard Trevitluck built a steam carriage, which was exhibited in London, and which was driven ninety miles from Camborne, where it was built, to London. This carriage brings us to the notable period of steam-coach construction in England, which lasted until 1836. From this time we have experienced periods of development of the automobile until it is in its present shape.<sup>1</sup>

1. New International Encyclopedia, vol. II, pp. 271, 272.



## Sec. 29. Development of motor carriage.

The successful displacement of animal power by mechanical devices is an old problem. The early records of achievement in this direction were so fragmentary and imperfect that the earliest conception of the idea is mysteriously hidden in the past. The application of the force of steam for propulsion on sea and land was anticipated by Roger Bacon when he wrote: "We will be able to construct machines which will propel large ships with greater speed than a whole garrison of rowers, and which will need only one pilot to direct them; we will be able to propel carriages with incredible speed without the assistance of any animal; and we will be able to make machines which by means of wings will enable us to fly into the air like birds."<sup>2</sup>

## Sec. 30. Growth of law.

To study automobile legislation and the decisions of the courts concerning motor vehicles, one does not have to wade through centuries of musty reports, though such a process often is necessary in looking up a rule or principle of law applicable to the automobile or its operation on the public streets and highways. The legislative enactment and judicial decisions in the *United States* do not extend far back. In *England*, however, Parliament has for some time regulated the operation of steam carriages and the act passed in 1896 was the parent of the amendatory act passed in 1903, known as the "Motor Car Act of 1903." In the *United States* in 1899 there were practically no cases decided concerning motor cars in the law reports, but from that time on until the present the increase of legislation and judicial decisions is very noticeable and marked; so that the conclusion is warranted that there has commenced a branch of the law which will devote much attention to the twentieth century conveyance.<sup>3</sup>

2. Roger Bacon's writings.—The *Encyclopedia Americana*, vol. I.

3. See Law Notes, vol. IX, No. 8, 147.

Critical legislative period.—The history of legislation controlling automo-

bile driving shows us that the regulation of automobiling started with few restrictions, and has gradually increased, until there are now many and numerous regulations in various states. We have arrived at the point where

**Sec. 31. Law keeps up with improvement and progress.**

"In all human activities the law keeps up with improvement and progress brought about by discovery and invention, and, in respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is met with inconvenience and even incidental injury to those using ordinary modes, there can be no recovery, provided the

there must be a turn in the tide, either in one way or the other, calling forth either an increase or a decrease in the control over the subject. Particularly unfortunate is it that at this critical period the industry and automobilists should be face to face with many examples of reckless driving, disregard for the public safety, and a disposition of even automobilists themselves to incite the speed mania.

The daily newspapers are editorially advocating further restrictions. The railroads are devising means and ways of protecting automobilists against their own recklessness.

The automobile associations have manifested a desire and overeagerness to stop reckless driving and to comply with the spirit of the automobile laws. Meetings have been held between representatives of these organizations and county officials to devise ways and means for preventing disastrous and reckless driving. Committees of public safety have been appointed by certain clubs and statements have been issued to the public asserting the position which the automobilists take against speeding. All this has had a tendency to some extent to restore confidence in the public; but actions speak louder than words. Nothing material has been accomplished, and to-day a more critical situation has never faced automobilism and the public.

It is utterly impossible to legislate evil out of existence. Accidents cannot be prevented by laws, neither can evil conduct. Conduct may, to a more

or less extent, be regulated by statutory control, if the penalties are severe enough to provoke respect in the minds of those who would disobey the law. Various men throughout the country have suggested ways and means for doing away with evils connected with automobiling. Very comprehensive laws have been enacted, notably the one in the State of New Jersey, which, it must be confessed, is as good a law as any for all concerned, with the exception, perhaps, of its revenue features. The courts have in one or two rare instances given a jail sentence to drivers who have been guilty of speeding under aggravating circumstances, but it must be noted that there has been no decrease in the evil.

The time has come for automobilists themselves to take active steps in order to protect automobiling. Instead of asking special favors, for more lenient regulations and for the privilege of holding illegal speed contests on the public highways, they should be spending their time devising a method to regain the respect which they should have in the minds of the public, and to protect themselves against the evils which are now known to exist. Automobilists should be just as eager to have a violator of the law prosecuted and punished as the public officials are, and it would seem that the proper method to get at this is for automobilists themselves to maintain a prosecuting department which will be energetic and active.

contrivance is compatible with the general use and safety of the road.”<sup>4</sup>

### Sec. 32. Highways open to new uses.

When the highway is not restricted in its dedication to some particular mode or use, it is open to all suitable methods; and it cannot be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience or even to the injury of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them.<sup>5</sup>

### Sec. 33. Tendencies in legislation.

The automobile legislation in the *United States* was originally framed upon the theory of regulation, in so far as registration requirements were concerned. In some of the States there has been a disposition to exact revenue from automobilists under the licensing power of the government. The revenue features of the automobile laws, so far as they interfere with the right of transit from State to State, are clearly

4. *Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. (N. S.) 238, 6 Ann. Cas. 656.

5. *Illinois*.—*People v. Marshall Field & Co.*, 266 Ill. 609, 107 N. E. 864.

*Indiana*.—*Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. (N. S.) 238, 6 Ann. Cas. 656; *McIntyre v. Orner*, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 359, 8 Ann. Cas. 1087.

*Maine*.—*Towle v. Morse*, 103 Me. 250, 69 Atl. 1044.

*Michigan*.—*Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522.

*Minnesota*.—*Carter v. Northwestern Tel. Exch.*, 60 Minn. 539, 63 N. W. 111,

28 L. R. A. 310; *Carli v. Stillwater St. Ry. & Transfer Co.*, 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290.

*New York*.—*Nason v. West*, 31 Misc. 583, 65 N. Y. Supp. 651.

*Pennsylvania*.—*Lockhart v. Craig St. Ry. Co.*, 139 Pa. St. 419, 21 Atl. 26, 3 Am. Elec. Cas. 314.

Any method of travel may be adopted by individual members of the public which is an ordinary method of locomotion or even an extraordinary method, if it is not of itself calculated to prevent a reasonably safe use of the streets by others. *Chicago v. Panker*, 112 Ill. App. 94.

unauthorized, since the police powers of the States do not permit of such taxation.<sup>6</sup>

The *New York* motor vehicle law of 1904 has been widely copied throughout the Union. This statute has, however, proven to be inadequate and has since been amended.

Effort has been made to persuade Congress to enact a Federal automobile registration law on the theory that interstate travel for pleasure constitutes interstate commerce. This has failed. It is doubted that interstate automobile travel constitutes interstate commerce, but it is suggested that such a measure might be within the domain of Congress if framed upon the theory of protecting the interstate commerce actually carried on over interstate highways.

One of the developments in motor vehicle legislation has been the appearance of a movement to have enacted uniform automobile laws in the various States. Such laws would greatly facilitate interstate touring and commercial travel, but it seems hardly possible to have many States enact the same kind of a motor vehicle law since conditions are different in the different jurisdictions. Moreover, the registration or license fees adequate for one State would under certain conditions, due to the number of automobiles and the location of the State, be insufficient for another State. Precise uniformity in automobile legislation throughout the *United States* does not, however, at the present time seem reasonably probable.

#### Sec. 34. Tendencies in judicial decisions.

That the courts reflect public sentiment is well-known. This is as it should be, provided no positive rule of law is warped or violated, since public sentiment is most always right. However, the courts should not blind their eyes to reason, and, merely because there happens to be some local and temporary public agitation concerning the automobile due to an automobile collision, for example, manifest the slightest prejudice against the automobilist. All the courts of the *United States* before whom the question as to whether the automobile is an agency dangerous *per se*, have emphatically held that

6. *Crandall v. Nevada*, 6 Wall. (U. S.) 35, 18 L. Ed. 745.

it is not *per se* dangerous. The Appellate Division of the Supreme Court of *New York* has declared that the automobile is no more dangerous *per se* than a carriage. The sound judicial tendency has been to enlarge the motorist's rights consistent with the safety of the public.<sup>7</sup>

7. See sections 36, 37, as to dangerous nature of automobile.

## CHAPTER III.

## NATURE AND STATUS OF AUTOMOBILE.

- SECTION 35. Automobile not merely a machine.  
 36. Automobile as a dangerous machine.  
 37. Not dangerous *per se*.  
 38. Adverse judicial statements.  
 39. Status of automobilist.  
 40. Motive power as affecting status.  
 41. Comparison of automobiles and horse-drawn vehicles.  
 42. Advantages over animal-drawn vehicles.  
 43. Tendency to frighten horses.  
 44. Automobiles as carriers.  
 45. As a tool or implement of trade.

**Sec. 35. Automobile not merely a machine.**

The automobile is something more than a mere machine. The mechanical part of the motor vehicle is only a substitute for animal power. Aside from its novel method of propulsion and guidance, the automobile is not substantially different from any other ordinary vehicle which travels on the public ways. However, it possesses many characteristics which take it out of the category of the older means of transportation, as will be seen later on. As has been said before, it is a carriage, and a vehicle, and not only is it a most efficient means of transportation, but it constitutes a most useful mode of road traveling either for pleasure or profit. It is hardly necessary to mention that an automobile is personal property, and the fact that it is property, affords to the owner the protection of constitutional provisions, both State and Federal, relating to taxation and interstate transit.<sup>1</sup>

1. **Not a machine merely.**—See *Baker v. City of Fall River*, 187 Mass. 53, 72 N. E. 336.

**Not a work of art.**—The nature of an automobile was considered in the case of *Walker v. Grout Bros. Automobile Co.*, 124 Mo. App. 628, 102 S. W. 25, and the court says: "An automobile is not a work of art, nor a machine about which there can be any

very peculiar fancy or taste, but it is not a common, gross thing, like a road wagon or an ox cart." The decision in this case had to do with the rights of a purchaser of an automobile, where the manufacturer agreed that the automobile would be "satisfactory" to the purchaser. The court held that in case the purchaser is dissatisfied under such an agreement, the machine

### Sec. 36. Automobile as a dangerous machine.

It is believed to be a common opinion among many that the automobile constitutes a dangerous machine, and that the operation of the motor vehicle on the public thoroughfares is necessarily hazardous. This is a mistaken view. The motor carriage is not to be classed with railroads, which, owing to their peculiar and dangerous character, are subject to legislation imposing many obligations on them which attach to no others.<sup>2</sup>

Certainly a motor vehicle is not a machine of danger when controlled by an intelligent, prudent driver. The hazard in many cases to which the safety of the public may be exposed, results from the personal part played in motoring, rather than from the nature of the vehicle.<sup>3</sup> So it is declared not to be an

may be returned and the price recovered back, no matter of the purchaser's dissatisfaction is unreasonable or groundless.

The right of transit through each State with every species of property known to the Constitution of the United States, and recognized by that paramount law, is secured by that instrument to each citizen, and does not depend upon the uncertain and changeable ground of mere comity. *Ex parte Archy*, 9 Cal. 147. The following cases are cited by the court: *Lydia v. Rankin*, 2 A. K. Marsh. (Ky.) 820; *Willard v. People*, 4 Scam. (Ill.) 461; *Julia v. McKinney*, 3 Mo. 272. The principal case cited here is in line with the decision in *Crandall v. Nevada*, 6 Wall. (U. S.) 35, 18 L. Ed. 745. The bearing which these decisions have on the right of the Federal government to regulate interstate automobile travel is of the utmost importance. Interstate transit can no more be taxed than interstate commerce.

**Replevin.**—To maintain an action of replevin for an automobile, sole ownership in the plaintiff is not essential, because he may recover, though not the sole owner, as against a stranger hav-

ing neither title nor right of possession, if he has an interest and is entitled to possession of the machine. Thus, in certain cases a tenant in common may maintain an action in his own name to recover possession of personal property from a stranger, in the absence of special circumstances going to show the necessity of any other party plaintiff. *Swenson v. Wells*, 140 Wis. 316, 122 N. W. 724.

2. *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 125 Am. St. Rep. 915, 14 L. R. A. (N. S.) 216. See also *Baldwin on American Railroad Law*, p. 217. And see sections 414, 624.

**Text criticized.**—In *Southern Cotton Oil Co. v. Anderson* (Fla.), 86 So. 629, the statement in the text was severely criticized. It is sufficient rebuttal to state that the conclusion reached in that decision is contrary to the rule established by the courts of last resort in practically every other state.

**Automobile is not a nuisance.**—*Gaskins v. Hancock*, 156 N. C. 56, 72 N. E. 80.

3. *Karpeles v. City Ice Delivery Co.*, 198 Ala. 532, 73 So. 642; *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 333. "While automobiles may not be classed

agency so dangerous as to render the owner liable for injuries to travelers on the highway inflicted thereby while being driven by another, irrespective of the relation of master and servant or agency as between the driver and the owner.<sup>4</sup>

So in the case of an owner of an automobile for hire it is held that such a vehicle is not of itself so dangerous as to require the owner, before entrusting another with its custody, to test and ascertain the competency and skill of the customer. When the car is not defective so as to render it incapable of control or a source of special danger a situation similar to that presented where a livery-stable keeper who wilfully lets for hire an animal he knows to be vicious and dangerous, does

as *per se* dangerous instrumentalities, yet because of their speed and weight they may suddenly become exceedingly dangerous by negligent or inefficient use." *Anderson v. Southern Cotton Oil Co.*, 73 Fla. 432, 74 So. 975.

Motor car is not an outlaw.—*Marshall v. Gowans*, 20 Ont. W. R. 37, 42, 3 Ont. W. N. 69.

4. *Alabama*.—*Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87.

*Georgia*.—*Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618.

*Indiana*.—*Premier Motor Mfg. Co. v. Tilford*, 61 Ind. App. 164, 111 N. E. 645; *Martin v. Lilly*, 188 Ind. 139, 121 N. E. 443.

*Kansas*.—*Zeeb v. Bahnmaier*, 103 Kans. 599, 176 Pac. 326, 2 A. L. R. 883.

*Kentucky*.—"The rule of law applicable to the care and protection of dangerous instrumentalities does not apply. That rule requires the master to exercise a proper degree of care to guard, control and protect dangerous instrumentalities owned or operated by him and to respond in damages for an injury incurred by reason of the improper use of such an instrumentality by a servant though not then engaged in the performance of his duties. The

principle on which liability is founded in such cases is the failure of the master properly to keep within his control such dangerous agencies. Manifestly, an automobile which becomes dangerous only when negligently operated cannot properly be placed in the same category with locomotives, dynamite, and ferocious animals. Consequently the courts have generally rejected this ground of liability." *Tyler v. Stephan's Adm'r*, 163 Ky. 770, 174 S. W. 790.

*Mississippi*.—*Woods v. Clements*, 113 Miss. 720, 74 So. 422.

*New Jersey*.—*Brunhoelzl v. Brandes*, 90 N. J. L. 31, 100 Atl. 163.

*New York*.—*Schultz v. Marrison*, 91 Misc. 248, 154 N. Y. Supp. 257.

*North Carolina*.—*Linville v. Nissen*, 162 N. Car. 95, 77 S. E. 1096.

*Tennessee*.—*Core v. Resha*, 204 S. W. 1149.

*Texas*.—*Allen v. Brand* (Civ. App.), 168 S. W. 35.

*Utah*.—*McFarlane v. Winters*, 47 Utah, 598, 155 Pac. 437.

*Washington*.—*Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 125 Am. St. Rep. 915, 14 L. R. A. (N. S.) 216; *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 120, 135 Pac. 821.

And see section 623, *et seq.*



not exist. The situation rather is similar to that of one who hires a horse or team and the same rule of liability applies in the case of an injury caused by negligence either in the care or management of either instrumentality.<sup>5</sup>

It is evident, therefore, that it is generally the manner of driving the vehicle, and that alone, which threatens the safety of the public. The ability immediately to stop, its quick response to guidance, its unconfined sphere of action, would tend to make the automobile one of the least dangerous of conveyances.<sup>6</sup> A different situation, however, is presented in

5. *Neubrand v. Kraft*, 169 Iowa, 444, 151 N. W. 455, 457, Judge Weaver said in this case: "It is next said that an automobile is of such character that while perhaps, not *per se* a dangerous instrument, it may easily become such, and the owner is therefore bound to the exercise of greater care than would be required were there less danger in its operation. There is more or less danger in the use of vehicles of any kind. The motor cycle, the bicycle, the stage coach, the ordinary carriage drawn by horses, all have their possibilities of peril, and there is room for difference of opinion concerning the various degrees of danger to be apprehended therefrom. The great body of those who use the various instrumentalities of travel are persons of ordinary prudence, while the incompetent or negligent is the exception. The fact that here and there a driver carelessly or recklessly converts his vehicle into an engine of injury or destruction to others is not a sufficient reason for requiring the owner of such vehicles for hire to test and ascertain the competency and skill of every customer before intrusting him with the custody of a car. Nor is there any likeness, as counsel seems to think, between this case and that of the livery stable keeper who willfully lets for hire an animal he knows to be vicious or dangerous. If the car in this case

was defective in some respect which rendered it incapable of control or made it a source of special danger, and defendants had allowed it to go out in that condition and thereby plaintiff had been injured, a very different question would be presented. But so far as shown the car was in perfect condition, and the sole cause of plaintiff's injury was the carelessness or forgetfulness of Kraft who, in an emergency, threw a lever the wrong way, thereby causing a sudden acceleration of speed instead of checking it as he intended. Had he been driving a hired team and in some way had heedlessly got the reins crossed in his hands, thereby running over and injuring the plaintiff, counsel would hardly advise his client that the owner of the outfit was liable in damages for the hirer's negligence. The fact that the vehicle in this case happens to have been an auto car instead of a horse and buggy or a coach and four calls for the application of no different rule."

6. *McIntyre v. Orner*, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 359, 8 Ann. Cas. 1087. See *Yale Law Journal*, Dec., 1905.

"The danger of rapidly moving machinery calls for the exercise of care on the part of its owner to avoid damage to persons lawfully near it. . . .

the case of an automobile which, by reason of some defect, is not thus subject to the control and guidance of the driver and of which defect he or the owner for whom he is acting in operating the machine has knowledge. So where a car was in such a condition that it ran at full speed, which it was impossible to lessen or regulate, it was held that it was a dangerous instrumentality when operated upon a highway which other parties were using.<sup>7</sup> And an automobile with defective

To the person injured, however, such machinery is suggestive of danger, and he must exercise remarkable care accordingly. And disregard of such danger . . . is contributory negligence sufficient to bar recovery. 2 Jaggard on Torts, §62, §63.

A motor car, like a carriage and pair, is in itself harmless enough; but if the carriage is driven in a crowded thoroughfare at the utmost speed that can be got out of the two horses, it becomes to all intents as dangerous a vehicle, and as much an instrument of terror, as a motor car would be when driven without any consideration or regard for the safety of the persons in the thoroughfare. The gravamen of the indictment against motorists as a class is that a large proportion of the individuals composing that class habitually drive their motor cars, whether intentionally or inadvertently, with a total disregard for the safety or comfort of other persons using the road. That such an evil exists and that active means should be taken to secure its immediate diminution, the suppression cannot be denied. The proper adjustment of the respective rights of persons owning and traveling in motor cars and of persons lawfully using the highways and public roads is the serious problem calling for solution. These two sections of the public each have definite legal rights, though there seems to be as yet a very indefinite conception of the nature of such rights. The Justice of the Peace,

vol. LXIX, No. 33, p. 458.

"A car with a defective brake is not such an immediately dangerous instrument as to render a railroad company liable to any one injured thereby, in the absence of contract or other relation." 2 Jaggard on Torts, §59.

A bicycle is in itself an innocent vehicle. It is entitled to the rights of the road (but not of the sidewalk) equally with a carriage or other vehicle; and, if it is going at such a rate of speed as to frighten horses, there is liability on the part of the rider only when his want of care can be shown. Carriages and other vehicles drawn by horses become dangerous because of the motion given to them, and because of the tendency of horses to run away and otherwise do damage. 2 Jaggard on Torts, §59.

**No more dangerous than horse and carriage.**—Cunningham v. Castle, 127 App. Div. (N. Y.) 580, 111 N. Y. Suppl. 537.

In *Texas Co. v. Veloz* (Tex. Civ. App.), 162 S. W. 377, wherein it was said: "The mere fact that an automobile is in a bad state of repair, certainly does not render it a dangerous instrumentality, but this was not the case made by the petition. The petition in addition to averring that the car was in a bad state of repair, averred that this condition rendered it unmanageable and uncontrollable and caused the same to run at a rapid and excessive rate of speed, and it occurs to us that a car in such a condition

wheels may be classed as a dangerous instrumentality.<sup>8</sup> So, too, a heavy automobile driven by a small boy or a careless or incompetent driver may be a dangerous menace to other travelers.<sup>9</sup>

### Sec. 37. Not dangerous *per se*.

That the courts have refused to stamp the automobile as an inherently dangerous machine, should be stated at the outset. To use legal phraseology, the motor vehicle is not considered in law as dangerous *per se*. The fact that it has been judicially established that the automobile is not inherently dangerous, is of the greatest importance to automobilists and the automobile industry of the *United States*, since a limit has now been placed upon the character of motor vehicle legislation which may constitutionally be enacted.

The Court of Appeals of *Georgia*<sup>10</sup> says, concerning the dangerous character of automobiles: "It is insisted in the argument that automobiles are to be classed with ferocious animals, and that the law relating to the duty of the owners of such animals is to be applied. It is not the ferocity of the automobile that is to be feared, but the ferocity of those who

that its speed cannot be regulated and its course controlled is one of the most dangerous instrumentalities that could be placed upon the public highway. This being the case made by the second count in the petition, we overrule the first assignment."

8. *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 16<sup>th</sup> Cir. 160 N. Y. App. Div. 35, 145 N. Y. Supp. 462.

9. *Gardiner v. Soloman*, 200 Ala. 115, 75 So. 621; *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Schultz v. Marrison*, 91 Misc. (N. Y.) 248, 154 N. Y. Supp. 257; *Allen v. Brand* (Tex. Civ. App.), 168 S. W. 35. "It is true that the automobile has become so perfected that it may not be classed as a 'dangerous instrumentality' when intelligently managed. It will not shy, balk, back up, or run

away when properly directed, but may do all of these when managed by an inexperienced, incompetent, or reckless driver. When in the control of such a one it becomes an exceedingly destructive agency as the daily toll of lives and the many injuries to persons chronicled by the newspapers attest. If the owner of such agency consent to turn it over to the control of an incompetent or reckless chauffeur he is not deprived of any legal right by holding him liable for its negligent operation when in such control and a greater degree of safety to the general public is likely to follow." *Stapleton v. Independent Brewing Co.*, 198 (Mich.) 170, 164 N. W. 520, L. R. A. 1918 A 916. And see section 662.

10. *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338.

drive them. Until human agency interferes they are usually harmless. While by reason of the rate of pay allotted to the judges of this State, few, if any, have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them; and we have, therefore, found out that there are times when these machines not only lack ferocity, but assume such an indisposition to go that it taxes the limit of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil-disposed mules, and the like.”

The Supreme Court of *Washington*<sup>11</sup> says, concerning the automobile's legal status: “We do not believe that the automobile can be placed in the same category as locomotives, gunpowder, dynamite, and similarly dangerous machines and agencies. It is true that the operation of these machines is attended with some dangers not common to the use of ordinary vehicles, and we believe, and have already held, that those who operate these machines must be held to that degree of care which is commensurate with the dangers naturally incident to their use.”

The courts of the various States of the *United States* have been very free in discussing the motor car's position in the law, but the two cases above quoted are among the leading and most important of all the legal decisions concerning the automobile or its operation. Another leading case is that of *Cunningham v. Castle*, decided by the Appellate Division of the Supreme Court of *New York*,<sup>12</sup> which held that the automobile is not a dangerous device. It is an ordinary vehicle of pleasure and business. It is no more dangerous than a team of horses and a carriage, or a gun, or a sailboat, or a motor launch. And a similar view is expressed by the court in a later case in *New York*.<sup>13</sup>

And in a case in *Wisconsin* it was held that an automobile is not inherently or *per se* a dangerous machine so as to ren-

11. *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915.

12. 127 App. Div. (N. Y.) 580, 111 N. Y. Suppl. 1057.

13. *Vincent v. Seymour*, 131 App. Div. (N. Y.) 200, 115 N. Y. Suppl. 600.

der its owner liable on that ground alone for injuries resulting from its use.<sup>14</sup> In this connection the court said: "We discover nothing in the construction, operation and use of the automobile requiring that it be placed in the category with the locomotive, ferocious animals, dynamite and other dangerous contrivances and agencies. When properly handled and used automobiles are as readily and effectually regulated and controlled as other vehicles in common use, and when so used they are reasonably free from danger. The dangers incident to their use as motor vehicles are commonly the result of the negligent and reckless conduct of those in charge of and operating them, and do not inhere in the construction and use of the vehicles. It is well-known that they are being devoted to and used for the purpose of traffic and as conveyances for the pleasure and convenience of all classes of persons and without menace to the safety of those using them or to others upon the same highway when they are operated with reasonable care. The defendant cannot, therefore, be held liable upon the ground that the automobile is a dangerous contrivance."

And, in the case of *McIntyre v. Orner*,<sup>15</sup> the Supreme Court of *Indiana* says: "There is nothing dangerous in the use of an automobile when managed by an intelligent and prudent driver. Its guidance, its speed, and its noise are all subject to quick and easy regulation, and under the control of a competent and considerate manager it is as harmless, or may soon become as harmless, on the road, as other vehicles in common use. It is the manner of driving an automobile on the highway, too often indulged in by thoughtless pleasure seekers and for the exploitation of a machine, that constitutes a menace to public safety."

And in a case in *New Hampshire* it is said: "There is nothing inherently dangerous in an automobile, any more than about an axe. Both are harmless so long as no one attempts to use them, and both are likely to injure those who

14. *Steffen v. McNaughton*, 142 Wis. 49, 124 N. W. 1016, 26 L. R. A. (N. S.) 382, 19 Ann. Cas. 1227.

15. 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 359, 8 Ann. Cas. 1087.

come in contact with them when they are used for the purpose for which they were intended.”<sup>16</sup>

These views are also endorsed in other later decisions,<sup>17</sup> so that the status of the automobile as a machine which is not dangerous *per se* may be regarded as settled.

### Sec. 38. Adverse judicial statements.

Adverse judicial statements have sometimes been made by the courts when considering the dangerous nature of motor

16. *Danforth v. Fisher*, 75 N. H. 111, 71 Atl. 533, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670.

17. *Alabama*.—*Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 42 L. R. A. (N. S.) 87; *Karpeles v. City Ice Delivery Co.*, 198 Ala. 449, 73 So. 642.

*Florida*.—*Anderson v. Southern Cotton Oil Co.*, 73 Fla. 432, 74 So. 975.

*Georgia*.—*Fielder v. Davidson*, 139 Ga. 509, 77 S. E. 618.

*Indiana*.—“Automobiles are not to be regarded in the same category with locomotives, ferocious animals, dynamite, and other dangerous contrivances and agencies.” *Priemer Motor Mfg. Co. v. Tilford*, 61 Ind. App. 164, 111 N. E. 645.

*Iowa*.—*Landry v. Overson*, 174 N. W. 255.

*Kentucky*.—*Tyler v. Stephen's Adm'r*, 163 Ky. 770, 174 S. W. 790.

*Michigan*.—*Hartley v. Miller*, 165 Mich. 115, 130 N. W. 336, 33 L. R. A. (N. S.) 81; *Brinkman v. Zuckerman*, 192 Mich. 624, 159 N. W. 316; *Stapleton v. Independent Brewing Co.*, 198 Mich. 170, 164 N. W. 520, L. R. A. 1918 A. 916.

*Mississippi*.—*Woods v. Clements*, 113 Miss. 720, 74 So. 422.

*Missouri*.—“The automobile is not of itself a necessarily dangerous agency, like an animal *ferae naturae*, so that it cannot lawfully be driven on a highway, nor is it a juggernaut, purposely constructed to crush out the lives of men,

but by reason of its great weight and power which it may be propelled it becomes exceedingly dangerous to the lives and limbs of others on the highways and to the driver and occupants of the car, unless the highest care and caution is used by the driver.” *Jackson v. Southwestern Bell Telep. Co.*, (Mo.) 219 S. W. 655.

*New Jersey*.—*Brunhoezel v. Brandes*, 90 N. J. L. 31, 100 Atl. 163.

*New York*.—*Towers v. Errington*, 78 Misc. 297, 138 N. Y. Suppl. 119.

*North Carolina*.—*Lineville v. Nissen*, 162 N. C. 95, 77 S. E. 1096.

*Tennessee*.—*Core v. Resha*, 204 S. W. 1149.

*Texas*.—*Texas Co. v. Veloz* (Civ. App.), 162 S. W. 377; *Allen v. Brand* (Civ. App.), 186 S. W. 35.

*Washington*.—“An automobile is not necessarily a dangerous device. It is an ordinary vehicle of pleasure and business. It is no more dangerous *per se* than a team of horses and a carriage, or a gun, or a sailboat, or a motor launch. It is not to be classed with what are commonly called ‘dangerous instrumentalities,’ such as ferocious animals, dynamite, gunpowder, and other inherently dangerous contrivances or agencies. While more nearly approximating a locomotive, the ordinary automobile differs materially therefrom. It is not an article or a machine of an inherently dangerous nature. Alone and of itself it will not move, explode,

vehicles.<sup>18</sup> Thus, the Supreme Court of *Illinois* has held that it is a matter of common knowledge that an automobile is likely to frighten horses. It is propelled by a power within itself, is of unusual shape, is capable of a high rate of speed, and produces a puffing noise when in motion. All this makes such a horseless vehicle a source of danger to pedestrians and persons traveling on the highway in vehicles drawn by horses.<sup>19</sup> And the Supreme Judicial Court of *Massachusetts* has declared that automobiles are capable of being driven, and are apt to be driven, at such a high rate of speed, and when not properly driven are so dangerous as to make some regulation necessary for the safety of other persons on the public ways.<sup>20</sup>

So, too, in a case in *Kentucky* it is said: "An automobile is nearly as deadly as, and much more dangerous than, a street car or even a railroad car. These are propelled along fixed rails, and all that the traveling public has to do to be safe is to keep off the tracks; but the automobile, with nearly as much weight and more rapidity, can be turned as easily as can an

or do any injury to any one." *Walters v. City of Seattle*, 97 Wash. 657, 167 Pac. 124.

18. *McFern v. Gardner*, 121 Mo. App. 1, 97 S. W. 972; *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122; *Ingraham v. Storkamore*, 63 Misc. (N. Y.) 114, 118 N. Y. Supp. 399; *Moore v. Reddie*, 103 Wash. 386, 174 Pac. 648. But see correction made by opinion on rehearing in *Moore v. Roddie*, 106 Wash. 548, 180 Pac. 879. See also *Williams v. Raper*, 139 Ga. 811, 78 S. E. 253.

19. *Christy v. Elliot*, 216 Ill. 31, 1 L. R. A. (N. S.) 215, 74 N. E. 1035, 3 Ann. Cas. 487, 108 Am. St. Rep. 196. And see chapter XX as to frightening horses.

20. *Commonwealth v. Boyd*, 188 Mass. 79, 74 N. E. 255.

In *Commonwealth v. Kingsbury*, 199 Mass. 542, 85 N. E. 848, the Supreme Judicial Court of *Massachusetts*, in holding that the regulation of the use of automobiles on particular roads, even

to their complete exclusion therefrom, is within the police power, with a view to the safety of the public, says: "Automobiles are vehicles of great speed and power whose appearance is frightful to most horses that are unaccustomed to them. The use of them introduces a new element of danger to ordinary travelers on the highways, as well as to those riding in the automobiles. In order to protect the public great care should be exercised in the use of them. Statutory regulation of their speed while running on the highways are reasonable and proper for the promotion of the safety of the public. It is the duty of the legislature, in the exercise of the police power, to consider the risks that arise from the use of inventions applying the forces of nature in previously unknown ways. The general principal is too familiar to need discussion. It has been applied to automobiles in the different States with the approval of the courts."

individual, and for this reason is far more dangerous to the traveling public than either the street car or the railway train." <sup>21</sup>

As a general proposition, however, the condemnation of the courts is directed to the careless driving of automobiles rather than to the machines themselves. But it may be forcibly argued that an automobile is more dangerous than a street car, because the latter travels on a fixed track and is thus more easily avoided by other travelers.<sup>22</sup> Likewise, it is proper to consider it more dangerous than other vehicles.<sup>22a</sup>

Thus, it was said in South Carolina, in discussing a statute which imposed a lien on automobiles for injuries occasioned thereby: "Motor vehicles are a new and comparatively a modern means of locomotion. They are unquestionably dangerous, and can and do destroy property, kill and maim people as much as locomotives and engines and cars on railroad tracks. The only difference being that railways are operated on tracks owned by them where no one else has the right as a matter of right to travel, and motor vehicles are operated on highways where the public generally has the right to travel. The railroads are generally able to respond in damages for any damages wilfully and negligently inflicted by them." <sup>23</sup>

### **Sec. 39. Status of automobilist.**

How is the automobilist considered by the courts? it may be asked. Is he to be looked upon invariably as a speed maniac? A violator of the rights of the people on the public highways? After being convicted of speeding, a criminal? As between the inanimate chattel, the automobile, and the automobilist, the latter constitutes a more appropriate subject of legal regulation. "It is the manner of driving an automobile on the highway, too often indulged in by thoughtless pleasure seekers and for the exploitation of a machine, that

<sup>21</sup> Weil v. Kreutzer, 134 Ky. 563, Cir. Ct. 531.

121 S. W. 471, 24 L. R. A. (N. S.) 557n.

See also, Collett v. Standard Oil Co.,

186 Ky. 142, 216 S. W. 356.

<sup>22</sup> Chittenden v. Columbus, 26 Ohio

<sup>22a</sup> State v. Goldstone, (Minn.) 175 N. W. 892.

<sup>23</sup> Merchants' & Planter's Bank v. Brigman, 106 S. Car. 362, 91 S. E. 332.



constitutes a menace to public safety," says the Supreme Court of *Indiana*.<sup>24</sup> "Until human agency intervenes they are usually harmless," says the Court of Appeals of *Georgia*.<sup>25</sup> So in a case in *Canada* it was said: "While it is quite true a motor is not an outlaw, it must also be borne in mind that the driver is not the lord of the highway, but a man in charge of a dangerous thing, and so called upon to exercise the greatest care in its operation." <sup>26</sup>

#### Sec. 40. Motive power as affecting status.

There is no vehicle operated in the public streets and highways that bears much similarity to the automobile. The bicycle, it is true, occupies a unique position when compared with the older vehicles, but the motor carriage occupies a position and status of its own. The motor car's freedom of navigation, speed, control, power, purpose, and the existence or non-existence of noise in running necessarily stamps the automobile with a status different from that attached to other vehicles. Especially is this true in reference to the motive power and its application. In animal-drawn vehicles the power is from the front. The vehicle is *drawn*. In automobiles the power is generally applied from the carriage, and the vehicle is in fact *pushed* along.

#### Sec. 41. Comparison of automobiles and horse-drawn vehicles.

In *Watts v. Stroudsburg Passenger Railway Company*,<sup>27</sup> the court compares automobiles and horse-drawn vehicles as follows: The use and operation of the ordinary vehicle drawn by a horse, or horses, has been known for so many years that every man is charged with knowledge as to the movement of such and the ordinary speed, and, therefore, a horse or horses and wagon happening to be on the track of an electric railway, the motorman on an electric car is bound by the knowledge of how fast the horse, or horses, can, or will,

24. *McIntyre v. Orner*, 166 Ind. 57, 59 S. E. 340.  
76 N. E. 750, 4 L. R. A. (N. S.) 1130,

117 Am. St. Rep. 359, 8 Ann. Cas. 1087.

25. *Lewis v. Amorous*, 3 Ga. App. 50,

26. *Fisher v. Murphy*, 20 Ont. W. R. 201, 3 Ont. W. N. 150.

27. 34 Penn. Co. Ct. Rep. 377.

ordinarily travel, and he must operate and control his car with that fact taken into consideration. The movement of an automobile has no such certainty. The movement of the ordinary horse is from a slow walk to about two miles an hour to a trot or pace of probably from six to ten miles an hour, the latter speed very rarely, however, being reached when a horse is traveling between the tracks of an electric railway company. The speed or movement of an automobile is anywhere from a few miles an hour to anywhere between twelve and thirty or more miles an hour. It is within common experience that they glide off and on tracks, run behind electric cars and then turn off the track, run around the cars and run on the track again and easily keep ahead of a car moving at an ordinary speed, when occasion requires, they easily move at a rate of speed which the trolley does not often obtain. The ordinary man knows that it is not easy for a person to get out of an electric railway track with a horse and wagon, nor can it be accomplished, ordinarily, quickly. The horse cannot move fast over the tracks, and the wheels of the wagon are apt to slide; and it is also within the common knowledge of people living in communities where automobiles are used that they can easily turn in and out of electric railway tracks and do it quickly.

#### **Sec. 42. Advantages over animal-drawn vehicles.**

The advantages of the automobile over animal-drawn vehicles are too numerous to mention in a work of this nature. However, there are one or two advantageous points in the motor vehicle's favor which should be mentioned. We have seen that there is an alleged element of danger in the operation of the horseless carriage. Aside from this, however, every other characteristic of the automobile is decidedly in its favor. It leaves no filth in the streets. It is the most sanitary vehicle that travels on the public ways. There certainly can never be any police regulation of the motor car's operation on account of filth, excepting the regulation of the emission of smoke. Automobiles occupy less space on the streets and highways than horse-drawn vehicles. The superiority of the

automobile in these matters needs no further discussion to be convincing.

### Sec. 43. Tendency to frighten horses.

That the automobile has a tendency to frighten horses unaccustomed to its appearance must be conceded. This has been one of the worst obstacles to motoring and driving, and has been the cause of much litigation. However, horses are fast being educated to the sight of the automobile, and when the horses generally are no longer frightened at its appearance the legislative regulation concerning the meeting of horses and automobiles on the road will be no longer needed and without reason. As said by the Supreme Court of *California*: "Of course, if the use of automobiles gradually becomes more common, there may come a time when an ordinance like the one here in question [the ordinance prohibited motoring at night on country roads] would be unreasonable. As country horses are frequently driven into cities and towns, many of them will gradually become accustomed to the sight of automobiles, and the danger of their use on country roads will be less."<sup>28</sup>

In connection with this subject it is of interest to note what has been said by the Appellate Division of the Supreme Court of *New York*: "Since the automobile has come into use upon our streets and highways these accidents [resulting from frightening horses] have been common, and actions to recover damages resulting therefrom have been frequent. These machines may be used on the public highways, but horses will also continue to be used for a time at least. Both may be equally used as motive power in public travel. Some horses are frightened when they meet these machines, and it is the duty of persons running the machines to exercise reasonable care to avoid accident when horses become frightened. It is not pleasant to be obliged to slow down these rapid-running machines to accommodate persons driving or riding slow country horses that do not readily become accustomed to the

<sup>28</sup>. Ex parte Berry, 147 Cal. 523, 82 Pac. 44. And see chapter XX, as to the liability for frightening horses.

innovation. It is more agreeable to send the machine along, and let the horse get on as best he may, but it is well to understand, if this course is adopted and accident and injury result, that the automobile owner may be called upon to respond in damages for such injuries."<sup>29</sup>

In another case,<sup>30</sup> the court, discussing the relative rights of automobilists and the drivers of horses, said: "Being heavy, powerful, fast and noisy, motors cars, if carelessly handled are as terrifying as they are dangerous. A reasonably considerate person in the situation of defendant would have anticipated the danger to the safety of the occupants of the buggy in running his car headlong in such close proximity to the horse. The possession of a powerful and dangerous vehicle, instead of giving defendant any right of might, imposed on him the duty of employing care commensurate to the risk of danger to others endangered by the presence of his vehicle on the public thoroughfare."

#### **Sec. 44. Automobiles as carriers.**

An automobile may be used as a common carrier, a private carrier, or a personal private conveyance. Public motor vehicles, such as sight-seeing cars, taxicabs, and others which are employed in carrying all persons applying for transportation, come within the definition that a common carrier of passengers is one who undertakes for hire to carry all persons who may apply for passage.<sup>31</sup>

A corporation authorized by its charter to carry passengers and goods by automobiles, taxicabs and other vehicles, but not to exercise any of the powers of a public service corporation, and which does such business, including the carrying of passengers to and from railroad terminals and hotels under contract therewith, and also does a garage business with individuals, may be classed as a common carrier.<sup>32</sup>

<sup>29.</sup> *Murphy v. Wait*, 102 N. Y. App. Div. 121, 92 N. Y. Suppl. 253.

<sup>30.</sup> *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122.

<sup>31.</sup> *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, 14 L. R.

A. 798, 29 Am. St. Rep. 827. And see sections 131-134.

<sup>32.</sup> *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 36 S. Ct. 533, modifying 43 App. D. C. 120.

But to constitute one a common carrier it is necessary that he should hold himself out as one. A carrier of passengers who undertakes to carry all persons who apply to him for transportation is engaged in a public employment, and is a public or common carrier of passengers. "A common carrier of passengers," says Judge Thompson, "is one who undertakes for hire to carry all persons indefinitely who may apply for passage." In a case in *Massachusetts* where an action was brought to recover for an injury to one while a passenger of a sight-seeing automobile carrying about twenty-five persons, it appeared that the owner had a regular stand from which the automobile started and that the business was publicly advertised by the placing of tickets for the trips for sale at different places in the city. As to the questions of the degree of care required and whether such owner was a common carrier, the court said: "It is apparent that this business much more resembled a public than a private carriage of passengers, and whether, in a strictly technical sense, the defendant could be regarded as a common carrier of passengers or not, we are of opinion that she was bound to use reasonable care according to the nature of the contract, and that in view of the nature of the business and the peril to life and limb of the passengers likely to arise from an accident, this reasonable care should be defined as the highest degree of care consistent with the proper transaction of the business." <sup>33</sup>

#### **Sec. 45. As a tool or implement of trade.**

It has been thought that an automobile was not a "tool" or "implement of trade" within the meaning of laws exempting such articles from levy or attachment.<sup>34</sup> But a contrary conclusion has been reached in another State as to the exemption of an automobile as an "implement."<sup>35</sup>

<sup>33</sup>. *Hinds v. Steere*, 209 Mass. 442, 95 N. E. 844.

<sup>34</sup>. *Eastern Mfg. Co. v. Thomas*, 82 S. Car. 509, 64 S. E. 401.

<sup>35</sup>. *Wickham v. Traders State Bank*, 95 Kans. 657, 149 Pac. 433. See also *Wickham v. Traders State Bank*, 96 Kans. 350, 150 Pac. 513.

## CHAPTER IV.

## GENERAL RIGHT TO USE HIGHWAYS.

- SECTION 46. General purposes of streets and highways.
47. New means of transportation.
  48. Right of automobilist to use highways.
  49. Equal rights of automobilists and other travelers.
  50. No superior rights for automobilists.
  51. Ferries and vessels.
  52. Toll roads.
  53. Exclusion of non-residents.
  54. Automobile racing.
  55. Setting aside highways for speed contests.

**Sec. 46. General purposes of streets and highways.**

Primarily,<sup>6</sup> the general purpose of streets and highways is that of travel, either on foot by a pedestrian or in a vehicle propelled by animal or other power. The members of the public have a right to use the public avenues for the purpose of travel and the transportation of property. It is improper to say that the driver of horses has rights in the road superior to the driver of an automobile. Both have the right to use the easement, and each is equally restricted in the exercise of his rights by the corresponding rights of the other.<sup>1</sup> Public highways are intended for the use of travelers, and they are entitled to use the same unobstructed in any unusual manner.<sup>2</sup> So, it is said in a recent case in *Illinois*: "The customary or usual and ordinary use of a street is for travel from one point to another, both along and across it. The use of a street by an automobile when operated with due care and caution and not in violation of State or municipal police regulations, would be deemed a proper and lawful one."<sup>3</sup> In this connection it may also be said that laws regulating the operation of motor vehicles upon the public highways generally contemplate the use of such highways for any lawful purpose.<sup>4</sup>

1. *Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 6 Ann. Cas. 656, 1 L. R. A. (N. S.) 238. And see section 49.

2. *Ft. Wayne Cooperage Co. v. Page* (Ind. App.), 82 N. E. 83, affirmed 170

Ind. 585, 84 N. E. 145, 23 L. R. A. (N. S.) 946.

3. *Jenkins v. Goodall*, 183 Ill. App. 633, 637.

4. *Fitzsimmons v. Snyder*, 181 Ill. App. 70.

**Sec. 47. New means of transportation.**

That the purposes of the public ways contemplate new and improved means of transportation there can be no doubt. Travelers are not confined to horses and ordinary carriages. Animal or muscular power has no exclusive or superior rights on the public avenues of travel. The use to which the public thoroughfare may be put comprehends all modern means of carrying, including the electric street railroad and the automobile. Judge Cooley in 1876 said: "Persons making use of horses as the means of travel by the highways have no rights therein superior to those who make use of the ways in other modes. It is true that locomotion upon the public roads has hitherto been chiefly by means of horses and similar animals, but persons using them have no prescriptive rights, and are entitled to the same reasonable use of the ways which they must accord to all others. Improved methods of locomotion are perfectly admissible, if any shall be discovered, and they cannot be excluded from the existing public roads, provided their use is consistent with the present methods. . . . When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods, and it cannot be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience or even to the injury of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic must admit of new methods wherever it is found that the general benefit requires them."<sup>5</sup> The Supreme Court of *Illinois* has expressed itself as follows: "To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport

5. *Macomber v. Nicholas*, 34 Mich. 217, 22 Am. Rep. 522.

"With respect to the methods of travel and transportation on the highway, as in all other spheres of action, the law seeks to adapt itself to the new

conditions arising from the progress of invention and discovery. The ordinary highway is open to all suitable methods of use." *Towle v. Morse*, 103 Me. 250, 68 Atl. 1044.

with the advancement and enlightenment of the present age.”<sup>6</sup> And in a late case in the same State the court declares that: “Public rights do not depend upon the methods of travel recognized at the time the streets were opened or such public uses as have been sanctioned by long continued custom and acquiescence. The use of the streets must be extended to meet the new needs of locomotion.”<sup>7</sup>

Equivalent views have been stated in *Minnesota*, in the following language: “If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this (highway) easement is expansive, developing, and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and next a way for vehicles drawn by animals; constituting respectively the *iter*, the *actus*, and the *via* of the Romans. And thus the methods of using the public highways expanded with the growth of civilization until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the public easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed.”<sup>8</sup>

And the same principle is announced by the Supreme Court of *Indiana*, which says: “In all human activities the law keeps up with improvement and progress brought about by discovery and invention, and, in respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is made with inconvenience and even incidental injury to those using ordinary modes, there can be no recovery provided the contrivance is compatible with

6. *Moses v. Pittsburgh, etc. R. Co.*, 21 Ill. 515.

7. *People v. Field & Co.*, 266 Ill. 609, 618, 107 N. E. 864. See also, *Chicago*

*v. Banker*, 112 Ill. App. 64.

8. *Cater v. Northwestern Telephone Exchange Co.*, 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51 Am. Rep. 543.



the general use and safety of the road. It is, therefore, the adaptation and use, rather than the form or kind of contrivance, that concerns the courts."<sup>9</sup> In other jurisdictions, similar views have been announced.<sup>10</sup>

9. *Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 6 Ann. Cas. 656, 1 L. R. A. (N. S.) 238n.

10. "It is true that locomotion upon the public roads has hitherto been chiefly by means of horses and similar animals; but persons using them have no prescriptive rights, and are entitled only to the same reasonable use of the ways which they must accord to all others. Improved methods of locomotion are perfectly admissible if any shall be discovered, and they cannot be excluded from the existing public roads, provided their use is consistent with the present methods. A highway is a public way for the use of the public in general for passage and traffic, without distinction." *Patton-Worsham Drug Co. v. Dreenon*, 104 Tex. 62, 133 S. W. 871. Automobiles are now recognized as legitimate means of conveyance on the public highway. The fact that horses unaccustomed to see them are likely to be frightened by their unusual sound and appearance has not been deemed sufficient reason for prohibiting their use, but it is an element in the question of due care on the part of the drivers of both horses and motor cars and a consideration to be entertained in determining whether such care has been exercised to avoid accident and injury in the exigencies of the particular situation." *Towle v. Morse*, 103 Me. 250, 68 Atl. 1044. See also *Birmingham Ry. L. & P. Co. v. Smyer*, 181 Ala. 121, 132, 61 So. 354, wherein it was said: "Lands once taken for, or dedicated as, public streets are taken for all time for the purpose of providing a means of passage common to all the people, and may be rightfully used in any way that will best serve this purpose. The

public thus acquire the right of passage over every part of it, from side to side, and from end to end. They acquire the right to use it, not only by the means of vehicles then in use, but also by other means and vehicles which science and the improvement of the age may invent or discover, to meet the needs of the ever-increasing population, or which may become necessary or expedient, provided such vehicles or modes do not exclude the proper use by other modes or kinds of vehicles. Any use of the street for public travel, which is within the limits of the public easement, whether it be by old or new methods, provided it does not tend to destroy the street as a means of passage and travel common to all, is lawful and permissible."

The employment of an automobile on a highway as a means of transportation is a lawful use of the road; and if it results in injury to one traveling by another mode the driver of the machine cannot be held liable for the injury, unless it be made to appear that he used the machine at a time or in a manner or under circumstances inconsistent with a proper regard for the rights of others. *McIntyre v. Orner*, 166 Ind. 56, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 8 Ann. Cas. 1087.

The easement of a highway embraces all travel not prohibited by law on foot, in carriages, omnibuses, stages, sleighs, or other vehicles, as the wants and habits of the public demand. The right of the public in the highway consists in the privilege of passage and such privileges as are annexed as incidents by usage or custom, as the right to make sewers and drains and lay gas and water pipes. It can hardly be questioned that

### Sec. 48. Right of automobilist to use highways.

Considering the automobile as merely a new means of transportation,<sup>11</sup> it is clear that, in the absence of peculiar regulations or unusual circumstances, an automobilist has a right to use the public highways for the propulsion of his machine, and numerous decisions sustain this right.<sup>12</sup> This right is subject to the general obligation of all travelers to exercise reasonable care to avoid injury to others, and to obey

the primary and fundamental purpose of a public highway, street, or alley, is to accommodate the public travel, to afford citizens and strangers an opportunity to pass and repass on foot or in vehicles with such movable property as they may have occasion to transport, and every man has a right to use on the road a conveyance of his own at will, subject to such proper regulation as may be prescribed by authority. The easement for public travel is not to be limited to the particular modes of travel in use at the time the easement was acquired, but extends to and includes all such new and improved methods of travel, the utility and general convenience of which may be afterwards discovered or developed, as are in aid of the identical use for which the street was acquired. *Carli v. Stillwater St. Ry. & Transfer Co.*, 10 N. W. 205, 28 Minn. 373, 41 Am. St. Rep. 290.

11. See section 47.

12. *Arkansas*.—*Russ v. Strickland*, 130 Ark. 406, 197 S. W. 709.

*Delaware*.—*Simeone v. Lindsay*, 6 Penn. (Del.) 224, 63 Atl. 778; *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44. "A public highway is open in all its length and breadth to the reasonable, common and equal use of the people on foot or in vehicles. The owner of an automobile has the same right as the owners of other vehicles to use the highways, and like them he must exercise reasonable care and caution for the safety of others. A

traveler on foot has the same right to the use of the public highways as an automobile or any other vehicle. On using such highway all persons are bound to the exercise of reasonable care to prevent accidents. Such care must be in proportion to the danger in each case. Where one undertakes to pass another on the highway, going in the same direction, he must take reasonable care to exercise that right so as not to injure another, and would be liable for all consequences resulting from negligence on his part. It is the duty of a person operating an automobile . . . upon the public highway to use reasonable care in its operation, to move it at a rate of speed reasonable under the circumstances, and cause it to slow up or stop, if need be, when danger is imminent, and could by the exercise of reasonable care be seen or known in time to avoid the accident. There is a like duty of exercising reasonable care on the part of the person traveling on foot. The person having the management of the automobile and the traveler on foot are required to use such reasonable care, circumspection, prudence and discretion as the circumstances require, an increase of care being required where there is increase of danger. Both are bound to the reasonable use of all their senses for the prevention of accident, and the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise under like circumstances. The more dangerous the

all valid regulations governing the conduct of travelers.<sup>13</sup> But, it is not negligence as a matter of law to use an automobile on a public highway.<sup>14</sup> The fact that motor vehicles may be novel and unusual in appearance, and for that reason are likely to frighten horses who are unaccustomed to see them, is no reason why the courts should adopt a view for the prohibition of such machines.<sup>15</sup> In the absence of statute a muni-

character of the vehicle or machine, and the greater its liability to do injury to others, the greater the degree of care and caution required in its use and operation." *Simeone v. Lindsay*, 6 Penn. (Del.) 224, 63 Atl. 778.

*Illinois*.—*Christy v. Elliott*, 216 Ill. 31, 1 L. R. A. (N. S.) 124, 74 N. E. 1035, 3 Ann. Cas. 487.

*Indiana*.—*Brinkman v. Pacholke*, 41 Ind. App. 662, 84 N. E. 762; *Harker v. Gruhl*, 62 Ind. App. 177, 111 N. E. 457. "It can no longer be questioned that the use of automobiles or motor cars, such as the one here in question, upon streets and other public highways, is lawful. Such vehicles furnish a convenient and useful mode of travel and transportation not incompatible with the proper use of the highway by others; but in consequence of the great speed with which they may be run, their size and general appearance, the noises made in their use, the infrequency of their use in particular localities, and the circumstances of the particular occasions of their use, commensurate care, skill and diligence must be required of the person employing such means of transportation. The general rule applies that he must so use his own as not to injure another. Automobiles may be used with safety to the other users of the highway, and in their proper use upon the highways their owners have equal rights with the users of other vehicles properly upon the highway." *Brinkman v. Pacholke*, 41 Ind. App. 662, 84 N. E. 762.

*Kentucky*.—*Cumberland Telep. &*

*Telep. Co. v. Yeiser*, 141 Ky. 15, 131 S. W. 1049, 31 L. R. A. (N. S.) 1137n.

*Maine*.—"With respect to the methods of travel and transportation on the highway, as in all other spheres of action, the law seeks to adapt itself to the new conditions arising from the progress of invention and discovery. The ordinary highway is open to all suitable methods of use." *Towle v. Morse*, 103 Me. 250, 68 Atl. 1044.

*Maryland*.—*Fletcher v. Dixon*, 107 Md. 420, 68 Atl. 875.

*Missouri*.—*Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122; *White v. Metropolitan St. Ry. Co.*, 195 Mo. App. 310, 191 S. W. 1122.

*Pennsylvania*.—*Brown v. Chambers*, 65 Pa. Super. Ct. 373.

*Texas*.—*Patton-Worsham Drug Co. v. Drennon*, 104 Tex. 62, 133 S. W. 871.

*Wisconsin*.—*Weber v. Swallow*, 136 Wis. 46, 116 N. W. 844.

13. See section 277, et seq., as to obligation to exercise care.

14. *Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 6 Ann. Cas. 656, 1 L. R. A. (N. S.) 238n; *O'Donnell v. O'Neil*, 130 Mo. App. 360, 109 S. W. 815.

15. See chapter XX, as to liability for frightening horses.

*Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 616, 1 L. R. A. (N. S.) 238, 6 Ann. Cas. 656, where it was said: "In all human activities the law keeps up with improvement and progress brought about by discovery and invention, and, in respect to highways, if the introduction of a new con-

cipality cannot forbid the use of heavy trucks, nor can it recover for the injuries caused to the roads by reason their use in a reasonable manner.<sup>15a</sup> In some States the right of cyclists and automobilists to use the highways is expressly affirmed by statutory enactments.<sup>16</sup> To a considerable extent, however, statutes and municipal ordinances may limit travel by motor vehicle along the highways. Thus, they may set aside certain streets or highways and forbid such travel on them, or they may limit motor vehicle traffic to certain hours of the day. These questions are treated in other places in this work.<sup>17</sup>

### Sec. 49. Equal rights of automobilists and other travelers.

The general rule is that all travelers have equal and reciprocal rights to the use of the public highways. That is, the right of an automobilist to run his machine along the highways is equal to that of other travelers,<sup>18</sup> whether such other

trivance for transportation purposes, conducted with due care, is met with inconvenience and even incidental injury to those using ordinary modes, there can be no recovery, provided the contrivance is compatible with the general use and safety of the road. It is, therefore, the adaptation and use, rather than the form or kind of conveyance, that concerns the courts. It is improper to say that the driver of the horse has rights in the road superior to the driver of the automobile. Both have the right to use the easement, and each is equally restricted in the exercise of his rights by the corresponding rights of the other. Each is required to regulate his own use by the observance of ordinary care and caution to avoid receiving injury as well as inflicting injury upon the other." See also *Murphy v. Wait* (N. Y.), 102 App. Div. 121, 92 N. Y. Suppl. 253.

15a. *Sumner County v. Interurban Transp. Co.*, 141 Tenn. 493, 213 S. W. 412, 5 A. L. R. 765.

16. *Brinkman v. Pacholke*, 41 Ind.

App. 662, 84 N. E. 762; *House v. Cramer*, 134 Iowa, 374, 112 N. W. 3, 13 Ann. Cas. 461, 10 L. R. A. (N. S.) 655; *Stanton v. Western Macaroni Mfg. Co.* (Utah), 174 Pac. 821; *Sutter v. Milwaukee Board of Fire Underwriters*, 164 Wis. 532, 166 N. W. 57.

17. See sections 56-82, 231, 232.

18. *United States*.—*Lane v. Sargent*, 217 Fed. 237.

*California*.—*Bidwell v. Los Angeles & S. D. Ry. Co.*, 169 Cal. 780, 148 Pac. 197; *Mayer v. Anderson* (Cal. App.), 173 Pac. 174.

*Connecticut*.—*Upton v. Windham*, 75 Conn. 288, 53 Atl. 660.

*Delaware*.—*Simcone v. Lindsay*, 6 Penn. 224, 63 Atl. 778; *Grier v. Samuel*, 4 Boyce, 106, 86 Atl. 209; *Brown v. City of Wilmington*, 4 Boyce, 492, 90 Atl. 44.

*Florida*.—*Farnsworth v. Tampa Electric Co.*, 62 Fla. 166, 57 So. 223.

*Georgia*.—*Shore v. Ferguson*, 142 Ga. 657, 83 S. E. 518; *Central of Ga. Ry. Co. v. Larsen*, 19 Ga. App. 413, 91 S. E. 517.

traveler shall proceed on foot or by an animal-drawn vehicle, or by some other means of conveyance.<sup>19</sup> At the same time he must recognize the equal rights of the other travelers and

*Illinois*.—Smiley v. East St. Louis & S. Ry. Co., 256 Ill. 482, 100 N. E. 157; Christy v. Elliott, 216 Ill. 31, 1 L. R. A. (N. S.) 215, 74 N. E. 1035, 3 Ann. Cas. 487, 108 Am. St. Rep. 196; Traeger v. Wasson, 163 Ill. App. 572; Wortman v. Trot, 202 Ill. App. 528.

*Indiana*.—Indiana Spring Co. v. Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. (N. S.) 238, 6 Ann. Cas. 656; Luther v. State, 177 Ind. 619, 98 N. E. 640; Brinkman v. Pacholke, 41 Ind. App. 662, 84 N. E. 762; East v. Amburn, 47 Ind. App. 530, 94 N. E. 895; Elgin Dairy Co. v. Sheppard (Ind. App.), 103 N. E. 433; Harker v. Gruhl, 62 Ind. App. 177, 111 N. E. 457.

*Iowa*.—House v. Cramer, 134 Iowa, 374, 112 N. W. 3, 13 Ann. Cas. 461, 10 L. R. A. (N. S.) 655; Delfs v. Dunshee, 143 Iowa, 381, 122 N. W. 236; Simmons v. Lewis, 146 Iowa 316, 125 N. W. 194; Rolfs v. Mullins, 179 Iowa, 1223, 162 N. W. 783.

*Kentucky*.—Shinkle v. Cullough, 116 Ky. 960, 77 S. W. 196; Cumberland Telep. & Teleg. Co. v. Yeiser, 141 Ky. 15, 131 S. W. 1049, 31 L. R. A. (N. S.) 1137n. "It is true, as we have said, that in a general sense the pedestrian and the automobilist have equal rights in streets that are set apart for the use of vehicles as well as the accommodation of foot travelers, and each has rights that the other is bound to respect, and it is also true that the automobile must use only the carriage way of the street, while the pedestrian, except at street crossings, uses generally only the sidewalk. But the pedestrian, in the use of the street at a regular crossing, has the same right to its use as vehicles, and is under no legal duty to give way to automobiles. The automobile can go around him as well as he

can go around it. It can get out of the way of the pedestrian about as easily and quickly as he can get out of its way, although it is usually the case, and rightfully so, that the pedestrian endeavors to keep out of the way of vehicles at street crossings; but if he does not, this does not excuse the driver of that vehicle who runs him down, unless it be that the driver was free from negligence, and the pedestrian by his own want of care was to blame for the collision." Weidner v. Otter, 171 Ky. 167, 188 S. W. 335.

*Louisiana*.—Shields v. Fairchild, 130 La. 648, 58 So. 497.

*Minnesota*.—Carson v. Turrish, 140 Minn. 445, 168 N. W. 349.

*Missouri*.—O'Donnell v. O'Neil, 130 Mo. App. 360, 109 S. W. 815; Hall v. Compton, 130 Mo. App. 675, 108 S. W. 1122; Young v. Bacon (Mo. App.), 183 S. W. 1079; Moenach v. Crawford, 187 S. W. 879; White v. Metropolitan St. Ry. Co., 195 Mo. App. 310, 191 S. W. 1122; Carradine v. Ford, 195 Mo. App. 684, 187 S. W. 285.

*New Hampshire*.—Gilbert v. Burquo, 72 N. H. 521, 57 Atl. 97.

*New Jersey*.—Pool v. Brown, 89 N. J. Law, 314, 98 Atl. 262.

*New York*.—Towner v. Brooklyn Heights R. Co., 44 App. Div. 628, 60 N. Y. Suppl. 289; Clark v. Woop, 159 App. Div. 437, 144 N. Y. Suppl. 595; Ebling Brewing Co. v. Lynch, 80 Misc. 517, 141 N. Y. Suppl. 480; Miller v. New York Taxicab Co., 120 N. Y. Suppl. 899.

*Oklahoma*.—White v. Rukes, 56 Okla. 476, 155 Pac. 1184.

*Pennsylvania*.—Borough of Applewold v. Desch, 239 Pa. St. 479, 86 Atl. 1070, Ann. Cas. 1914 D. 481; Silberman v. Huyette, 22 Montg. Co. L. Rep. (Pa.)

must exercise due care to avoid injury to them.<sup>20</sup> Statutory or municipal regulations, or the general duty to exercise reasonable care, may, as a practical proposition, detract from the theory of equal rights at particular places, such as intersecting streets,<sup>21</sup> railroad crossings,<sup>22</sup> or other places where greater precautions are generally required for the avoidance of injuries.

### Sec. 50. No superior rights for automobilists.

Although automobiles may be said to possess an equal right to use the public highways and roads after compliance with the requirements of the law, such as pertain to registration, licensing, equipment, etc., nevertheless they possess no superior right of way over other travelers.<sup>23</sup>

The driver of a motor vehicle is bound to operate his ma-

39; *Brown v. Chambers*, 65 Pa. Super. Ct. 373. "An owner of an automobile has as much right to the highway as the driver of a horse and carriage. If a horse cannot be driven past a vehicle or car properly managed, the driver should keep him off the highway or submit to the consequences." *Silberman v. Huyette*, 22 Montg. Co. L. Rep. (Pa.) 39.

*Tennessee*.—*Coco Cola Bottling Works v. Brown*, 139 Tenn. 640, 202 S. W. 926.

*Vermont*.—*Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669.

*Virginia*.—*Core v. Wilhelm*, 98 S. E. 27.

*Washington*.—*Minor v. Stevens*, 65 Wash. 423, 118 Pac. 313; *Locke v. Green*, 100 Wash. 397, 171 Pac. 245.

*Wisconsin*.—*Weber v. Swallow*, 136 Wis. 46, 116 N. W. 844.

Bicycles have equal rights on the public ways. *Holland v. Bartch*, 120 Ind. 46, 22 N. E. 83, 16 Am. St. Rep. 317; *Lacey v. Winn* (Com. Pl.), 3 Pa. Dist. Rep. 811; *Lacey v. Winn* (Com. Pl.), 4 Pa. Dist. Rep. 409. A bicycle being a vehicle, riding one in the usual

manner on a public highway is not unlawful. *Thompson v. Dodge*, 58 Minn. 555, 60 N. W. 545, 28 L. R. A. 608.

19. While vehicles and pedestrians have equal rights upon the highway it is said that this can only be so when conditions are equal. *Gagnon v. Robitaille*, 16 R. L. N. S. 235.

20. See section 276, *et seq.*

21. See sections 261-262, 394, 435, 497.

22. See section 550, *et seq.*

23. *Arkansas*.—*Butler v. Cabe*, 116 Ark. 16, 171 S. W. 1190.

*Georgia*.—*O'Dowd v. Newham*, 13 Ga. App. 220, 80 S. E. 36.

*Illinois*.—*Graham v. Hagaman*, 270 Ill. 52, 110 N. E. 337; *Kerchner v. Davis*, 183 Ill. App. 600.

*Indiana*.—*East v. Amburn*, 47 Ind. App. 530, 94 N. E. 895.

*Missouri*.—*Carradine v. Ford*, 195 Mo. App. 684, 187 S. W. 285.

*Nebraska*.—*Tyler v. Hoover*, 92 Neb. 221, 138 N. W. 128.

*New York*.—*Lorenz v. Tisdale*, 127 N. Y. App. Div. 433, 111 N. Y. Suppl. 173.

chine with reasonable care and with due consideration to the rights of footmen or other travelers having an equal right to the use of the way.<sup>24</sup> As was said in one case,<sup>25</sup> "The mere fact that automobiles are run by motor power and may be operated at a dangerous and high rate of speed gives them no superior rights on the highway over other vehicles, any more so than would the fact that one is driving a race horse give such driver superior rights on the highway over his less fortunate neighbor who is pursuing his journey behind a slower horse."

### Sec. 51. Ferries and vessels.

While dealing with the right of automobiles to use the public highways, it is of interest to consider the motor vehicle's right on ferries, which are in the nature of highways, and are generally a continuation thereof. The Revised Statutes of the United States prohibiting passenger steamers to carry as freight certain articles, including petroleum products or other like explosive fluids, except in certain cases and under certain conditions, was amended by the Act of Feb. 21, 1901, ch. 386, 31 Stat. at L. 799, U. S. Comp. Stat. 1901, p. 3050, which provided that: "Nothing in the foregoing or following sections of this act shall prohibit the transportation by steam vessels of gasolene or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: *Provided, however,* that all fire, if any, in such vehicles or automobiles be extinguished before entering the said vessel and the same be not relighted until after said vehicle shall have left the same . . . ." Under this statutory provision it was held that gasolene contained in the tank of an automobile being transported on a steam vessel was carried as freight within the meaning of the statute, that an automobile in which the motive power was generated by passing an electric spark through a compressed mixture of gasolene and air in the cylinder, causing intermittent explosions, carried a fire while the vehicle was

24. See sections 277-282.

110 N. E. 337, affirming 189 Ill. App.

25. *Graham v. Hagaman*, 270 Ill. 252, 631.

under motion from its own motive power; and that the carrying by a steam ferry-boat of such a vehicle, which was run on and off the boat under its own power, was a violation of the statute.<sup>26</sup>

In 1905 Congress amended the existing law by enacting that "Nothing in the foregoing or following sections of this Act shall prohibit the transportation by steam vessels of gasoline or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: *Provided, however,* That all fire, if any, in such vehicles or automobiles be extinguished immediately after entering the said vessel, and that the same be not relighted until immediately before said vehicle shall leave the vessel: *Provided further,* That any owner, master, agent, or other person having charge of passenger steam vessels shall have the right to refuse to transport automobile vehicles, the tanks of which contain gasoline, naphtha, or other dangerous burning fluids."<sup>27</sup> It will be seen that Congress relieved, by this amendment, steam vessels from the penalty which they were subjected to under the old law as construed by the decision mentioned above. However, as the law now stands, "any owner, master, agent, or other person having charge of passenger steam vessels shall have the right to refuse to transport automobile vehicles" carrying gasoline, naphtha, or other dangerous burning fluids.

### Sec. 52. Toll roads.

A decision of much importance to automobilists handed down by the Supreme Court of *New York*, held that a certain toll bridge company possessed no legal right to charge tolls for automobiles. The charter of this company enumerated specifically the classes of vehicles for the passage of which tolls could be collected; it made no mention of automobiles. The importance of this decision is due to the fact that there are many other toll bridges throughout the *United States*

26. *The Texas*, 134 Fed. 909.

27. See 33 Stat. at L., part 2, p. 720,  
4 U. S. Comp. St. 1913, § 8242; U. S.  
Rev. St., § 4472, as amended by Act

Feb. 18, 1905, c. 586, as amended by  
Act March 3, 1905, c. 1457, § 8, as  
amended by Act May 28, 1906, c. 2565,  
as amended by Act Jan. 24, 1913, c. 10.



which possess similar charters, and must therefore permit automobiles to pass over their bridges toll free. However, if the charter of such a corporation expressly authorizes the company to charge tolls for certain classes of vehicles mentioned, and in enumerating the list uses the phrase "any other vehicle," then the automobile might be held to pay toll.

The principle of law governing the subject of exacting automobile tolls is that a corporation which is given valuable privileges from the State possesses only those powers which are expressly granted or conferred by necessary implication from the charter provisions. Justice Spencer, of the *New York* Supreme Court, in making the decision here referred to, says: "The company's right to exact tolls is confined to the animals and vehicles specified in the act conferring the franchise. All other animals and vehicles must be presumed to have the right to cross free. The fact that automobiles were not known at the time of the passage of the act makes no difference, for the reason that defendants, by accepting the franchise in consideration for the right to collect the tolls stipulated for, assumed the duty and responsibility of building and maintaining a bridge that would meet the reasonable requirements of all travelers on the public highway, including vehicles and animals then in common use by travelers, and also such as might thereafter come into common use. Its power to collect toll is derived from the provisions of the franchise. It stipulated for no other or further right, and may not exact toll except as therein provided. If it deems it necessary to require payment of tolls from others it must apply to the Legislature for authority so to do. Its power must be strictly construed."<sup>28</sup> The decision in *New York* has been followed

28. *Mallory v. Saratoga Lake Bridge Co.*, 53 Misc. (N. Y.) 446, 104 N. Y. Suppl. 1025.

**New York statute.**—Since the above decision the legislature of *New York* passed an enabling act allowing toll bridges to charge reasonable tolls for automobiles, but no more than is charged for other vehicles. See L. 1907, ch. 127.

**Assault on toll gate keeper.**—Evidence, although contradicted, that the defendants approached a toll gate in an automobile, and when toll was demanded choked the keeper, rushed their machine through the gate and injured the keeper's wife, and that they had previously driven through a number of toll gates at a high rate of speed without paying toll, is sufficient to warrant

in *Vermont*,<sup>29</sup> but a contrary conclusion has been reached in *New Jersey*.<sup>29a</sup>

In a case in *Pennsylvania* the right of a turnpike company to prohibit the use of the turnpike road to automobiles was considered. In that case the court, after referring to the acts under which it was incorporated and the power conferred upon it, decided that the turnpike company's road was a public highway and that an automobile was within the term "other carriage of burden or pleasure," within the laws of that State, as to the use of highways and turnpike roads by such vehicles, and that the company could not refuse to grant the right to an automobile to use its road and that a peremptory writ of mandamus would issue, compelling it to perform the duties prayed for in the petition.<sup>30</sup> A petition for a writ of mandamus commanding a turnpike company to allow the petitioner, while operating and using his automobile, the right and privilege of passing over and upon its turnpike road, upon his paying the tolls established by law for the passage of vehicles of similar weight and width of tires over turnpike roads of the commonwealth of *Pennsylvania*, must aver that the petitioner has complied with all the requirements of the provisions of the State Automobile Act.<sup>31</sup>

a verdict of guilty of assault. In such a case a demand by the keeper for a higher rate of toll than was legal did not justify the assault. *Commonwealth v. Rider*, 29 Pa. Super. Ct. 621.

29. *Peru Turnpike Co. v. Peru*, 91 Vt. 295, 100 Atl. 679, wherein it was said: "The legislature failed to provide for the unforeseen condition which has arisen. That this condition was unforeseen does not admit of doubt. It must be remembered that we are not dealing with a situation existing more than a hundred years ago. Steam as a means of transportation was yet in the experimental stage; petroleum products were unknown; railroads were unprojected in the state, and none was chartered until years afterwards; canals were expected

to furnish the principal means of heavy transportation. To say that the legislature of 1814 foresaw the advent of the automobile or any other mechanical carriage, and intended to provide for it in this charter, would be to ascribe to its members a prophetic vision that even those wise and far-seeing men could not possess. If they had, it is fair to assume that they would have added a general clause to the charter to manifest their purpose."

29a. *Proprietors of Cornish Bridge v. Fitts* (N. H.), 107 Atl. 626.

30. *Seranton v. Laurel Run Turnpike Co.*, 225 Pa. St. 82, 73 Atl. 1063.

31. *Bertles v. The Laurel Run Turnpike Co.*, 15 Pa. Dist. Rep. 94.

**Sec. 53. Exclusion of non-residents.**

As to the exclusion of non-resident motorists from the public ways, there is no authority or power in the State to do this, on the ground of non-residence, and the States have no power to place greater restrictions or burdens on non-resident automobilists than those imposed on their own citizens. Such action on the part of a State would violate the Federal Constitution. However, the State may compel non-residents to comply with the regulations controlling residents. No discrimination is created in such a case, as all are treated alike.<sup>32</sup>

**Sec. 54. Automobile racing.**

Under the common law, the racing of vehicles upon the highways was a misdemeanor.<sup>33</sup> But, though the racing of automobiles upon a public highway is illegal, a spectator who is injured thereby cannot recover for injuries from the municipality wrongfully permitting the race.<sup>34</sup> On the other hand, one using the highway for purposes of travel might be permitted to recover for the damages he has sustained through the wrongful use of the road.<sup>35</sup> Where two or more automobilists are unlawfully or negligently racing on the highway, and a traveler is struck by one of the machines, he may have his action against either one or against both jointly, for they are jointly and severally liable.<sup>36</sup> A municipality which dedicates a street to such a hazardous use as automobile racing

<sup>32</sup>. See sections 64, 114, 115.

<sup>33</sup>. Section 728.

<sup>34</sup>. *Rose v. Gypsum City* (Kans.), 179 Pac. 348; *Bogart v. City of New York*, 200 N. Y. 379, 93 N. E. 937.

A spectator at an automobile contest alleged to have been injured by defendant's negligence in operating the car which it had entered in the race held guilty of contributory negligence as a matter of law. *Baldwin v. Locomobile Co.*, 143 N. Y. App. Div. 599, 128 N. Y. Suppl. 429.

Contributory negligence of boy watching auto race on fair ground.—*Scott v. Kansas State Fair Assoc.*, 102

Kans. 653, 171 Pac. 634.

**Liability of Fair** for injuries received by spectator of race on fair grounds. *Jerrell v. Harrisburg Assoc.*, 215 Ill. App. 273; *Arnold v. State*, 163 N. Y. App. Div. 253, 148 N. Y. Suppl. 479. See also *Ross v. State*, 186 N. Y. App. Div. 156, 173 N. Y. Suppl. 656. As to liability of driver of one of racing cars, see *Mankin v. Bartley*, 266 Fed. 466.

<sup>35</sup>. See *Bogart v. City of New York*, 200 N. Y. 379, 93 N. E. 937.

<sup>36</sup>. *Reader v. Otis* (Minn.), 180 N. W. 117; *Thomas v. Rasmussen* (Neb.), 184 N. W. 104; *De Carvalho v. Brunner*, 223 N. Y. 284, 119 N. E. 563.

cannot be said to keep it "reasonably safe" for travel.<sup>37</sup> And, when a city or village is sued for injuries occasioned through unlawful racing in the street, it has been held that it cannot defend on the ground that the acts of officials permitting the race were unauthorized.<sup>38</sup> A contrary view, however, has been sustained on this question.<sup>39</sup> If racing on a public highway is absolutely illegal and unauthorized, it would seem that the proper rule should be that an automobilist would do so at his peril.<sup>40</sup> But it has been held that the mere fact of racing is not, of itself, sufficient to charge the driver with negligence.<sup>41</sup>

### Sec. 55. Setting aside highways for speed contests.

Under a law in *New York* regulating the speed of motor vehicles<sup>42</sup> it was provided that local authorities may "set aside for a given time a specified public highway for speed tests or races, to be conducted under proper restrictions for the safety of the public." In construing this act it was decided that the power to grant or withhold the necessary consents thereto, which carries with it the right to impose conditions, was given to the local authorities whose districts would

37. *Burnett v. City of Greenville*, 106 S. Car. 255, 91 S. E. 203.

38. *Burnett v. City of Greenville*, 106 S. Car. 255, 91 S. E. 203, wherein it was said: "It is suggested by the city that the dedication of the public ways to automobile racing lay wholly outside the powers of the corporation, for which act the corporation is not liable. That is another way of saying the corporation is liable if the authorities act within the law, and is not liable, if the authorities act without the law. The prime duty of any city is to keep its streets clear for the public travel. The incumbrance of the streets with automobiles running at a dangerous rate of speed, just for practice, is a violation of that prime duty. To answer that the mayor and council had no authority to authorize such a use of the

streets, is to admit the wrong."

39. *Rose v. Gypsum City (Kans.)*, 179 Pac. 348.

40. *Brown v. Thayer*, 212 Mass. 392, 99 N. E. 237.

41. *Johnson v. Reliance Automobile Co.*, 23 Cal. App. 222, 137 Pac. 603.

"Race."—The word "race" has been construed as referring to a pre-arranged contest, not to an enhanced speed of a machine when trying to keep another car from passing. *Canning v. Wood*, 44 D. L. R. (Canada) 525, 52 N. S. R. 452.

**Defects in highway.**—It has been held that one taking part in a race does not assume latent defects in the highway. *National Vehicle Co. v. Kellum*, 184 Ind. 457, 109 N. E. 196.

42. Laws of 1904, ch. 538, § 3, subd. 6; Laws 1909, ch. 30, § 296.

be injured by the wear and tear of the machines and perhaps benefited by the commercial advantages from the race. And it was held that the State Engineer and Surveyor had no authority, by virtue of the powers conferred on him,<sup>43</sup> to prohibit the use of said highways or to recover for damages thereto occasioned by such a race. And where such official sought to enforce a rule that where the consent of the local authorities had been so obtained there should be deposited with him a certain sum for each mile to be raced over for each day of said race as a prerequisite to the right to hold the race, it was decided that such action was clearly illegal, as his consent to the race taking place was not necessary and he had no authority to promulgate the rules.<sup>44</sup>

43. Laws 1898, ch. 115, as amended in 1907.

44. *Morrell v. Skene*, 64 Misc. (N. Y.) 185, 119 N. Y. Suppl. 28.

## CHAPTER V.

### STATUTORY REGULATION OF MOTOR VEHICLES.

#### SECTION 56. Scope of chapter.

57. General power of regulation.
58. Regulatory power lodged in legislature.
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- 64 Discrimination between owners of different machines—non-residents.
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#### Sec. 56. Scope of chapter.

In this chapter are discussed the general principles relating to the regulation of motor vehicles, together with a discussion of certain specific regulations. Generally, the construction and effect of particular regulations are treated in other parts of this work. Thus, in other places will be found a discussion of particular regulations such as pertain to the registration and licensing,<sup>1</sup> speed,<sup>2</sup> and lighting<sup>3</sup> of vehicles, the law of the road,<sup>4</sup> the regulation of jitneys,<sup>5</sup> taxicabs, and other carriage for hire.<sup>6</sup> So, too, matters governing the conduct of garagekeepers<sup>7</sup> and chauffeurs,<sup>8</sup> will be found covered in the chapters on those subjects. Also, various matters in relation to the enforcement of regulations by means of criminal prosecutions, together with a discussion of some of the penal offenses involved, are to be found in another chapter.<sup>9</sup> And the probative effect of a violation of a valid regulation, as it bears on the issue of negligence, is reserved for a subsequent

1. Sections 92-128.

2. Sections 230, 306-324.

3. Sections 344-348.

4. Sections 236, 241-275, 371-394,  
492-499.

5. Sections 130-173.

6. Section 132, *et seq.*

7. Sections 195-200.

8. Sections 220-222.

9. Chapter XXVII.

chapter.<sup>10</sup> The powers of Congress,<sup>11</sup> and of municipal bodies,<sup>12</sup> are also discussed in other chapters. In short, at this place, it is intended to discuss the matters which pertain to regulation in general, as distinguished from the construction and effect of particular regulatory measures.

## Sec. 57. General power of regulation.

It is, of course, true that automobilists have the right to use the public highways for purposes of pleasure or business,<sup>13</sup> but this right is not so sacred that it is beyond the control of the State and municipal divisions. On the contrary, there is no dissent from the general rule that the Legislature, by virtue of its police power, may make regulations governing the conduct of the owners and drivers of motor vehicles.<sup>14</sup> A regulation must be enacted in a constitutional manner. That

10. Sections 297-302.

11. Sections 83-91.

12. Sections 69-82.

13. Section 48.

14. *United States*.—Hendrick v. State of Maryland, 35 S. Ct. 140; Kane v. State of New Jersey, 242 U. S. 160, 37 S. Ct. 30.

*California*.—*Ex parte Berry*, 147 Cal. 523, 82 Pac. 44; *Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685; *Ex parte Lee*, 28 Cal. App. 719, 153 Pac. 992; *Ex parte Smith*, 26 Cal. App. 116, 146 Pac. 82; *Ex parte Smith*, 33 Cal. App. 161, 164 Pac. 618.

*Kentucky*.—Newport v. Merkel Bros. Co., 156 Ky. 580, 161 S. W. 549; Smith v. Commonwealth, 175 Ky. 286, 194 S. W. 367.

*Maine*.—State v. Mayo, 106 Me. 62, 75 Atl. 295, 26 L. R. A. (N. S.) 502, 20 Ann. Cas. 512; State v. Phillips, 107 Me. 249, 78 Atl. 283.

*Maryland*.—Swann v. City of Baltimore, 132 Md. 256, 103 Atl. 441.

*Massachusetts*.—Commonwealth v. Kingsbury, 199 Mass. 542, 85 N. E. 848, 127 Am. St. Rep. 513; Commonwealth

v. Sloeum, 230 Mass. 180, 119 N. E. 687.

*Michigan*.—Johnson v. Sargent, 168 Mich. 444, 138 N. W. 468; Jasmowski v. Board of Assessors of City of Detroit, 191 Mich. 287, 157 N. W. 891.

*Minnesota*.—Schaar v. Comforth, 128 Minn. 460, 151 N. W. 275.

*Missouri*.—*Ex parte Kneedler*, 243 Mo. 632, 147 S. W. 983, Ann. Cas. 1913 C. 923; Hall v. Compton, 130 Mo. App. 675, 108 S. W. 1122; City of St. Louis v. Hammond, 199 S. W. 411.

*Nebraska*.—Schultz v. State, 88 Neb. 613, 130 N. W. 972, 34 L. R. A. (N. S.) 243.

*New Jersey*.—West v. Asbury Park, 89 N. J. L. 402, 99 Atl. 190.

*New York*.—McIntosh v. Johnson, 211 N. Y. 265, 105 N. E. 416; People v. MacWilliams, 91 App. Div. 176, 84 N. Y. Suppl. 357; Strauss v. Enright, 105 Misc. 367.

*Ohio*.—State v. Schaeffer, 96 Ohio, 215, 117 N. E. 220; City of Fremont v. Keating, 96 Ohio St. 468, 118 N. E. 114.

*Oklahoma*.—*Ex parte Mayes*, 167 Pac. 749.

is, it must be in the required form with respect to its title,<sup>15</sup> and constitutional requirements with reference to the wording or separation of provisions must be obeyed.

### Sec. 58. Regulatory power lodged in legislature.

The control of the highways is, in the first instance, lodged in the Legislature of the State.<sup>16</sup> This control may be exercised by the Legislature by the enactment of statutes governing the powers and liabilities of automobilists. Or, the law

*South Carolina.*—Lillard v. Melton, 103 S. Car. 10, 87 S. E. 421; Merchants' & Planter's Bank v. Brigman, 106 S. Car. 362, 91 S. E. 332.

"The legislature has the inherent police power to pass any law it judges fit for the protection and welfare of its people in traveling over the public highways of the State, and it is a matter within the discretion of the legislature of the State to determine what interests the public requires, and to adopt such measures and means as are reasonably necessary for the protection of such interests, and to make reasonably safe the traveling public. As long as the legislature acts in relation to the police power vested in it as the law-making power, it is not for the court to vacate their action upon constitutional grounds, or to say whether the measure is wise or unwise. The legislature by passing the act judged the measure to be reasonable and wise. The public generally has the right to use the highways of the State and travel over the same—afoot, horseback, in vehicles, and motor vehicles." Merchants' & Planter's Bank v. Brigman, 106 S. Car. 362, 91 S. E. 332.

*Texas.*—Peters v. City of San Antonio (Civ. App.), 195 S. W. 989.

"The cases with unanimity decide that the legislatures of states have full and complete control over the highways, streets and alleys, and that such control may be delegated to municipalities,

and it follows from such complete control that the use of the streets for the prosecution of any private business may be wholly denied, or granted with such provisions and regulations as may be deemed proper by the municipality. When a franchise is granted, during its existence unreasonable and oppressive regulations might form the ground of complaint; and, when a vested right is regulated, the reasonableness of the regulation could undoubtedly be made the subject of judicial investigation. But, when a privilege to which a party has no right has been given and which is granted for an indefinite time and which can be terminated at any time by the granting power, we fail to understand how the reasonableness of such regulations can be made the basis of an attack." Peters v. City of San Antonio (Tex. Civ. App.), 195 S. W. 989.

*West Virginia.*—*Ex parte* Dickey, 76 W. Va. 576, 85 S. E. 781; Beek v. Cox, 77 W. Va. 442, 87 S. E. 492.

*Canada.*—A province of Canada has power to regulate the use of motor vehicles upon the highways within it. Matter of Rogers, 7 E. L. R. (Canada) 212.

15. Section 60.

16. Western Union Teleg. Co. v. Hopkins, 160 Cal. 116, 116 Pac. 567; *Ex parte* Smith, 26 Cal. App. 116, 146 Pac. 82; State *ex rel.* Lunig v. Johnson, 71 Fla. 363, 72 So. 477; Peters v. City of San Antonio (Tex. Civ. App.), 195 S. W. 989.



makers may delegate some of their powers to municipal divisions of the State, such as counties, cities, villages, towns, etc.<sup>17</sup> But the Legislature, after a delegation of certain powers, is not precluded from further action in the matter, but it may by appropriate legislation repeal the delegation and resume control of the subject.<sup>18</sup> The situation is, of course, somewhat different when the authority of a municipal division is protected by the Constitution of the State. In such a case, a law abridging the power of the municipality might be unconstitutional.<sup>19</sup> Thus, where the Constitution provides in effect that the Legislature shall have no power to impose taxes upon counties or upon the inhabitants thereof, for county purposes, but shall empower the county authorities to impose taxes for such purposes, the State cannot impose a license tax on automobiles for the construction and repair of county roads.<sup>20</sup>

### Sec. 59. Purpose of acts.

Several different purposes are subserved through the enactment of regulations. The principal purpose is the safety of other travelers.<sup>21</sup> But regulations may be said to have been enacted in the interest of uniformity in the regulation of the machines.<sup>22</sup> That is, it is in the interest of automobilists that they encounter similar regulations in the various villages and

17. Section 70.

18. State *ex rel.* Lunig v. Johnson, 71 Fla. 363, 72 So. 477; Anderson v. Wentworth, 75 Fla. 300, 78 So. 265; People v. Braun, 100 Misc. (N. Y.) 343, 166 N. Y. Suppl. 708; *Ex parte* Shaw (Okla.), 157 Pac. 900.

"There is nothing in our constitution that prohibits the legislature from enacting a statute taking away from the boards of county commissioners, not only a part, but the whole, of their supervision and control of public roads and bridges, and lodging such powers elsewhere, since the control of all general public highways is vested in the state absolutely without any constitutional limitations or restrictions. State

*ex rel.* Lunig v. Johnson, 71 Fla. 363, 72 So. 477. And see also section 72.

19. *Ex parte* Schuler, 167 Cal. 282, 139 Pac. 685; People v. McGraw, 184 Mich. 233, 150 N. W. 836; City of Fremont v. Keating, 96 Ohio St. 468, 118 N. E. 114; Kalich v. Knapp, 73 Oreg. 558, 145 Pac. 22.

20. *Ex parte* Schuler, 167 Cal. 282, 139 Pac. 685. See also *Ex parte* Shaw (Okla.), 157 Pac. 900.

21. *Elsbery v. State*, 12 Ga. App. 86, 76 S. E. 779; *City of St. Louis v. Hammond* (Mo.), 199 S. W. 411; *State v. Schaeffer*, 96 Ohio, 215, 117 N. E. 220.

22. *Dozier v. Woods*, 190 Ala. 279, 67 So. 283; *Ex parte Smith*, 26 Cal. App. 116, 146 Pac. 82; *People v. Sar-*

cities through which they may pass, and regulations may be designed to this end and to the prohibition of various drastic requirements by municipal corporations.<sup>23</sup> Or, to a certain extent, they may be designed to afford revenue or to reimburse municipalities for the injuries to the highways which are occasioned by motor vehicles.<sup>24</sup>

gent, 254 Ill. 514, 98 N. E. 959; *City of Barbaroo v. Dwyer*, 166 Wis. 372, 165 N. W. 297.

23. *People v. Sargent*, 254 Ill. 514, 98 N. E. 959; *People ex rel. Hainer v. Keeper of Prison*, 121 N. Y. App. Div. 645, 106 N. Y. Suppl. 314, affirmed 190 N. Y. 315, 83 N. E. 44; *City of Barbaroo v. Dwyer*, 166 Wis. 372, 165 N. W. 297. "The invention, development and use of the automobile introduced an entirely new element and revolutionized travel upon all the highways of the State. The operation of these motor vehicles at exceedingly high rates of speed introduced a new element of danger for all those who enter upon the public highways. Negligence in the operation of motor vehicles involves great danger to the lives and property of others lawfully using the highways. In former times, vehicles drawn by horses or oxen moved at a comparatively low rate of speed, and even in cases of a runaway, others upon the highway but infrequently had difficulty in avoiding injury or danger. When vehicles so drawn were negligently managed, and injured the person or property of others, there was usually but little difficulty in locating the person responsible for the injury. Such vehicles did not usually travel long distances and the person responsible for the injury inflicted by them could usually be found somewhere within the region where the cause of action arose. The modern vehicle drawn by an engine, is capable of traversing the State from one end to the other within a single day. Such vehicles make journeys far distant from the residence of the person responsible

for negligence in their operation, thus making it difficult for the person injured in person or property, to even ascertain the identity of the person responsible for his injuries, and still more difficult for him to obtain redress, in case he has to follow the negligent operator of the engine to some distant part of the State. These considerations led, in earlier years, following the introduction of this class of traffic, to the adoption of stringent police regulations with regard to the running of motor vehicles on the highways of numerous municipalities of the commonwealth. Each municipality had its own code of regulations, and the numerous codes greatly varied. Some of the requirements were perhaps unreasonable. The operator of an automobile could form no idea from reading the rules of one municipality what new regulations he might have to observe when he crossed the line into the jurisdiction of some municipal neighbor. This was the condition of affairs when the legislature of the State assumed the duty, in the exercise of the supreme police power with which it was vested, to establish uniform regulation with regard to this matter and limit the power of local authorities to the ordaining of regulations which were not inconsistent with the uniform code. The act of April 27th, 1909 (P. L. 265), is the final expression of the legislative will upon this subject and supersedes all prior legislation inconsistent therewith." *Garrett v. Turner*, 47 Pa. Super. Ct. 128, affirmed 235 Pa. St. 383, 84 Atl. 354.

24. *Ex parte Smith*, 26 Cal. App. 116, 146 Pac. 82; *State v. Ingalls*, 18

**Sec. 60. Title and form of statute.**

In the enactment of motor vehicle laws, as well as other statutes, constitutional provisions relative to the title, form and manner of enactment of laws, must receive compliance. Otherwise, the proposed law will fail to become effective, though the subject matter is within the legislative power. Thus, constitutional provisions in some States require that a proposed statute shall comprise but one subject or that the subject shall be expressed in the title to the act.<sup>25</sup> A requirement of a State constitution that no law shall contain more than one subject, is not offended by an act which regulates the operation of motor vehicles and also provides for the payment of license fees.<sup>26</sup> And an act entitled as being an act for the regulation licensing and governing of motor vehicles, is not invalid because it also provides for the disposition of license fees received under the act.<sup>27</sup> And a statute making the speed of a motor vehicle at a prohibited rate *prima facie* evidence of negligence in case of an injury to another traveler, is held to

N. Mex. 211, 135 Pac. 1177; Commonwealth *ex rel.* Bell v. Powell, 249 Pa. St. 144, 94 Atl. 746.

**25. Title of municipal ordinances.**—A constitutional requirement relative to the title of acts, may not apply to municipal ordinances. Craddock v. City of Antonio (Tex. Civ. App.), 198 S. W. 634.

**26. Jasmowski v. Board of Assessors of City of Detroit,** 191 Mich. 287, 157 N. W. 891. See also, Wilson v. State (Tenn.), 224 S. W. 168.

**27. Smith v. Commonwealth,** 175 Ky. 286, 194 S. W. 367. See also People v. Sargent, 254 Ill. 514, 98 N. E. 959.

**Pennsylvania statute.**—A statute of Pennsylvania providing for registration, licensing, and disposition of the fees, is germane to the subject to the regulation of motor vehicles, which is expressed in the title of the act, and is not in violation of a provision of the

Constitution forbidding bills, except general appropriation bills, from containing more than one subject which shall be clearly expressed in the title. Nor is a provision of such a law providing for the use of such moneys in the maintenance of State highways offensive to a constitutional requirement providing that the general appropriation bills shall embrace nothing but appropriations for the ordinary expense of the executive, legislative and judicial departments, interest on public debt and for public schools, and that all other appropriations shall be made by separate bills, each embracing but one subject; for such a constitutional provision is intended to apply only to biennial appropriations from general revenues and not to a fund created for a special purpose to which it is dedicated. Commonwealth *ex rel.* Bell, 249 Pa. St. 144, 94 Atl. 746.

be within the title of a motor vehicle statute for "regulating the use and speed" of motor vehicles.<sup>28</sup>

### **Sec. 61. Due process of law.**

The objection is frequently made to motor vehicle regulations that they take property without due process of law. Inasmuch as they are based on the police power of the State, the objection must generally fail.<sup>29</sup> But an act rendering the owner of a motor vehicle liable for the negligent operation thereof by one who takes the machine without his consent, such as a mere trespasser, is deemed violative of the constitutional protection.<sup>30</sup> On the other hand, it has been held that an act creating a lien on a motor vehicle for injuries occasioned by its negligent operation and giving such lien priority next to State and county taxes, is within the legislative power.<sup>31</sup>

### **Sec. 62. Discrimination between motorists and other persons.**

As a general proposition, it is not an unjustifiable discrimination or special legislation to enact a law regulating the use of motor vehicles on the public highways, though other vehicles using the way are unaffected or less affected thereby.<sup>32</sup> Persons who own, use or operate automobiles may very properly be classed together and made subject to legislation which, though distinctive, is appropriate to them, provided the legis-

<sup>28</sup>. *Hartje v. Moxley*, 235 Ill. 164, 85 N. E. 216.

<sup>29</sup>. See section 57.

<sup>30</sup>. *Daugherty v. Thomas*, 174 Mich. 371, 140 N. W. 615, 45 L. R. A. (N. S.) 699, Ann. Cas. 1915 A. 1163.

<sup>31</sup>. *Merchants' & Planters' Bank v. Brigman*, 106 S. Car. 362, 91 S. E. 332.

<sup>32</sup>. *Hudgens v. State*, 15 Ala. App. 156, 72 So. 605; *Westfalls, etc., Express Co. v. City of Chicago*, 280 Ill. 318, 117 N. E. 439; *State v. Lawrence*, 108 Miss. 291, 66 So. 745; *City of St. Louis v. Hammond (Mo.)*, 199 S. W. 411; *State v. Ingalls*, 18 N. Mex. 211, 135 Pac. 1177; *Garrett v. Turner*, 47 Pa. Super. Ct. 128, affirmed 235 Pa. St. 383, 84

Atl. 354.

"The constitutional requirement is that laws, upon the subjects discriminated by the section of the Constitution in question, shall be general, not local or special, and uniformity of result is only one of the judicial tests applied to laws for the determination of their character as to generality. A law may by classification or otherwise produce some diversion of result and yet be general, but where the classification is based on genuine distinctions, its expediency is for legislative determination." *Garrett v. Turner*, 47 Pa. Super. Ct. 128, affirmed 235 Pa. St. 383, 84 Atl. 354.

lation applies to all within the class and affects them all alike.<sup>33</sup> Thus, an act regulating the speed of automobiles is not unconstitutional as class legislation.<sup>34</sup> And a regulation which fixes a speed limit and which by its terms includes all vehicles, is not subject to the objection that it is discriminatory and special legislation because the limit is fixed so high that only motor vehicles can violate it.<sup>35</sup> So, too, a provision of a motor vehicle law which makes excessive speed *prima facie* evidence of negligence, is not invalid on the theory that it gives one injured by an automobile a special advantage in a suit for his injuries.<sup>36</sup> And a regulation may be effective

33. *Garrett v. Turner*, 235 Pa. St. 383, 84 Atl. 354.

"Motor vehicles have been classified separately from horse-drawn vehicles and have been the subject of separate legislation ever since they came into general use. Their departure, in character, use, and speed from horse-drawn vehicles has been so great as to justify such classification, even though there is some similarity in weight, length, and use between the motor trucks and the kind of horse-drawn vehicles employed by public cartmen for commercial purposes. Motor trucks, traveling for longer distances in shorter time, are more dangerous because of greater speed and the heavier loads carried, and courts can take judicial knowledge that they do more damage to the surface of the streets and therefore might very reasonably be required to pay a greater tax than a horse-drawn vehicle. The question of reasonable classification is primarily for the legislative branch of the government, and only becomes a judicial question when such legislative action is clearly unreasonable. The legislature may classify persons or objects for the purpose of legislative regulation and control, provided such classification is not an arbitrary one and is based upon some substantial difference bearing proper relations to the classification." *Westfalls, etc., Express Co. v.*

*City of Chicago*, 280 Ill. 318, 117 N. E. 439.

34. *Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 3 Ann. Cas. 487, 108 Am. St. Rep. 196; *City of St. Louis v. Hammond (Mo.)*, 199 S. W. 411.

35. *Ex parte Snowden*, 12 Cal. App. 521, 107 Pac. 724.

36. *Hartje v. Moxley*, 235 Ill. 164, 85 N. E. 216, wherein it was said: "It is also urged that section 16, *supra*, violates section 22 of article 4 of the Constitution of the State in that it is special legislation, for the reason that it confers upon persons who claim to have been injured by a moving automobile a peculiar advantage in the trial of a case to recover damages resulting from the injury, by application of a rule of evidence not applicable where the injury results from negligently moving a vehicle not included in the Motor Vehicle Law. The classification is made primarily to govern those operating motor vehicles and prevent injuries to persons and property consequent upon their negligent use. The vehicles covered by the act are of such a character as that they properly form a class to which, alone, legislation may apply. Under the construction which we have above placed upon this section it is not the subject of constitutional objection."

which applies to bicycles and not to other silently moving vehicles.<sup>37</sup> And a higher license fee may be charged against the drivers of motor vehicles than is imposed against animal-drawn vehicles.<sup>38</sup>

**Sec. 63. Discrimination between owners of different machines  
— between different motor vehicles.**

A statute which imposes different obligations on the owners of motor vehicles of different sizes and weights does not necessarily create an unlawful discrimination. A classification of motor vehicles, and the imposition of different burdens on those of different classes, is proper, if the classification is made on a reasonable basis and is applicable, without discrimination, to all similarly situated.<sup>39</sup> Thus, the license fees for different machines are generally graded according to their horse power.<sup>40</sup> Or license fees may be graduated according to the seating capacity of the machine.<sup>41</sup> Or the owners of commercial trucks or vehicles used for hire may be required to pay a higher or lower license fee than is charged against the owners of pleasure automobiles.<sup>42</sup> And a different classification may be given to the manufacturers of automobiles than is given to individual users.<sup>43</sup> And a regulation may be sustained which exacts a fee of ten dollars for busi-

37. *City of Des Moines v. Keller*, 116 Iowa, 648, 88 N. W. 827.

38. *Westfalls, etc., Express Co. v. City of Chicago*, 280 Ill. 318, 117 N. E. 439. See also sections 109-115.

39. *Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627.

40. *Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685; *State v. Amos*, 76 Fla. 26, 79 So. 433; *Lillard v. Melton*, 103 S. Car. 10, 87 S. E. 421.

"The apportionment on a basis of horse power has a direct and natural relation to the privilege granted, the use of the highway, and since the license relates to all persons in a class, and operates uniformly upon all therein, there is no unlawful discrimination." *Lillard v. Melton*, 103 S. Car. 10, 87 S.

E. 421. See also section 111.

41. *Mark v. District of Columbia*, 37 App. D. C. 563, 37 L. R. A. (N. S.) 440; *State v. Amos*, 76 Fla. 26, 79 So. 433.

42. *Smith v. State*, 130 Md. 482, 100 Atl. 778.

"Business trucks and ordinary automobiles are unlike in their use. The use of the latter over greater area, and during a larger portion of the day, and with greater speed, might well appeal to the council as justifying a higher tax." *Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627. See also section 112.

43. *Jasmowski v. Board of Assessors of City of Detroit*, 191 Mich. 287, 157 N. W. 891.

ness trucks and fifty cents per horse power for other machines.<sup>44</sup> And motor vehicles owned by a city and operated for the police and fire departments thereof, may be exempted from the payment of license fees without giving ground for a complaint of discrimination.<sup>45</sup>

**Sec. 64. Discrimination between owners of different machines — non-residents.**

The fact that a license fee may be required of a resident of a State for the right to operate a motor vehicle on the public highways and that none may be required of a non-resident while he is temporarily within the State, is not an unlawful discrimination which vitiates the regulation.<sup>46</sup> But regulations may, to a certain extent, be enacted which will apply to non-residents as well as residents.<sup>47</sup>

**Sec. 65. Discrimination between owners of different machines — aliens.**

To a limited extent, citizenship may properly be the basis for classification, and a regulation prohibiting the issuance of licenses to aliens for the carriage of persons for hire, has been sustained.<sup>48</sup>

**Sec. 66. Certainty of enactment.**

Regulations forbidding an "unreasonable" rate of speed for motor vehicles are generally sustained as proper legislative enactments.<sup>49</sup> But in a few States it may be held that a motor vehicle regulation which forbids the operation of motor vehicles at a speed which is "improper" or "unreasonable" may be open to the objection that it is too indefinite and un-

<sup>44</sup>. *Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627.

<sup>45</sup>. *State v. Collins*, 94 Wash. 310, 162 Pac. 556. See also *Ex parte Snowden*, 12 Cal. App. 521, 107 Pac. 724.

<sup>46</sup>. *Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685; *Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627; *State v. Lawrence*, 108 Miss. 291, 66 So. 745; *Lillard v. Melton*, 103 S. Car. 10, 87 S.

E. 421. See also sections 114, 115.

<sup>47</sup>. *Kane v. State of New Jersey*, 242 U. S. 160, 37 S. Ct. 30.

<sup>48</sup>. *Norin v. Nunan* (N. J.), 103 Atl. 378.

<sup>49</sup>. *Ex parte Daniels* (Cal.), 192 Pac. 442; *People v. Beak*, 291 Ill. 449, 126 N. E. 201; *State v. Schaeffer*, 96 Ohio 215, 117 N. E. 220. See also *Rex v. Wells*, 91 L. T. (Eng.) 98.

certain to be enforced in a criminal prosecution for an alleged violation thereof.<sup>50</sup> But, though ineffective in a criminal case, it may be held to furnish a rule of conduct so that due force may be given to it in civil actions for injuries received through the excessive speed of the automobilist. And it has been held that a statute, which by two sections limits the rate of speed of an automobile or motor vehicle to a certain number of miles per hour upon public roads, streets or driveways, is not void for uncertainty, because it provides in another section that "no person in charge of an automobile or motor vehicle on any public road, street or driveway shall drive the same at any speed greater than is reasonable and proper, having regard to the traffic and use of the public road, street or driveway by others, or so as to endanger the life and limb of any person thereon. In construing such a statute it is said that the latter section was enacted for a wise purpose, and, under the general rule of law that "you must so use your own as not to injure the rights of others or the public right," it is to be regarded as a limitation upon the speed rates mentioned in the previous sections.<sup>51</sup>

A statute requiring the driver or operator of a vehicle on a public highway to drive or operate such vehicle in a careful manner with due regard for the safety and convenience of pedestrians, is too indefinite to form the basis of a criminal prosecution.<sup>51a</sup>

### **Sec. 67. Repeal of statutes.**

Under its power of regulation of motor vehicles, the Legislature, after passing a statute on the subject, may, as a general proposition, repeal such act and enact a different regulation. It is the general rule that, unless a contrary intention is indicated, a statute of special or limited application is not deemed repealed by a statute which is of general application. But a special act may be deemed repealed by a general one, when it is apparent that the general act is intended to fur-

<sup>50</sup> See section 732.

<sup>51a</sup> *Russell v. State* (Tex. Cr.), 223

<sup>51</sup> *Byrd v. State*, 59 Tex. Cr. 513, S. W. 566.  
129 S. W. 620.



nish the only rule on the subject or is intended as a consolidation of various special laws. Thus, a statute regulating the use of motor vehicles in a particular county may be repealed by a motor vehicle act of general application, though the latter does not mention the special statute.<sup>52</sup> One prosecuted under a regulation at the time of its repeal must be discharged where the repealing act contains no saving clause as to pending prosecutions.<sup>53</sup>

### Sec. 68. Construction of regulations.

A statute creating a criminal offense is entitled to a strict construction so that the application of the act will not be extended beyond the clear intention of the law makers.<sup>54</sup> But, nevertheless, the guiding principle in the interpretation of statutes is the ascertainment of the legislative intent, and a statute should not receive such a narrow construction as to exclude those acts intended to be included within its application.<sup>55</sup> A common sense interpretation must be given to a statute,<sup>56</sup> considering the whole statute in construing a part thereof.<sup>57</sup> In construing a motor vehicle law, the court should give force and effect to every part of it to carry out the in-

52. *Jones v. Stokes*, 145 Ga. 745, 89 S. E. 1078, wherein it was said: "The mere enactment by the legislature of a general statute upon a subject-matter dealt with in a formerly passed particular statute will not alone repeal the latter. Ordinarily, unless the provisions of the general statute expressly provide that it shall have the effect of repealing a previously passed particular statute dealing with the same subject-matter, or unless the general statute by its terms necessarily embraces those of the other, or there is an irreconcilable conflict between the provisions of the two, the subsequently enacted general statute will not supersede the particular one. However, this being a rule of construction in such cases as in all others, the intention of the legislature is the

cardinal rule to be applied by the court; and therefore, in the absence of an express repeal, if it be apparent that the legislature intended, in a given case, that the later general statute should supplant the particular one, the courts will construe the subsequently enacted general law as having that effect."

53. *Ex parte Wright*, 82 Tex. Cr. 247, 199 S. W. 486.

54. *Patterson v. State*, 16 Ala. App. 483, 79 So. 157.

55. *State v. Amos*, 76 Fla. 26, 79 So. 433; *State v. Goodwin*, 169 Ind. 265, 82 N. E. 459.

56. *State v. Pfeifer*, 96 Kan. 791, 153 Pac. 552.

57. *Patterson v. State*, 16 Ala. App. 483, 79 So. 157.

tent of the Legislature, if possible, such intent to be ascertained from the language in its plain and natural meaning.<sup>58</sup>

58. *State v. Amos*, 76 Fla. 26, 79 So. 433. "In construing a statute it is the duty of the court to give force and effect to every part of it to carry out the intent of the legislature, if possible. Where the language is clear the intent is ascertained from the language of the act itself, and it is the duty of the court to give to the language used its plain and natural meaning, for the legislature is presumed to mean what it has plainly expressed, and there is no field for construction. If the act contains contradictory provisions, the courts will endeavor to so construe it as to give force and effect to the entire act

and harmonize it, if possible, and, failing in this, they seek light from other sources. Where the language is plain and unequivocal, the courts must follow it implicitly, but, where it is doubtful or ambiguous, it is the duty of the court to remove the doubt by deciding it, and, when the court has given its decision, the point can no longer be considered doubtful. . . . They should not, however, adopt an arbitrary conclusion as to what was the intention of the legislature, if there is any way in which that may be ascertained." *State v. Amos*, 76 Fla. 26, 79 So. 433.

**CHAPTER VI.****MUNICIPAL REGULATIONS.****SECTION 69. Scope of chapter**

- 70. Municipal power in general—power delegated from state.
- 71. Municipal power in general—police power of regulation.
- 72. Municipal power in general—abrogation of municipal powers.
- 73. Municipal power in general—Park Commissioners.
- 74. Regulations must not conflict with Constitution—in general.
- 75. Regulations must not conflict with Constitution—discrimination between motorists and other travelers.
- 76. Regulations must not conflict with Constitution—discrimination between motor vehicles.
- 77. Regulations must not conflict with State law.
- 78. Regulations must be reasonable.
- 79. Manner of enactment.
- 80. Application of regulation beyond municipal limits.
- 81. Punishment for violation of ordinance.
- 82. Proof of ordinance.

**Sec. 69. Scope of chapter.**

This chapter is intended to cover the power of municipal divisions to make regulations with respect to the operation of motor vehicles along the public highways. The powers of Congress<sup>1</sup> and of State legislative bodies,<sup>2</sup> are treated in other chapters. The validity and application of particular regulations is not discussed in this chapter, but resort to other parts of the work is to be made for a detailed discussion of such subjects as registration and licensing,<sup>3</sup> jitneys, taxicabs,<sup>4</sup> chauffeurs,<sup>5</sup> garages,<sup>6</sup> the law of the road,<sup>7</sup> criminal prosecutions,<sup>8</sup> and various other matters of lesser importance.<sup>9</sup> So, too, the probative effect of a violation of a municipal ordinance on the issue of negligence in a particular case, is discussed in another chapter.<sup>10</sup>

- 1. See chapter VII.
- 2. See chapter V.
- 3. See chapter VIII.
- 4. See chapter IX.
- 5. See chapter XII.

- 6. See chapter XI.
- 7. See chapter XIV.
- 8. See chapter XXVII.
- 9. See chapter XIII.
- 10. See sections 297-302.

## **Sec. 70. Municipal power in general — power delegated from State.**

Control over the streets and highways within a State is primarily lodged in the legislative body of the State, to be exercised directly by such body or to be delegated by it to municipal divisions of the State.<sup>11</sup> Of course, constitutional prohibitions in various States may abridge the power of the Legislature, but, in the absence of such prohibitions, it may give or withhold to the municipal divisions such power over the control of motor vehicles as seems wise to the law makers.<sup>12</sup> A municipal corporation possesses such legislative power only, as has been delegated to it by the Legislature, and the authority to pass a particular ordinance must be found in its charter or in general laws pertaining to the powers of municipal divisions.<sup>13</sup> If conditions are annexed to the power of municipalities, compliance therewith must be made before the municipal regulation can be sustained.<sup>14</sup> Municipal powers, however, may be either express or implied. A proper police regulation, duly and legally passed by a municipal corporation, is entitled to as much respect, and is as much a legal regulation within the limits of the municipality, as a police regulation passed by the Legislature.<sup>15</sup>

## **Sec. 71. Municipal power in general — police power of regulation.**

Though the power of a municipality to regulate the streets within its limits is one which is first lodged in the Legislature and the municipality has only a delegated power in respect

11. Section 58.

12. *Kalich v. Knapp*, 73 Oreg. 558, 142 Pac. 594, 145 Pac. 22; *Peters v. City of San Antonio* (Tex. Civ. App.), 195 S. W. 989.

**County commissioners.**—The legislature may delegate to a court of county commissioners of a certain county the authority to make and promulgate rules and regulations, the violation of which constitutes crime. *State v. Strawbridge* (Ala. App.), 76 So. 479. See

also, *Zackary v. Morris*, 78 Fla. 316, 82 So. 830.

13. *Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917; *Heartt v. Village of Downer's Grover*, 278 Ill. 92, 115 N. E. 869.

14. *Town of Decatur v. Gould*, 185 Iowa 203, 170 N. W. 449.

15. *People v. Morosini*, N. Y. L. Journ., April 18, 1918; *Schell v. DuBois*, 94 Ohio, 93, 113 N. E. 664.

thereto,<sup>16</sup> it may be said, as a proposition of practical experience, that, upon the creation of a municipality, it receives the police power of regulating the traffic along its streets.<sup>17</sup> Thus, it is the general rule that a municipality, subject to constitutional<sup>18</sup> and statutory<sup>19</sup> limitations, and subject to the requirement that its ordinances be reasonable,<sup>20</sup> has, by virtue of its general police power, the right to regulate the use of the streets by motor vehicles.<sup>21</sup> A provision of a general

16. Section 70.

17. "Municipal corporations in this State have always exercised the police power by making regulations necessary for the protection of the safety, health and morals of society, and every ordinance for that purpose which has been found reasonable and not in violation of any constitutional restriction has been sustained as strictly within the legitimate exercise of the power." *Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917.

18. Sections 74-76.

19. Section 77.

20. Section 78.

21. *United States*.—Fifth Ave. Coach Co. v. New York City, 221 U. S. 467, 31 S. Ct. 709.

*Alabama*.—Watts v. Montgomery Tr. Co., 175 Ala. 102, 57 So. 471; Adler v. Martin, 179 Ala. 97, 59 So. 597; City of Montgomery v. Orpheum Taxi Co., 82 So. 117; State v. Strawbridge (Ala. App.), 76 So. 479. "A municipality would not doubt have the right, under its police power, to regulate the travel upon its streets so as to prevent congestion and collision, and could thereby protect all persons using the streets, including street cars." *Watts v. Montgomery Tr. Co.*, 175 Ala. 102, 57 So. 471.

*California*.—*Ex parte Berry*, 147 Cal. 52, 82 Pac. 44; *Ex parte Smith*, 26 Cal. App. 116, 146 Pac. 82; *Pemberton v. Army* (Cal. App.), 183 Pac. 356, affirmed 182 Pac. 964; *Ham v. Los Angeles County* (Cal. App.), 189 Pac. 462.

*Georgia*.—*Columbus R. Co. v. Waller*, 12 Ga. App. 674, 78 S. E. 52; *Sanders v. City of Atlanta*, 147 Ga. 819, 95 S. E. 695.

*Illinois*.—*Harder's Storage & Van Co. v. Chicago*, 235 Ill. 58, 85 N. E. 243; *Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917; *Chicago v. Shaw Livery Co.*, 258 Ill. 409, 101 N. W. 588; *Johnson Oil Refining Co. v. Galesburg, etc., Power Co.*, 200 Ill. App. 392; *Slade v. City of Chicago*, 1 Ill. Cir. Ct. Rep. 520.

*Indiana*.—*Kersey v. Terre Haute*, 161 Ind. 471, 68 N. E. 1027.

*Iowa*.—*Pilgrim v. Brown*, 168 Iowa, 177, 150 N. W. 1; *Pugh v. City of Des Moines*, 176 Iowa 593, 156 N. W. 892.

*Kansas*.—*Dresser v. City of Wichita*, 96 Kans. 820, 153 Pac. 1194.

*Kentucky*.—*Commonwealth v. Nolan*, 189 Ky. 34, 224 S. W. 506.

*Maine*.—*State v. Mayo*, 106 Me. 62, 75 Atl. 295, 20 Ann. Cas. 512, 26 L. R. A. (N. S.) 502n.

*Maryland*.—*Swann v. City of Baltimore*, 132 Md. 256, 103 Atl. 441.

*Massachusetts*.—*Commonwealth v. Crowninshield*, 187 Mass. 221, 72 N. E. 963; *Commonwealth v. Slocum*, 230 Mass. 180, 119 N. E. 687.

*Michigan*.—*People v. McGraw*, 184 Mich. 233, 150 N. W. 836; *Brennan v. Connolly*, 207 Mich. 25, 173 N. W. 511.

*Minnesota*.—*State v. Larrabee*, 104 Minn. 37, 115 N. W. 948; *City of Duluth v. Easterly*, 115 Minn. 64, 131 N. W. 791; *Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627.

statute authorizing cities to make and enforce all necessary police ordinances, may be construed as a grant of police power to cities and authorizes them to make and enforce reasonable police regulations for the operation of motor vehicles.<sup>22</sup>

## Sec. 72. Municipal power in general — abrogation of municipal powers.

The regulatory power over public highways is lodged in the Legislature.<sup>23</sup> This function may be exercised directly by the

*Missouri*.—*Roper v. Greenspon*, 272 Mo. 288, 198 S. W. 1107, L. R. A. 1918, D. 126; *City of St. Louis v. Hammond*, 199 S. W. 411; *Young v. Dunlap*, 195 Mo. App. 119, 190 S. W. 1041; *City of Windsor v. Bast* (Mo. App.), 199 S. W. 722.

*Nebraska*.—*Christensen v. Tate*, 87 Neb. 848, 128 N. W. 632.

*New Jersey*.—*Fonsler v. Atlantic City*, 70 N. J. L. 125, 56 Atl. 119; *West v. City of Asbury Park*, 89 N. J. L. 402, 99 Atl. 190.

*New York*.—*McIntosh v. Johnson*, 211 N. Y. 265, 105 N. E. 416; *People v. Untermyer*, 153 App. Div. 176, 138 N. Y. Suppl. 334; *People v. Milne*, 86 Misc. 417, 149 N. Y. Suppl. 283; *Mason-Seaman Transp. Co. v. Mitchel*, 89 Misc. 230, 153 N. Y. Suppl. 461; *People v. Fitzgerald*, 101 Misc. (N. Y.) 695, 168 N. Y. Suppl. 930; *People v. Dwyer*, 136 N. Y. Suppl. 148; *People v. Bell*, 148 N. Y. Suppl. 753; *People v. Morosini*, N. Y. L. Journ., April 18, 1918.

*Ohio*.—*Schell v. DuBois*, 94 Ohio, 93, 113 N. E. 664. "Nothing is more firmly established than that of the State and municipal authorities, in the exercise of the police power, may make all such provisions as may be reasonably necessary and appropriate for the protection of the public health and safety." *Schell v. DuBois*, 94 Ohio, 93, 113 N. E. 664.

*Oregon*.—*Kellaher v. Portland*, 57 Oreg. 575, 112 Pac. 1076; *Kalich v. Knapp*, 73 Oreg. 558, 145 Pac. 22;

*Everart v. Fischer*, 75 Oreg. 316, 145 Pac. 33.

*Pennsylvania*.—*Jitney Bus Assoc. of Wilkesbarre v. Wilkesbarre*, 256 Pa. St. 462, 100 Atl. 954; *Radnor Tp. v. Bell*, 27 Pa. Super. Ct. 1.

*Texas*.—*Peters v. City of San Antonio* (Civ. App.), 195 S. W. 989; *Craddock v. City of San Antonio* (Civ. App.), 198 S. W. 634; *City of Dallas v. Gill* (Civ. App.), 199 S. W. 1144; *Ex parte Parr*, 82 Tex. Cr. 525, 200 S. W. 404.

*Vermont*.—*State v. Jarvis*, 89 Vt. 239, 95 Atl. 541.

*Washington*.—*City of Seattle v. King*, 74 Wash. 277, 133 Pac. 442; *Seattle Taxicab & Tr. Co. v. Seattle*, 86 Wash. 594, 150 Pac. 1134; *State ex rel. Shafer v. City of Spokane*, 109 Wash. 360, 186 Pac. 864.

*West Virginia*.—*Beek v. Cox*, 77 W. Va. 442, 87 S. E. 492.

*Wisconsin*.—*Eichman v. Buchheit*, 128 Wis. 385, 107 N. W. 325, 8 Ann. Cas. 435; *City of Oshkosh v. Campbell*, 151 Wis. 567, 139 N. W. 316; *Sutter v. Milwaukee Board of Fire Underwriters*, 164 Wis. 532, 166 N. W. 57.

**Fenders on trucks.**—A city ordinance requiring fenders on certain trucks has been sustained. *Consumers Co. v. City of Chicago*, 208 Ill. App. 203.

**22.** *Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917; *City of Windsor v. Bast* (Mo. App.), 199 S. W. 722.

**23.** *Ex parte Smith*, 26 Cal. App. 116, 146 Pac. 82. See also section 58.

State through the passage of statutes prescribing the use of the public highways, or the Legislature may delegate the power of regulation to municipalities.<sup>24</sup> But the legislative power is not forever lost by a delegation of some part thereof to a municipal corporation, but it may resume its absolute control over the subject, unless constitutional provisions obstruct the free use of the legislative power.<sup>25</sup> In a few jurisdictions, however, the rights of municipal corporations are constitutionally protected against the assaults of the Legislature.<sup>26</sup> The Legislature, as a general proposition, may abrogate the power under which the municipality passed regulations.<sup>27</sup> Or it may pass statutes which are inconsistent with regulations already enacted by municipal bodies and hence strike down such inferior regulations, for municipal ordinances are ineffective when they are in conflict with State statutes.<sup>28</sup> But statutes forbidding the regulation of motor vehicles by municipal corporations are construed as not to prohibit the passage of rules of the road prescribing the course of traffic along city streets.<sup>29</sup> The mere fact that the State, in the exercise of its police power, has made certain regulations, does not prohibit a municipality from legislating with reference to the subject; and, so long as there is no conflict between the two and the municipal regulations are reasonable and harmonious with the Constitution, both will stand.<sup>30</sup> Of course, if a State statute expressly forbids muni-

24. Section 70.

25. *Ex parte Smith*, 26 Cal. App. 116, 146 Pac. 82; *Heartt v. Village of Downers Grove*, 278 Ill. 92, 115 N. E. 869; *People v. Braun*, 100 Misc. 343, 166 N. Y. Suppl. 708; *City of Seattle v. Rothweiler*, 101 Wash. 680, 172 Pac. 825; *City of Muskogee v. Wilkins* (Okla.), 175 Pac. 497.

26. *City of Montgomery v. Orpheum Taxi Co.* (Ala.), 82 So. 117; *People v. McGraw*, 184 Mich. 233, 150 N. W. 836; *City of Fremont v. Keating*, 96 Ohio St. 468, 118 N. E. 114; *Kalich v. Knapp*, 73 Ore. 558, 142 Pac. 594, 145 Pac. 22. See also *Muther v. Capps*, 38 Cal. App. 721, 177 Pac. 882.

27. *State v. Scheidler*, 91 Conn. 234, 99 Atl. 492; *Ayres v. City of Chicago*, 239 Ill. 237, 87 N. E. 1073; *Hiler v. City of Oxford*, 112 Miss. 22, 72 So. 837; *People ex rel. Hainer v. Keeper of Prison*, 121 N. Y. App. Div. 645, 106 N. Y. Suppl. 314, affirmed 190 N. Y. 315, 83 N. E. 44; *Peck v. O'Gilvie*, 13 R. L. N. S. (Canada) 54, 31 Queb. S. C. 227.

28. Section 77.

29. *Commonwealth v. Newhall*, 205 Mass. 344, 91 N. E. 206; *Kelly v. James*, 37 S. Dak. 272, 157 N. W. 990; *Beck v. Cox*, 77 W. Va. 442, 87 S. E. 492.

30. *Ex parte Snowden*, 12 Cal. App. 521, 107 Pac. 724; *Bruce v. Ryan*, 138

cipalities from passing ordinances relative to a certain subject, and such statute survives the test of constitutionality, there can be no dispute about the lack of municipal power in respect to that particular subject.<sup>31</sup>

### Sec. 73. Municipal power in general — Park Commissioners.

In some cases, statutory provisions will be found delegating to park commissioners or equivalent officers having charge of parks the power to make regulations for the use of highways through the parks. The Legislature may authorize the appointment of such commissioners and invest them with authority in such matters.<sup>32</sup> Thus, it has been held that the park commissioners may be authorized to limit the rate of speed of motor vehicles along roads within their jurisdiction.<sup>33</sup> And a statute empowering park commissioners to restrict certain highways to the use of horse and light carriages and to exclude therefrom other vehicles, such as bicycles and motor vehicles, has been sustained.<sup>34</sup> And they may in some cases regulate the course of traffic within the boundaries of parks.<sup>34a</sup> Or they may have the power to license the use of buses.<sup>34b</sup> Regulations made by park commissioners, as well as those enacted by municipal legislative bodies, must be reasonable and must not conflict with the Constitution or statutes.<sup>35</sup> If the park commissioners do not exercise their authority in the

Minn. 264, 164 N. W. 982; Freeman v. Green (Mo. App.), 186 S. W. 1166; Kolankiewicz v. Burke, 91 N. J. L. 567, 103 Atl. 249; People v. Fitzgerald, 101 Misc. (N. Y.) 695, 168 N. Y. Suppl. 930; City of Fremont v. Keating, 96 Ohio St. 468, 118 N. E. 114; City of Spokane v. Knight, 101 Wash. 656, 172 Pac. 823; City of Seattle v. Rothweiler, 101 Wash. 680, 172 Pac. 825.

31. Anderson v. Wentworth, 75 Fla. 300, 78 So. 265; Heartt v. Village of Downers Grove, 278 Ill. 92, 115 N. E. 869; City of Seattle v. Rothweiler, 101 Wash. 680, 172 Pac. 825.

32. Commonwealth v. Crowninshield, 187 Mass. 221, 72 N. E. 963, 68 L. R.

A. 245; Commonwealth v. Tyler, 199 Mass. 490, 85 N. E. 569.

33. Commonwealth v. Crowninshield, 187 Mass. 221, 72 N. E. 963, 68 L. R. A. 245; Commonwealth v. Tyler, 199 Mass. 490, 85 N. E. 569. See also People v. Lloyd, 178 Ill. App. 66.

34. People ex rel. Cavanaugh v. Waldo, 72 Misc. (N. Y.) 416, 131 N. Y. Suppl. 307.

34a. Hedges v. Mitchell (Colo.), 194 Pac. 620.

34b. People ex rel. Hoyne v. Chicago Motor Bus Co. (Ill.), 129 N. E. 114.

35. Commonwealth v. Crowninshield, 187 Mass. 221, 72 N. E. 963.



matter, the general regulations promulgated by the Legislature may apply.<sup>36</sup>

**Sec. 74. Regulations must not conflict with Constitution — in general.**

Municipal regulations, to be effective, not only must be reasonable,<sup>37</sup> and in harmony with State statutes,<sup>38</sup> but must not offend any constitutional provision. In particular, a municipal regulation must not take property without due process of law, deprive persons of the equal protection of the law,<sup>39</sup> or impair the obligation of a contract.<sup>40</sup> But the constitutionality of regulations pertaining to the use of motor vehicles and their accessories is generally sustained.<sup>41</sup> Thus, a regulation forbidding the issuance of a garage permit for the storage of inflammable oils within fifty feet of a school building, is not an unreasonable interference with the rights of a garage keeper, but is a fair, reasonable, and appropriate exercise of the police power, and the fact that the garage in question was used as such for a number of years prior to the enactment of the regulation does not affect the validity or prevent the enforcement thereof.<sup>42</sup>

36. *Rockett v. Philadelphia*, 256 Pa. St. 347, 100 Atl. 826.

37. Section 78.

38. Section 77.

39. **Requiring obedience to directions of traffic officers.**—A municipal ordinance which requires the drivers of motor vehicles to comply with all directions of police officers, is invalid. *City of St. Louis v. Allen*, 275 Mo. 501, 204 S. W. 1083.

40. See *Peters v. City of San Antonio* (Tex. Civ. App.), 195 S. W. 989.

**Advertising.**—A municipal regulation prohibiting advertising on certain motor buses, held not to impair the contract rights of the corporation operating the buses. *Fifth Ave. Coach Co. v. New York City*, 221 U. S. 467, 31 S. Ct. 709.

41. *California*.—*Ex parte Berry*, 147 Cal. 52, 82 Pac. 44.

*Georgia*.—*Sanders v. City of Atlanta*, 147 Ga. 819, 95 S. E. 695.

*Maine*.—*State v. Mayo*, 106 Me. 62, 75 Atl. 295, 20 Ann. Cas. 512, 26 L. R. A. (N. S.) 502n.

*Missouri*.—*Young v. Dunlap*, 195 Mo. App. 119, 190 S. W. 1041; *City of St. Louis v. Hammond*, 199 S. W. 411.

*New Jersey*.—*West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190.

*New York*.—*Mason-Seaman Transp. Co. v. Mitchel*, 89 Misc. 230, 153 N. Y. Suppl. 461.

*Texas*.—*Peters v. City of San Antonio* (Civ. App.), 195 S. W. 989; *Craddock v. City of San Antonio* (Civ. App.), 198 S. W. 634.

42. *McIntosh v. Johnson*, 211 N. Y. 265, 105 N. E. 416.

**Sec. 75. Regulations must not conflict with Constitution — discrimination between motorists and other travelers.**

It is recognized that a motor vehicle is a different and a more dangerous means of conveyance than are other vehicles along the highway, and hence a municipal ordinance which regulates motor vehicles is not necessarily invalid because it does not apply to other forms of transportation.<sup>43</sup> And, on the other hand, a regulation relative to vehicles on city streets may be valid, although automobiles are excluded from the operation thereof.<sup>44</sup> An ordinance which prohibits a speed in excess of a prescribed rate, is not invalid because street cars are permitted to go faster.<sup>45</sup> So, too, an ordinance which fixes a speed limit, is not special or class legislation because the speed is fixed so high that only motor vehicles can violate the regulation.<sup>46</sup> And an ordinance prohibiting advertising on vehicles on certain streets is not unconstitutional, because the signs of owners can be displayed on business wagons or because companies using other methods of transportation may display advertising signs.<sup>47</sup>

**Sec. 76. Regulations must not conflict with Constitution — discrimination between motor vehicles.**

For some purposes different kinds of motor vehicles may be classed and a more onerous obligation placed on one machine than on others. For example, there is no objection to an ordinance imposing license fees on motor vehicles, merely because the vehicles are classified according to their horse power, or according to their use as pleasure or business cars, and different fees are placed on different classes.<sup>48</sup> So, too,

43. Fifth Ave. Coach Co. v. New York City, 221 U. S. 467, 31 S. Ct. 709; Westfalls, etc., Express Co. v. City of Chicago, 280 Ill. 318, 117 N. E. 439; Slade v. City of Chicago, 1 Ill. Cir. Ct. Rep. 520; Commonwealth v. Nolan (Ky.), 224 S. W. 506; City of St. Louis v. Hammond (Mo.), 199 S. W. 411; City of Windsor v. Bast (Mo. App.), 199 S. W. 722.

44. Kersey v. Terre Haute, 161 Ind.

471, 68 N. E. 1027.

45. Chittenden v. Columbus, 26 Ohio Cir. Rep. 531.

46. *Ex parte* Snowden, 12 Cal. App. 521, 107 Pac. 724.

47. Fifth Ave. Coach Co. v. New York City, 221 U. S. 467, 31 S. Ct. 709.

48. Westfalls, etc., Express Co. v. City of Chicago, 280 Ill. 318, 117 N. E. 439; Park v. City of Duluth, 134 Minn. 296, 159 N. W. 627; West v. City of

a license fee may be required of a resident of a municipality, and at the same time one who is a non-resident and is temporarily within the municipality may be excused from such obligation.<sup>49</sup> And aliens may be denied the right to transport passengers for hire in motor vehicles within the boundaries of a municipality.<sup>50</sup> And an ordinance which makes speed limitations for the use of its streets by vehicles, but which excepts vehicles operated by the police and fire departments, is not by reason of such exception invalid.<sup>51</sup> But a rule which permits pleasure vehicles of a certain weight on a highway, but excludes business vehicles of the same weight, may be invalid.<sup>52</sup>

An ordinance requiring fenders to be placed at the front of trucks of a carrying capacity of 1,500 pounds or more, has been thought discriminatory.<sup>52a</sup>

## Sec. 77. Regulations must not conflict with State law.

The power of a municipal corporation to enact regulations is derived from the State Legislature and is subject to such statutes as may be passed. In case of a conflict between a regulation of the State and one of a municipality, the municipal regulation is ineffective. Hence, a regulation relative to the use of the municipal highways by motor vehicles is invalid if it is in conflict with a statute enacted by the Legislature.<sup>53</sup> A conflict which results in the striking down of an

Asbury Park, 89 N. J. L. 402, 99 Atl. 190; Kellaher v. Portland, 57 Oreg. 575, 112 Pac. 1076. See also sections 111, 112.

49. *Heartt v. Village of Downer's Grove*, 278 Ill. 92, 115 N. E. 869; *Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627. See also *Pegg v. Columbus*, 80 Ohio St. 367, 89 N. E. 14. See also section 114.

50. *Norin v. Nunan* (N. J.), 103 Atl. 378.

51. *Ex parte Snowden*, 12 Cal. App. 521, 107 Pac. 724. See also *Devin v. Chicago*, 172 Ill. App. 246.

52. *Clausen v. DeMedina*, 82 N. J. L. 491, 81 Atl. 924.

52a. *Consumers' Co. v. City of Chicago* (Ill.), 131 N. E. 628.

53. *California*.—*Ex parte Smith*, 26 Cal. App. 116, 146 Pac. 82.

*Illinois*.—*City of Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917; *Lincoln v. Dehner*, 268 Ill. 175, 108 N. E. 991; *Chicago v. Francis*, 262 Ill. 331, 104 N. E. 662; *Heartt v. Village of Downer's Grove*, 278 Ill. 92, 115 N. E. 869.

*Massachusetts*.—*Commonwealth v. Newhall*, 205 Mass. 344, 91 N. E. 206. See also *Commonwealth v. Crowninshield*, 187 Mass. 221, 72 N. E. 963.

*Minnesota*.—*Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627.

*New York*.—*People v. Braum*, 100

ordinance may arise by a statute passed either before or after the adoption of the ordinance; for a subsequent statute has the effect of annulling a municipal ordinance from the time of its passage.<sup>54</sup> One purpose of general motor vehicle laws in some States has been to make uniform regulations throughout the State and to avoid different regulations in different localities.<sup>55</sup> The practice of leaving the matter for local regu-

Misc. (N. Y.) 343, 166 N. Y. Suppl. 708.

*West Virginia*.—State *ex rel.* Constanzo v. Robinson, 104 S. E. 473.

*Wisconsin*.—City of Oshkosh v. Campbell, 151 Wis. 567, 139 N. W. 316; City of Baraboo v. Dwyer, 166 Wis. 372, 165 N. W. 297.

*Texas*.—See Craddock v. City of Antonio (Civ. App.), 198 S. W. 634.

**Freeholder's charter.**—In case an ordinance adopted by a city having a freeholder's charter and applying to a municipal matter conflicts with a State statute, it may be that the ordinance will prevail. *Ex parte*, Daniels, (Cal.), 192 Pac. 442. Muther v. Capps, 38 Cal. App. 721, 177 Pac. 882; Helmer v. Superior Ct. (Cal. App.), 191 Pac. 1001.

**54.** *Ex parte* Smith, 26 Cal. App. 116, 146 Pac. 82; Swann v. City of Baltimore, 132 Md. 256, 103 Atl. 441; People v. Braum, 100 Misc. (N. Y.) 343, 166 N. Y. Suppl. 708.

**Ordinance not revived by repeal of statute.**—An ordinance of the city of Columbus to license and regulate the use of the streets of the city by persons who used vehicles thereon, in so far as it applied to motor vehicles, was annulled by the statute of 1906 (98 O. L. 320) and was not revived by the repeal of the act by the act passed in 1908 (99 O. L. 538)). Frisbie v. City of Columbus, 80 Ohio St. 686, 89 N. E. 92.

**55.** *Ex parte* Smith, 26 Cal. App. 116, 146 Pac. 82; People v. Hayes, 66 Misc. 606, 124 N. Y. Suppl. 417; City of

Baraboo v. Dwyer, 166 Wis. 372, 165 N. W. 297.

**The New York Motor Vehicle Law** was passed really in the interests of motorists. The various rules, regulations and ordinances in the many villages and cities of the State upon the various subjects of licenses, speed, and penalties were so numerous, conflicting and confusing that the persons interested in the subject appealed to and succeeded in having passed by the legislature a general act under which a motorist in any part of the State would know exactly what his restrictions and his liabilities were, and the act expressly repealed all ordinances, rules, or regulations theretofore in effect, and permitted local authorities to thereafter pass ordinances, rules, or regulations in regard to the speed of motor vehicles on the public highway only under three express conditions: First, that such ordinances, rules, or regulations should fix the same speed limitations for all other vehicles; second, that the local authorities should have placed conspicuously on each main public highway, where crossed by the city or village line, and on every main highway, where the rate of speed changes, signs of sufficient size to be easily readable, showing the rate of speed permitted; and third, that such ordinances should fix the penalties for violation thereof similar to and no greater than those fixed by the local authorities for violations of the speed regulations for all other vehicles. People *ex rel.* Hainer v. Keeper

lation with the result that each locality has regulations of its own, is more or less oppressive to tourists, for they are bound to take notice of the regulations of every city or village. If the statute in question is contrary to the State or Federal constitution, the municipal ordinance will, of course, be effective.<sup>56</sup> When the State has adopted a system for the registration of motor vehicles and for the payment of license fees for the use of the highways, and forbids the imposition of further taxes on motor vehicles or the requirement of further licenses, municipal regulations relative to registration and licensing are ineffective.<sup>57</sup> A statute giving the owners of motorcycles the same rights on the public streets as other persons, does not interfere with the right of a municipality to adopt a rule giving a fire patrol a right of way when going to or returning from a fire.<sup>58</sup> So, too, statutes forbidding the regulation of motor vehicles by municipal corporations do not generally forbid ordinances prescribing the law of the road,<sup>59</sup> or prohibiting obstructions,<sup>60</sup> but may preclude speed ordinances.<sup>61</sup>

And an ordinance prohibiting the use of motor vehicles in such a manner as to permit the escape of any noxious smoke, gas, steam or other offensive odors or so as to discharge any

of the Prison, 121 N. Y. App. Div. 645, 106 N. Y. Suppl. 314, affirmed 190 N. Y. 315, 83 N. E. 44.

56. *City of Montgomery v. Orpheum Taxi Co.* (Ala.), 82 So. 117; *Helmer v. Superior Ct.* (Cal. App.), 191 Pac. 1001; *People v. McGraw*, 184 Mich. 233, 150 N. W. 836. See also sections 74-76.

57. *Barrett v. New York*, 189 Fed. 268; *Lincoln v. Dehner*, 268 Ill. 175, 108 N. E. 991; *Frisbee v. City of Columbus*, 80 Ohio St. 686, 89 N. E. 92. But see *Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627. See also section 99.

**Vehicles for hire.**—When the State statute expressly permits the municipality to impose license fees on the owners of automobiles used for hire, a regulation of a municipality along such

lines is not in conflict with State registration and licensing system. *Ex parte Parr*, 82 Tex. Co. 525, 200 S. W. 404.

58. *Sutter v. Milwaukee Board of Fire Underwriters*, 164 Wis. 532, 166 N. W. 57.

59. *Seager v. Foster*, 185 Iowa 32, 169 N. W. 681; *Commonwealth v. Newhall*, 205 Mass. 344, 91 N. E. 206; *Bruce v. Ryan*, 138 Minn. 264, 164 N. W. 982; *Freeman v. Green* (Mo. App.), 186 S. W. 1166; *Kolankiewicz v. Burke*, 91 N. J. L. 567, 103 Atl. 249; *Kelley v. James*, 37 S. Dak. 272, 157 N. W. 990. And see section 236.

60. *Beck v. Cox*, 77 W. Va. 442, 87 S. E. 492.

61. *City of Seattle v. Rothweiler*, 101 Wash. 680, 172 Pac. 825; *City of Baraboo v. Dwyer*, 166 Wis. 372, 165 N. W. 297.

embers, oil or residue from the fuel used, will not generally conflict with State statutes relative to motor vehicle operation.<sup>62</sup> And a municipal regulation prohibiting a rate of speed which is somewhat in excess of that forbidden by statute and making a violation of the ordinance a misdemeanor, is not necessarily in conflict with the statute.<sup>63</sup> So, too, a statute fixing a general rate for the State is not deemed in conflict with a municipal regulation making a lower maximum at certain dangerous places within the municipality, such as street intersections, dangerous curves, etc.<sup>64</sup> But a municipal ordinance which assumes to permit within the municipal limits a rate of speed greater than that allowed by statute, is invalid.<sup>65</sup> Where both the State statute and the municipal ordinance are effective, one offending both regulations may be prosecuted under either, but two separate judgments of conviction may not be rendered against him.<sup>66</sup>

### Sec. 78. Regulations must be reasonable.

The test of reasonableness is to be applied to municipal ordinances before they will be enforced by the courts; and, if they are found to be unreasonable, they are ineffective.<sup>67</sup> The right of the driver of the automobile to use the public thor-

62. *Chicago v. Shaw Livery Co.*, 258 Ill. 409, 101 N. E. 588.

63. *Ex parte Snowden*, 12 Cal. App. 521, 107 Pac. 724; *Ham v. Los Angeles County* (Cal. App.), 189 Pac. 462. See also *Hood & Wheeler Furniture Co. v. Royal*, 200 Ala. 607, 76 So. 965.

In *Nebraska* it has been held that the law gives cities of the second class control of their streets and that an ordinance regulating the speed of motor vehicles will not be held to be in conflict with a statute on the subject, unless it appears that the limitation of speed is such as to prohibit the free use of the streets by such vehicles. *Christensen v. Tate*, 87 Neb. 848, 128 N. W. 632.

64. *Brennan v. Connolly*, 207 Mich. 35, 173 N. W. 511; *Roper v. Greenspon*,

272 Mo. 288, 198 S. W. 1107, L. R. A. 1918, D. 126; *City of Windsor v. Bast* (Mo. App.), 199 S. W. 722. See also *People v. Fitzgerald*, 101 Misc. (N. Y.) 695, 168 N. Y. Suppl. 930.

65. *Ex parte Smith*, 26 Cal. App. 116, 146 Pac. 82.

66. *People v. Fitzgerald*, 101 Misc. (N. Y.) 695, 168 N. Y. Suppl. 930.

67. *Chicago v. Shaw Livery Co.*, 258 Ill. 409, 101 N. E. 588; *Wasson v. City of Greenville* (Miss.), 86 So. 450; *City of Windsor v. Bast* (Mo. App.), 199 S. W. 722; *Pegg v. Columbus*, 80 Ohio St. 367, 89 N. E. 14; *Schell v. DuBois*, 94 Ohio 93, 113 N. E. 664; *Royal Indemnity Co. v. Schwartz* (Tex. Civ. App.), 172 S. W. 581. See also *State v. Jarvis*, 89 Vt. 239, 95 Atl. 541.

oughfare must be recognized and not unreasonably interfered with, but the rights of pedestrians and others must be equally respected.<sup>68</sup> Whether a given ordinance is reasonable, is a question for the court, not for the jury,<sup>69</sup> and the courts will not declare an ordinance unreasonable, unless it clearly appears to be so.<sup>70</sup> Thus, it was said in one case,<sup>71</sup> "Whether any particular ordinance is reasonable for the purpose for which it is enacted is in the first instance a question to be determined by the municipal authorities. When they have acted and the ordinance has been passed it is presumptively valid, and before a court would be justified in holding it invalid its unreasonableness must be clearly made to appear. While it is true that municipal ordinances, to be valid, must be reasonable, the presumption is in favor of their validity, and it is incumbent upon any one seeking to have them set aside as unreasonable, to point out or show affirmatively wherein the unreasonableness consists."

With reference to the speed of motor vehicles, it has been said that, unless it should appear that the rate of speed prescribed is such as to render it impossible for the machine to be propelled, the limitation will not be held to be so unreasonable as to make the ordinance void.<sup>72</sup> An ordinance fixing a speed at six miles an hour on city streets between crossings and four miles an hour at crossings is not necessarily unreasonable.<sup>73</sup> And an ordinance prohibiting a speed in excess of three miles an hour has been sustained.<sup>74</sup> In fact, under certain circumstances, such as when an automobilist is passing a street car receiving or discharging passengers, regulations may require that the automobile be brought to a complete stop.<sup>75</sup>

68. *Schell v. DuBois*, 94 Ohio 93, 113 N. E. 664.

69. *Columbus R. Co. v. Waller*, 12 Ga. App. 674, 78 S. E. 52.

70. *City of St. Louis v. Hammond* (Mo.), 199 S. W. 411; *City of Windsor v. Bast* (Mo. App.), 199 S. W. 722; *Ex parte Parr*, 82 Tex. Cr. 525, 200 S. W. 404.

71. *Chicago v. Shaw Livery Co.*, 253 Ill. 409, 101 N. E. 583.

72. *Columbus R. Co. v. Waller*, 12 Ga. App. 674, 78 S. E. 52.

73. *Eichman v. Buelheit*, 123 Wis. 385, 107 N. W. 325, 8 Ann. Cas. 435.

74. *Columbus R. Co. v. Waller*, 12 Ga. App. 674, 78 S. E. 52.

75. *Schell v. DuBois*, 94 Ohio 93, 113 N. E. 664. See also section 425.

There are circumstances under which an ordinance appearing unreasonable on its face may be justified, as, for example, where a city having the power to exclude certain types of motor vehicles from certain streets, does so in an indirect manner by prescribing an excessive license fee for the use of those streets. The fact that the fee is so unreasonable as to exclude the vehicles from the streets does not invalidate the ordinance, for the municipality having the power of exclusion may attach such conditions as it sees fit to the use of the streets.<sup>76</sup> But, if there is no sound reason or basis for forbidding certain vehicular traffic on certain streets, the ordinance may be invalid.<sup>77</sup> An ordinance may be deemed unreasonable if it attempts to regulate the use of vehicles at places other than streets and alleys.<sup>78</sup>

#### **Sec. 79. Manner of enactment.**

Constitutional and statutory requirements for the enactment of municipal ordinances must be obeyed, or the enforcement of the ordinance will be doubtful. The passage of an ordinance for the regulation of jitneys, however, is not the granting of a franchise, and such an ordinance need not go through the special form which is prescribed in many States for the grant of a franchise.<sup>79</sup> Requirements as to the posting and publishing of the proposed ordinance must receive compliance before it becomes effective. And, if the law requires that a proposed ordinance be entitled in a certain manner, the absence of a proper title may render the ordinance void.<sup>80</sup> In some jurisdictions, statutes permit municipalities to enact certain speed limits for motor vehicles within their limits, but require the establishment of a sign at the limits as a warning to travelers of the limit to be enforced

76. *Dresser v. City of Wichita*, 96 Kans 820, 153 Pac. 1194.

77. *Curry v. Osborne*, 76 Fla. 39, 79 So. 293, 6 A. L. R. 108.

78. *Royal Indemnity Co. v. Schwartz* (Tex. Civ. App.), 172 S. W. 581.

79. *City of Dallas v. Gill* (Tex. Civ. App.), 199 S. W. 1144.

80. A constitutional provision relative to the title of proposed laws will not necessarily apply to municipal ordinances. *Craddock v. City of San Antonio* (Tex. Civ. App.), 198 S. W. 634.

The title is sufficient if it shows the general character of the ordinance. *White v. Turner* (Wash.), 195 Pac. 240.



within the municipality.<sup>81</sup> Under such statutes, if the municipal authorities have failed to erect the proper sign, they cannot enforce a limit lower than that prescribed by the general State law. But the legislature need not require municipalities to establish such signs, and municipal ordinances will be sustained, if all the statutory requirements receive compliance, though no warning of the limit is given to travelers.<sup>82</sup> Where, in a prosecution for operating an automobile at a speed in excess of that prescribed by the by-laws of a town, it was agreed that such by-laws were "duly established," such stipulation was deemed to admit that they were advertised and posted as provided by the State statute, and that they were made as authorized by such act.<sup>83</sup> If the delegation from the Legislature of the power to adopt ordinances specify that they shall be enacted by a certain body, such as the common council, regulations by another body or a municipal official may be void.<sup>84</sup>

### Sec. 80. Application of regulation beyond municipal limits.

The jurisdiction of municipal legislative bodies is confined, as a general proposition, to the territorial limits of the municipality. And, though municipal regulations may be made for the operation of motor vehicles within its boundaries, they

81. *People v. Untermyer*, 153 App. Div. 176, 138 N. Y. Suppl. 334; *People v. Hayes*, 66 Misc. 606, 124 N. Y. Suppl. 417; *People v. Chapman*, 88 Misc. 469, 152 N. Y. Suppl. 204. See also *State v. Buchanan*, 32 R. I. 490, 79 Atl. 1114. "The construction of the statute which compels the erection of signs upon all highways where speed is to be reduced is consistent with its general object and the evil sought to be corrected. Violations of speed regulations are not crimes *mala in se*; they involve no moral turpitude. The legislature, therefore, has directed that, before one can be held for violations of this prohibited act, a notice shall be given by means of a sign; and, if it be plainly readable and contains what

the statute says it must, it then becomes actual notice, whether seen or not." *People v. Hayes*, 66 Misc. 606, 124 N. Y. Suppl. 417.

**First class cities.**—Under the provisions of the Highway Law, as amended by chapter 274 of the laws of 1910, cities of the first class may pass ordinances regulating the speed of automobiles, without any condition as to posting of signs. *People v. Untermyer*, 153 N. Y. App. Div. 176, 138 N. Y. Suppl. 334.

82. *Eichman v. Buchheit*, 128 Wis. 385, 107 N. W. 325, 8 Ann. Cas. 435.

83. *Commonwealth v. Sherman*, 191 Mass. 439, 78 N. E. 98.

84. *Harding v. Cavanaugh*, 91 Misc. Rep. 511, 155 N. Y. Suppl. 374.

have no force outside of the limits.<sup>84a</sup> And a city ordinance requiring the payment of a license fee by persons operating vehicles for the transportation of passengers for hire within the city limits, has been held inapplicable to the transportation of passengers between points within the city and points outside.<sup>85</sup> But a contrary opinion has been announced in respect to this class of traffic.<sup>86</sup> But, where one is engaged in carrying passengers between two points out of a city, though his course goes through the city, it is held that his acts do not constitute "a business transacted and carried on in such city," within the meaning of a statute permitting the city to license such business.<sup>87</sup>

### Sec. 81. Punishment for violation of ordinance.

Though the question is open to doubt, it has been held that a municipality may make the violation of one of its ordinances a criminal offense and punish the offender by fine.<sup>88</sup> And it has been held that the Legislature can delegate to a court of county commissioners the authority to make and promulgate rules and regulations, the violation of which constitutes crime.<sup>89</sup> In any event, it is proper procedure to maintain a civil action to collect a fine imposed by a municipal ordinance.<sup>90</sup>

### Sec. 82. Proof of ordinance.

As a general proposition, the courts will not take judicial notice of local ordinances, and hence their existence and terms must be proved as a fact.<sup>91</sup> Even in proceedings in an in-

<sup>84a</sup>. *Miller v. Week*, 186 Ky. 552, 217 S. W. 904.

<sup>85</sup>. *McDonald v. City of Paragould*, 120 Ark. 226, 179 S. W. 335.

<sup>86</sup>. *City of Carterville v. Blystone*, 160 Mo. App. 191, 141 S. W. 701.

<sup>87</sup>. *Ex parte Smith*, 33 Cal.-App. 161, 164 Pac. 618. See also section 100.

<sup>88</sup>. *Chapman v. Selover*, 225 N. Y. 417, 122 N. E. 417, reversing *Chapman v. Selover*, 172 App. Div. 858, 159 N. Y. Suppl. 632. See also *People v. Chap-*

*man*, 88 Misc. (N. Y.) 469, 152 N. Y. Suppl. 204.

<sup>89</sup>. *State v. Strawbridge* (Ala. App.), 76 So. 479.

<sup>90</sup>. *State v. Hamley*, 137 Wis. 458, 119 N. W. 114.

<sup>91</sup>. *Muther v. Capps*, 38 Cal. App. 721, 177 Pac. 882; *Linstroth v. Peper* (Mo. App.), 188 S. W. 1125; *People v. Trainee*, 92 Misc. (N. Y.) 82, 155 N. Y. Suppl. 1015; *White v. State*, 82 Tex. Cr. 274, 198 S. W. 964.

ferior court sitting in the municipality passing the ordinance in question, it is held in some jurisdictions that the ordinance must be proved.<sup>92</sup> And the courts will not take judicial knowledge that park commissioners have passed regulations prescribing the rate of speed for motor vehicles on the park roads.<sup>93</sup> But in some jurisdictions local courts will take judicial notice of ordinances in force in such locality.<sup>94</sup> And, by virtue of statutory enactments in some States, the courts are required in some cases to take judicial notice of ordinances.<sup>95</sup> It has been held that, on a trial for a violation of a municipal ordinance, the prosecution must show, not only that the ordinance was duly adopted by the legislative body of the municipality, but also that there had been a compliance with all the requirements of the law relative to the adoption of ordinances, such as the publication and the posting of the regulation.<sup>96</sup> Compilations of ordinances authorized by statute are generally *prima facie* proof of their substance, legality of adoption, and their date of passage.<sup>97</sup>

92. *People v. Trainee*, 92 Misc. (N. Y.) 82, 155 N. Y. Suppl. 1015.

93. *People v. Lloyd*, 178 Ill. App. 66.

94. *City of Spokane v. Knight*, 96 Wash. 403, 165 Pac. 105.

95. *Hart v. Roth*, 186 Ky. 535, 217 S. W. 893; *Cohen v. Goodman & Sons, Inc.*, 189 N. Y. App. Div. 209, 178 N.

Y. Suppl. 528; *Wirth v. Burns Bros.*, 229 N. Y. 148, 128 N. E. 111; *Peterson v. Pallis*, 103 Wash. 180, 173 Pac. 1021.

96. *People v. Chapman*, 88 Misc. (N. Y.) 469, 152 N. Y. Suppl. 204.

97. *Barrett v. Chicago, etc., R. Co. (Iowa)*, 175 N. W. 950.

**CHAPTER VII.****FEDERAL CONTROL OVER MOTORING.****SECTION 83. In general.**

- 84. Powers of State and Federal governments.
- 85. Regulation of internal matters belongs to State.
- 86. Interstate motoring.
- 87. The right of transit.
- 88. Citizen's right of transit.
- 89. Transit of vehicle.
- 90. Limitation on license fees.
- 91. Questions of interstate commerce not in issue.

**Sec. 83. In general.**

The question has been raised in the minds of many whether or not the United States government should, to any extent, control the operation of automobiles and seek to take the matter out of the hands of the States. This question naturally arises from a consideration of the adverse attitude which some of the State legislators have taken in reference to the automobile. The advisability of Congress to control interstate motoring does not depend upon any action the State might take in regulating the automobiling within its borders.

**Sec. 84. Powers of State and Federal governments.**

It is not so much a question whether the United States should control the operation of the motor vehicles as whether the Federal government really possesses the power to act in the matter. It must not be forgotten that in this country there are two distinct sovereignties — two governments — that of the State and that of the United States. Each government is distinct and independent of the other in many matters. There are certain things that the United States government cannot do which affect the State, and there are matters the State has no control over which affect the United States.

**Sec. 85. Regulation of internal matters belongs to State.**

The regulation of the use of internal highways is a matter which belongs exclusively to the State government. It is a

matter of purely internal concern and comes under the State's power to pass regulations protecting the public from danger in the operation of vehicles on the highways. Over these State internal police matters the United States has no control at all; and, in so far as motoring is confined exclusively within the jurisdiction of a State, Congress cannot act.

### **Sec. 86. Interstate motoring.**

Where, however, automobiling is interstate, that is, where the motorist passes from one State into another, the Federal government is not necessarily given jurisdiction over such travel by the commerce clause of the United States Constitution. The United States has jurisdiction to control interstate commerce, and interstate commerce possibly may include interstate pleasure travel by means of the motor car, but there is great doubt as to this. Action by the United States in respect to interstate motoring, however, would not prevent the States from regulating automobile travel within their own domains. This right is granted the States by the Constitution and could not be taken from them by any act of Congress.

There is a question in regard to the power of Congress to regulate interstate automobiling, and that is, does interstate travel for pleasure, such as interstate automobiling generally is, constitute interstate commerce within the meaning of the United States Constitution, granting to Congress the exclusive control thereof? This question leads us to ask what commerce is. Ordinarily commerce consists of "commercial intercourse." It must be conceded that interstate travel for pleasure and recreation does not savor of anything commercial. It is not business.<sup>1</sup> It is pleasure and recreation, and nothing more. Of course, interstate travel carried on by automobiles used for commercial purposes, such, for example, as the public carrying of passengers and goods, without question constitutes interstate commerce. The greater amount

1. **Interstate transportation of liquors.**—Congress has enacted legislation forbidding the transportation of liquors into "dry" territory and one may be

prosecuted under such legislation where an automobile is used as the means of transportation. See *Ex parte Westbrook*, 250 Fed. 636.

of interstate automobile travel, however, is for the purpose of pleasure and recreation. Business and pecuniary gain have no connection with it.

The idea that Congress may possess the power to pass regulations controlling interstate automobiling is not by any means a new one. There can be no question as to Congress' power. Whether the travel be by steam railroad, trolley car, vessel, automobile, bicycle, or on foot, if it consists of the passage of either persons, animals or goods from one State into another, across the boundary line of any two States, then the travel may constitute interstate commerce provided there exists a commercial purpose. People who, for commercial gain or commercial purposes, walk across a bridge which spans a river between two States may be said to carry on interstate commerce, and Congress possesses plenary power to regulate this travel. But if a valid, just and non-discriminating law is to be enacted, the form in which the bill is framed and the method of procedure of its supporters are of paramount importance. Direct legislation will not do.

Manifestly the flying of a kite or the throwing of a stone across the boundary of two States would not constitute interstate commerce. The passage of telegraph and telephone messages, however, has been held to come within the commerce clause of the Constitution, and the kind of messages, whether concerning business, pleasure or what not, makes no difference according to the decisions. It must be admitted that in the case of the automobile we have the following elements of interstate commerce:

1. A means of travel.
2. Actual travel or traffic.
3. A means of, and actual travel, which will satisfactorily carry and convey people and freight.
4. Interstate travel or traffic.
5. Business or commercial purpose of travel.

Does the purpose or object of all this automobile travel have any bearing on the question as to whether it constitutes commerce? This is the only question which must be decided before the authority of Congress, to legislate on the subject

is established. We will consider briefly in the note the meaning of the term commerce and ascertain if the travel must in some way be connected or related to business, trade or gain.<sup>2</sup>

It is the opinion of many persons that Congress possesses no power to take cognizance of the automobile which is engaged in interstate travel for pleasure merely, by legislation directly regulating that kind of travel. Hon. Henry B. Brown, former Associate Justice of the Supreme Court of the United States, also considers Congress' power in this respect

2. "Commerce" is defined in the famous case of *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 6 L. Ed. 23, to mean *not only traffic but also intercourse*, and it is said in *McNaughton Company v. McGirl*, 20 Mont. 124, 49 Pac. 651, 38 L. R. A. 367, that *commerce is traffic*, but it is something more—it is intercourse. The transportation of passengers is a part of commerce. *Passenger Cases*, 48 U. S. (7 How. 283). *Commerce is traffic*, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on. *Chicago & N. W. R. R. Co. v. Fuller*, 84 U. S. (17 Wall.) 560, 21 L. Ed. 710. The term "commerce" in its broadest acceptation includes *not merely traffic but the means and vehicles by which it is prosecuted*. *Winder v. Caldwell*, 55 U. S. (14 How.) 434, 14 L. Ed. 487. The term *embraces all instruments by which commerce may be conducted*. *Trademark Cases*, 100 U. S. 82, 25 L. Ed. 550. But it is well settled that insurance is not commerce, and logs which are floating down a river uncontrolled are not an element of commerce. *Harrigan v. Connecticut River Lumber Company*, 129 Mass. 500.

In *Pensacola Tel. Company v. Western Union Tel. Company*, 96 U. S. 1, 24 L. Ed. 708, we have the following enumeration of agencies of travel which may be engaged in interstate travel,

and the enumeration is made in the order of improved means of transit. The court begins with the horse, mentions the stage-coach, sailing vessel, steamboat, railroad, and ends with the telegraph. If automobiles had been in use they might have been included if used commercially.

In view of an attempt to have Congress consider favorably a federal automobile registration law, the following decision is of interest:

In *United States v. Colorado & N. W. R. R.*, decided by the United States Circuit Court of Appeals, Eighth Circuit, 157 Fed. 321, 85 C. C. A. 27, 13 Ann. Cas. 893, 15 L. R. A. (N. S.) 167, the following is from the syllabus by the court: The Safety Appliance Acts (Acts March 2, 1893, chap. 196, 27 Stat. 531, amended by Act April 1, 1896, chap. 87, 29 Stat. 85, U. S. Comp. St. 1901, pp. 3, 174, and Act March 2, 1903, chap. 976, 32 Stat. 103, U. S. Comp. St. Supp. 1907, p. 885), apply to and govern a railroad company engaged in interstate commerce which operates entirely within a single State independently of all other carriers.

Every part of every transportation of articles of commerce in a continuous passage from a commencement in one State to a prescribed destination in another is a transaction of interstate commerce.

Congress may lawfully affect interstate commerce so far as necessary to

doubtful. In the February, 1908, number of the *Yale Law Journal* he says, concerning the automobile: "It is very doubtful . . . whether the interstate commerce clause of the Constitution extends to private carriage not engaged in regular traffic between the States, and only entering them occasion-

regulate effectually and completely interstate commerce, because the Constitution reserved to Congress plenary power to regulate interstate and foreign commerce, and the Constitution and the Acts of Congress in pursuance thereof are the supreme law of the land.

In *Lehigh & Wilkes-Barre Coal Co. v. Borough of Junction* (N. J. L. 1918), 68 Atl. 806, it is said: "While interstate commerce necessarily involves interstate transportation, the converse is not always true. A railroad or ferry company, for example, which transports persons or property from one State to another, is undoubtedly engaged in interstate commerce, and a tax by the State upon owners of vessels or common carriers so transporting persons or property has been held void as a regulation of commerce. On the other hand, transportation may be conducted without constituting commerce or traffic, which has been defined to be the exchange of merchandise between individuals, communities or countries, whether directly in the form of barter or by the use of money or other medium of exchange. A manufacturer who sends his goods manufactured in Connecticut to his own entry port or store in New York city, transports the products from one State to another, but the transaction by such owner is not of itself, so far as the owner is concerned, interstate commerce in the sense that the city of New York has no power to tax the goods thus stored and awaiting sale in New York, although the merchandise may be intended for a foreign market. The transaction lacks the es-

sential element of trade, namely, sale or exchange.

The Supreme Court of the United States says, concerning the commerce over which the Federal government has exclusive control: "Let us inquire what is commerce, the power to regulate which is given to Congress? This question has been frequently propounded in this court, and the answer has been—and no more specific answer could well have been given—that commerce among the several States comprehends traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph—indeed, every species of *commercial* intercourse among the several States—but not that commerce 'completely internal,' which is carried on between man and man, in a State, or between different parts of the same State, and which does not extend to or affect other States. The power to regulate governed. Of course, as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that which is done is in plain violation of the Constitution. . . . Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to, or connection with, the commerce regulated." *Per* Mr. Justice Harlan, in *Adair v. U. S.*, 208 U. S. 161, 28 Sup. Ct. 277, 13 Ann. Cas. 764.



ally and irregularly for the purposes of pleasure. . . . The practice of rushing to Congress to obtain legislation of doubtful validity is one which ought not to be encouraged, when the States can afford a sufficient remedy."

### **Sec. 87. The right of transit.**

Since the advent of the new means of transportation, the automobile, pleasure driving has developed wonderfully, throughout the United States. A Saturday or Sunday afternoon drive, which formerly amounted to nothing more extensive than traveling a distance of four or five miles, may now, by use of the motor vehicle, consist of a twenty-five mile ride, and across the line into another State. A whole day's automobile drive might, in some instances, take one into more than one State other than his own.

Distances have been shortened by the motor vehicle, cities brought closer together and touring through the country necessitating passage over and across several and many States is now prevalent. For an automobilist to suggest a drive between the cities of New York and Philadelphia, for example, would be generally looked upon as a short ride, although the drive requires the use of the highways of three States. Correctly it may be said that automobiling to-day is more *interstate* than purely local within any one particular State's borders. Rhode Island automobilists, probably more than any other citizens, realize this, since the State has a very small area over which the automobilist can travel. The same situation exists in Delaware. Considering the nature of automobile travel and its distinctive interstate character, it is naturally a question paramount in the minds of motorists as to whether the various States of this Union possess the authority to enact laws which require non-resident automobilists coming into the State to pay a fee which is in the nature of revenue. In other words, can revenue be collected from touring automobilists by the States through which they travel?

In considering this question, it must not be forgotten that the United States of America is a nation. It is a country and is sovereign within its limits. It is a distinct government the

same as France or Germany. The people of the United States are its citizens. United States citizenship carries with it not only certain duties and responsibilities, but many rights. Some of these rights are inalienable, others are not. It is necessary for us to start, with these ideas in view, in order properly to understand the status of a United States citizen who wishes to travel across the country by means of a private carriage. We are apt to lose sight of the fact that there is a larger and more important government here than that of the State, although a State is sovereign within its proper sphere.

#### **Sec. 88. Citizen's right of transit.**

The question which we will start with will be confined to merit *transit* from one State to another by a United States or State citizen. Who is there that can deny to the citizen of any State the right to transport himself from one State to the one adjoining? He may either walk, ride behind or on a horse, be carried by an automobile, sailing or power vessel, railroad train and possibly a flying machine, without being compelled to pay one penny for the privilege of so doing. It is the citizen's inalienable right to be allowed to enter another State, to choose another domicile, and, if he desires, to constantly pass and repass from one State into another. "Liberty" which is guaranteed by the Federal Constitution to the people of the various States not only secures this right, but the general fundamental principles of constitutional government give to the citizens the right of transit from State to State. We will, if you please, confine the above assertion to transit unaccompanied by any contrivance such as the automobile.

#### **Sec. 89. Transit of vehicle.**

Being convinced that transit of persons cannot be obstructed by the State, let us ask if there can be any restrictions placed upon transit carried on by a mechanical contrivance of admitted dangerous characteristics. At the outset let it be said that the automobile is not dangerous *per se*. This has been held to be the law in several cases decided by the highest

courts in this country. However, it must be admitted that there are certain dangers connected with the operation of automobiles which are not experienced in driving horse-drawn vehicles on the public highways. Therefore, the State possesses the authority under its police powers to regulate automobiling, to prescribe speed limits and to require drivers and owners of motor vehicles to become registered or licensed. It is necessary, in order to regulate automobiling, to pay the expenses of the department issuing licenses and registering drivers and owners of automobiles. These expenses naturally should be met by the class of persons regulated and licensed. No quarrel can be picked with any of the States because the support of the motor vehicle departments is placed upon the shoulders of automobilists. But the amount of the fees charged is limited by law, by the United States Constitution and the common law as found in American judicial decisions.

#### **Sec. 90. Limitation on license fees.**

It is a well settled principle of the law governing license fees and occupation or privilege taxes that the sum charged for the license must not be unreasonable and so large as to make the act performed virtually prohibited. The rule lays it down that the reasonableness of the sum is to be determined according to what the expenses are incident to issuing licenses and maintaining the department in its activities. If, therefore, the fee charged for registering an automobile or a motor vehicle driver is reasonable according to the standards just mentioned, then it is a just and legal exaction, otherwise it is not.<sup>3</sup>

#### **Sec. 91. Questions of interstate commerce not in issue.**

That the State cannot tax interstate commerce is forever settled; so we need not dwell upon that phase of the question. Moreover, it is extremely doubtful if travel for pleasure is commerce within the meaning of the Federal limitation.

We do not need to consider the commerce feature of interstate travel any longer, and the surprise is great that hereto-

3. See chapter VIII herein as to registration and licensing.

fore the inviolability of the *correlative right of transit* has not been advocated. No matter if the travel is by rail or automobile, interstate transit can no more rightfully be taxed than interstate commerce. Here is a new phase of interstate communication for the judiciary to deal with, yet it is very old, so old that it has nearly been forgotten. We first heard of this right of transit in 1867 in *Crandall v. Nevada*.<sup>4</sup>

In this case it was held that a State cannot tax the right of transit through the State by the *ordinary means of travel*. The opinion of the court in this case was written by Mr. Justice Miller, and is in part as follows:

“The people of the United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capitol established by law, where its principal operations are conducted. Here sits its Legislature, composed of senators and representatives, from the States and from the people of the States. Here resides the President, directing, through thousands of agents, the execution of the laws over all this vast country. Here is the seat of the supreme judicial power of the nation, to which all its citizens have a right to resort to claim justice at its hands. Here are the great executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations. These are all established and conducted under the admitted powers of the Federal government.

“That government has a right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; *and this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered.*

“The government, also, has its offices of secondary importance in all other parts of the country. On the seacoasts and on the rivers it has its ports of entry. In the interior it has its land offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to

4. 6 Wall (U. S.) 35, 18 L. Ed. 745.

close points from all quarters of the nation, *and no power can exist in a State to obstruct this right that would enable it to defeat the purposes for which the government was established.*

“The Federal power has a right to declare and prosecute wars, and, as a necessary incident, to raise and transport troops through and over the territory of any State of the Union.

“If this right is dependent in any sense, however limited, upon the pleasure of a State, the government itself may be overthrown by an obstruction to its exercise. . . .

“But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon the government, or to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has a right to *free access* to its seaports through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, *and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.*

“The views here advanced are neither novel nor unsupported by authority. The question of the taxing power of the States, as its exercise has affected the functions of the Federal government, has been repeatedly considered by this court, and the right of the States to impede or embarrass the constitutional operations of that government, *or the rights which its citizens hold under it, has been uniformly denied.*”

In the opinion of the court the famous case of *McCulloch v. Maryland*<sup>5</sup> was commented on and the remarks of Chief Justice Marshall, “that the power to tax involves the power to destroy” were given prominence. Given the power to tax, the extent is unlimited. If a tax of one dollar is legal, a thousand dollar tax would be lawful.

The court adopted and approved of the views expressed in the Passenger Cases, as follows:

5. 4 Wheat. (U. S.) 316, 4 L. Ed. 415.

“Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States from the most remote States or Territories, *is entitled to free access*, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State in the Union. For all the great purposes for which the Federal government was formed, *we are one people, with one common country.*”

“We are citizens of the United States, and as members of the same community, *must have the right to pass and repass through every part of it without interruption*, as freely as in our own States.”

“And a tax imposed by a State for entering its territories or harbors, is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain. *Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it.*”

The automobile is now a common and ordinary mode of interstate travel. There can be no question about this. *Crandall v. Nevada*, it will be particularly noticed, held that the State cannot tax transit carried on by the *ordinary modes of travel*. Interstate automobile travel clearly comes within the ruling of the court in this case; consequently it cannot constitutionally be taxed.

But, while it is reasonably clear that property in transit from one State to another is exempt from State taxation, if it be stored for an indefinite time during such transit, at least for natural causes or lack of transportation, it may lawfully be assessed by the State authorities.<sup>6</sup>

6. *State v. Maxwell Motor Sales Corp.* 142 Minn. 226, 171 N. W. 566.

## CHAPTER VIII.

### LICENSING AND REGISTRATION.

- SECTION 92. Scope of chapter.
93. Nature of license.
94. Nature of license fee.
95. Purpose of registration.
96. General power to require registration and licensing.
97. Power of municipal corporations—in general.
98. Power of municipal corporations—licensing power annulled by State.
99. Power of municipal corporations—abrogation of municipal powers by subsequent general statute.
100. Power of municipal corporations—territorial application of ordinance.
101. Constitutionality of regulations—in general.
102. Constitutionality of regulations—title.
103. Constitutionality of regulations—interference with interstate commerce.
104. Constitutionality of regulations—prohibition of use of highways until registration.
105. Constitutionality of regulations—license fees beyond cost of registration.
106. Constitutionality of regulations—double taxation.
107. Constitutionality of regulations—exemption from other taxation.
108. Constitutionality of regulations—taxation not based on value of property.
109. Discrimination—in general.
110. Discrimination—between motor vehicles and other conveyances.
111. Discrimination—different sizes of machines.
112. Discrimination—vehicles used for different purposes.
113. Discrimination—dealers in different class.
114. Discrimination—non-residents.
115. Discrimination—non-resident exemption based on reciprocity.
116. Registration by particular classes of owners—corporations and partnerships.
117. Registration by particular classes of owners—registration in trade name.
118. Registration by particular classes of owners—dealers.
119. Registration by particular classes of owners—issuance of blank licenses to automobile organization.
120. Registration by particular classes of owners—by purchaser of machine.
121. Registration by particular classes of owners—death of owner.
122. Disposition of license moneys.
123. Vehicles to which regulations are applicable.
124. Display of number plate.

SECTION 125. Effect of non-registration in actions for injuries—Massachusetts rule.

126. Effect of non-registration in actions for injuries—general rule.

127. Effect of non-registration in actions for injuries—burden of proof.

128. Certificate as evidence of ownership.

## Sec. 92. Scope of chapter.

The discussion in this chapter covers the registration and licensing of motor vehicles, including such subjects as the power of the State and municipal corporations to require the registration of the machines or to exact license fees for their operation on the public highways.

In other chapters are discussed the general powers of the State<sup>1</sup> or municipal divisions<sup>2</sup> to regulate the operation of motor vehicles. And the questions of the registration and licensing of the drivers of vehicles, as distinguished from the machines, are reserved for another chapter.<sup>3</sup> So, too, regulations particularly relating to conveyances used for hire, such as jitneys, taxicabs, etc., are treated in another chapter.<sup>4</sup>

Criminal prosecutions with reference to the failure of an owner to register his machine, are discussed in another chapter.<sup>5</sup>

## Sec. 93. Nature of license.

A license to operate an automobile is merely a privilege.<sup>6</sup> It does not constitute a contract, and hence does not neces-

1. Chapter 5.

2. Chapter 6.

3. Chapter 12.

4. Chapter 9.

5. Chapter 27.

6. *Foshee v. State*, 15 Ala. App. 113, 72 So. 685; *State, ex rel. McClung v. Becker* (Mo.), 233 S. W. 54.

**What an automobile license is.**—It is very generally understood throughout the United States to-day that in order for one to operate a motor vehicle on the public highways in most of the States it is first necessary to procure a license to do so from the proper authorities. After having procured this

license, all that the autoist cares about is his protection under it and the authority it gives him to drive his automobile. The motor car driver seldom has any occasion to consider the nature of his license and what all his rights are under it aside from the privilege given to him to use his machine. An automobile license is, however, something more than a mere formality, which can be procured by compliance with a certain amount of red tape. The various automobile acts in the United States provide for two kinds of licenses—perpetual and annual. The perpetual license, of course, is more valuable than



sarily pass to a purchaser of the vehicle.<sup>7</sup> Moreover, as a mere license and not a contract, it may be revoked for cause shown.

In some jurisdictions, particularly in *England*, a procedure is established for the revocation of motor vehicle licenses.<sup>8</sup> The usual registration and licensing system pertains to the machine rather than to the operator thereof. Regulations may, however, be adopted requiring the licensing of chauffeurs.<sup>9</sup>

one that is temporary, since the latter necessitates the payment of a fee periodically, while the former may be procured and enjoyed upon the payment of but one fee. Whether the license be temporary or perpetual, it is in contemplation of law merely a license—a privilege. But what does such a license mean, and what are the legal rights of the holder of it? We might say that he has no legal rights conferred upon him by the license, and that it is negative in its operation. For without a license he is subject to arrest and criminal prosecution; with it he is immune from interference. In other words the license confers upon him a sort of negative right to be let alone if he otherwise complies with the law. This is really all that the automobilist's license amounts to. For it has been held many times by the highest courts in this country that a license does not constitute a contract within the meaning of the Federal Constitution prohibiting a State from passing any law impairing the obligation of contracts, and it is because a license is not a contract that it may be revoked or suspended by legislative authority.

7. *Foshee v. State*, 15 Ala. App. 113, 12 So. 685.

8. *Indorsing conviction on license.*—Where the identification plate is not in accordance with the local government

board regulations in England there is held to be "an offense in connection with the driving of a motor car" within the meaning of the English Motor Act 1903 (3 Edw. 7, ch. 36), section 4, authorizing an indorsement of conviction on the license. *Rex v. Gill* (K. B. Div.), 100 T. R. (N. S.) 858.

So the license may be indorsed on a conviction for exceeding the speed limits in the royal parks, though the regulations creating the speed limits were made after the passing of the Motor Car Act. *Rex v. Plowden* (K. B. Div.), 100 Law T. R. (N. S.) 856.

Allowing a motor car to stand in the highway so as to cause an unnecessary obstruction is not "an offense in connection with the driving of a motor car" within the meaning of the English Motor Car Act 1903 (3 Edw. 7, ch. 36), sec. 4, subsecs. 1, (c) 2, which authorizes the court to indorse the particulars of a conviction of such act upon the license. *Rex v. Justices of West Riding of York* (K. B. Div.), 102 Law T. R. (N. S.) 138.

**When no power to indorse a license to drive a motor car with particulars of the conviction when the holder is convicted of a first or second offense of exceeding a speed limit.** *Rex v. Marsham*, 97 Law T. R. (N. S.) 396.

9. See chapter XII.

**Sec. 94. Nature of license fee.**

The charge imposed for the privilege of operating a motor vehicle on the public highways is not generally considered a tax, but is a mere license or privilege fee.<sup>10</sup> When considered as a tax, it is not deemed a tax on the vehicle as such, but as a tax on the privilege of using the vehicle for transportation along the public highways. That is to say, it is not a tax on property, but is a tax on privilege.<sup>11</sup>

A municipal ordinance which requires the registration and numbering of motor vehicles and requires the payment of a fee to cover the value of the number plate furnished by the municipality, is held to constitute, not a license, but merely a regulation.<sup>12</sup>

10. *Alabama*.—Foshee v. State, 15 Ala. App. 113, 72 So. 685.

*Florida*.—Jackson v. Neff, 64 Fla. 326, 332, 60 So. 350.

*Illinois*.—Harder's Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. Y. 254.

*Massachusetts*.—Commonwealth v. Boyd, 188 Mass. 79, 74 N. E. 255.

*Mississippi*.—State v. Lawrence, 108 Miss. 291, 66 So. 745.

*New Jersey*.—Unwin v. State, 73 N. J. L. 529, 64 Atl. 163, affirmed 75 N. J. L. 500, 68 Atl. 110.

*Oklahoma*.—*Ex parte* Shaw, 157 Pac. 900.

*Tennessee*.—Ogilvie v. Harley, 141 Tenn. 392, 210 S. W. 645.

*Texas*.—Atkins v. State Highway Dept. (Civ. App.), 201 S. W. 226.

*Vermont*.—State v. Jarvis, 39 Vt. 239, 95 Atl. 541.

11. *Alabama*.—Hudgens v. State, 15 Ala. App. 156, 72 So. 605; Foshee v. State (Ala. App.), 72 So. 685.

*Florida*.—Jackson v. Neff, 64 Fla. 326, 60 So. 350.

*Idaho*.—*Ex parte* Kessler, 26 Idaho, 764, 146 Pac. 113.

*Illinois*.—Harder's Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245.

*Kentucky*.—Smith v. Commonwealth, 175 Ky. 286, 194 S. W. 367.

*Michigan*.—Jasnowski v. Board of Assessors of City of Detroit, 191 Mich. 287, 157 N. W. 891.

*Mississippi*.—State v. Lawrence, 108 Miss. 291, 66 So. 745.

*Missouri*.—State, *ex rel.* McClung v. Becker (Mo.), 233 S. W. 54.

*New Jersey*.—Unwin v. State, 73 N. J. L. 529, 64 Atl. 163, affirmed 75 N. J. L. 500, 68 Atl. 110.

*New Mexico*.—State v. Ingalls, 18 N. Mex. 211, 135 Pac. 1177.

*Oklahoma*.—*Ex parte* Phillips, 167 Pac. 221.

*South Carolina*.—Lillard v. Melton, 103 S. Car. 10, 87 S. E. 421.

*Tennessee*.—Wilson v. State, 224 S. W. 168.

*Washington*.—State v. Collins, 94 Wash. 310, 162 Pac. 556. "A license fee, such as is provided for in this act, may or may not be a tax, depending upon whether its imposition is tied to the police or taxing power of the State. But, giving respondent the benefit of his contemplation that this license fee is imposed under the taxing power of the State, it is clear that it is not a property tax, but is in the nature of a license or privilege tax." State v. Collins, 94 Wash. 310, 162 Pac. 556.

12. *People v. Schneider*, 139 Mich. 673, 103 N. W. 172, 12 Det. L. N. 32,

While ordinarily a licensing statute may be construed as merely a regulation, a more serious question arises when the amount of the license fee is designed to create a fund in excess of the needs for supervision of the machines and the enforcement of the law. In some jurisdictions it is held that when an excess is thus produced, the act becomes a revenue measure as to the excess,<sup>13</sup> but in other jurisdictions the view is taken that an excess may be raised for the maintenance of the public highways without the law being classed other than as a regulatory measure.<sup>14</sup>

### Sec. 95. Purpose of registration.

The reason assigned for the necessity of registration and licensing is that the vehicle should be readily identified in order to debar operators from violating the law and the rights of others, and to enforce the laws regulating the speed, and to hold the operator responsible in cases of accident. The Legislatures have deemed that the best method of identification, both as to the vehicle and the owner or operator, is by a number on a tag conspicuously attached to the vehicle. In case of any violation of law this furnishes means of identification, for, from the number, the name of the owner may be readily ascertained and through him the operator.<sup>15</sup> Such

69 L. R. A. 345, 5 Ann. Cas. 790; *Unwin v. State*, 73 N. J. L. 529, 64 Atl. 163, affirmed 75 N. J. L. 500, 68 Atl. 110; *Borough of Applewold v. Dosch*, 60 Pitts. Leg. J. 22.

13. *Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685; *Vernor v. Secretary of State*, 179 Mich. 157, 146 N. W. 338; *Ex parte Mayes* (Okla.), 167 Pac. 749. See also, *State, ex rel. McClung v. Becker* (Mo.), 233 Mo. 54.

14. *Ex parte Kessler*, 26 Idaho, 764, 146 Pac. 113; *Smith v. Commonwealth*, 175 Ky. 286, 194 S. W. 367; *Atkins v. State Highway Dept.* (Tex. Civ. App.), 201 S. W. 226. See also section 105.

15. See *People v. MacWilliams*, 91 App. Div. (N. Y.) 176, 86 N. Y. Supp.

357; *Ruggles v. State*, 120 Md. 553, 87 Atl. 1080; *People v. Schneider*, 139 Mich. 673, 103 N. W. 172, 12 Det. L. N. 32, 69 L. R. A. 345, 5 Ann. Cas. 790; *Martin v. White* (1910), 1 K. B. (Eng.) 665.

The Massachusetts Act forbidding the operation of an automobile by a person without a license permits an unlicensed person to operate an automobile with a licensed chauffeur. The statute was intended to provide an opportunity for persons to learn to use an automobile by running it under the supervision of a licensed person and thus acquire skill by practice. *Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404, 35 L. R. A. (N. S.) 701.

acts are not passed merely for the purpose of revenue but have for their object the protection of the public.<sup>16</sup> It is not difficult to see that the registration and numbering of automobiles is intimately connected with their safe operation in the State. Many automobiles are precisely alike in external appearance. They are sometimes operated by those whose faces are partially concealed and whose identity is uncertain. Those operators who are most reckless and indifferent — and those are the ones that endanger the safety of others — may violate the law with impunity unless some method is adopted by which they or their automobiles may be identified. A provision in a law for registration and numbering is such a method. It is reasonable to believe that, when he knows that

**Purpose of re-registration.**—"The manifest purpose of requiring registration and the display of official number plates is (1) to accomplish in advance the collection of the license or registration fee, and (2) to furnish a means of identification of the vehicle. The pre-eminent purpose, however, of requiring annual re-registration and annual number plates (which is the requirement involved in the case at bar) is to accomplish the collection of the annual fee. Identification is not aided by mere re-registration or by a change of numbers or plates." *State v. Gish*, 168 Iowa, 70, 150 N. W. 37.

16. *Knight v. Savannah Elec. Co.*, 20 Ga. App. 719, 93 S. E. 17; *Greig v. City of Merritt*, 11 Dom. Law Rep. 852, 854, wherein it was said: "I do not think however, that the sole or indeed the principal reason in the statute for requiring registration and licensing of motors is to secure revenue. There is, I think, a peculiar significance in the fact that the motor must be registered. To secure registration under sec. 11 the applicant must sign an application form which contains full particulars as to the make of the car, and as to the garage or place where the car is kept, with

the name in full of the owner, the applicant. When a license is issued, sec. 25 of the Act requires that the motor shall have attached at the back the number of the license, the figures being four inches in height and displayed in a conspicuous place at the back. And now by a more stringent provision of the amending Act of 1913 a specially designed number plate must be displayed on the front and at the back of the car. The object of such provisions is clearly for the benefit of the public. In the event of the law being violated the offender can be readily identified by the number on his car and brought to justice. The motor car whilst not an outlaw on the highway is yet without doubt a very dangerous machine unless under very careful control. The statute, containing as it does, some drastic provisions affecting one's common law rights and especially so in the matter of the burden of proof, is clearly framed with an eye to the protection of the public, and the question of revenue is, I think, merely incidental in the Act." See also *Hughes v. New Haven Taxicab Co.*, 87 Conn. 416, 87 Atl. 421. See also section 94.

the number displayed on the automobile identifies the vehicles, fear of discovery and punishment will lead the automobile driver to observe the requirements of the law.<sup>17</sup>

## Sec. 96. General power to require registration and licensing.

There is no dispute as to the general proposition that a State, in the exercise of its police power, has the power to require the registration of motor vehicles and the payment by owners of license fees.<sup>18</sup> This power the State may exer-

17. See *People v. Schneider*, 139 Mich. 673, 103 N. W. 172, 12 Det. L. N. 32, 69 L. R. A. 345, 5 Ann. Cas. 790.

18. *United States*.—*Hendrick v. State of Maryland*, 235 U. S. 610, 35 S. Ct. 140; *Kane v. State of New Jersey*, 242 U. S. 160, 37 S. Ct. 30.

*Alabama*.—*Matter of Bozeman*, 7 Ala. App. 151, 61 So. 604, 63 So. 201; *Foshee v. State*, 15 Ala. App. 113, 72 So. 685.

*California*.—*Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685.

*Connecticut*.—*State v. Scheidlér*, 91 Conn. 234, 99 Atl. 492.

*District of Columbia*.—*Mark v. District of Columbia*, 37 App. D. C. 563, 37 L. R. A. (N. S.) 440.

*Florida*.—*Jackson v. Neff*, 64 Fla. 326, 60 So. 350.

*Illinois*.—*Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 3 Ann. Cas. 487, 108 Am. St. Rep. 196; *Harder's Storage & Van Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245; *Heartt v. Village of Downer's Grove*, 278 Ill. 92, 115 N. E. 869.

*Indiana*.—*Kersey v. Terre Haute*, 161 Ind. 471, 68 N. E. 1027.

*Iowa*.—*State v. Gish*, 168 Iowa, 70, 150 N. W. 37.

*Kentucky*.—*City of Henderson v. Lockett*, 157 Ky. 366, 163 S. W. 199; *City of Newport v. Merkel Bros. Co.*, 156 Ky. 580, 161 S. W. 549; *Smith v. Commonwealth*, 175 Ky. 286, 194 S. W. 367. "It is conceded that it is a right

inherent in the sovereignty of the State to regulate the use of motor vehicles upon the roads of the State, and it has been so held by many courts." *Smith v. Commonwealth*, 175 Ky. 286, 194 S. W. 367.

*Massachusetts*.—*Commonwealth v. Boyd* 188 Mass. 79, 74 N. E. 255.

*Michigan*.—*People v. Schneider*, 139 Mich. 673, 103 N. W. 172, 12 Det. Leg. N. 32, 69 L. R. A. 345, 5 Ann. Cas. 790; *Vernor v. Secretary of State*, 179 Mich. 157, 146 N. W. 338; *Jasnowski v. Board of Assessors of City of Detroit*, 191 Mich. 287, 157 N. W. 891.

*Minnesota*.—*Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627. "It is not seriously questioned that the legislature might impose a wheelage tax upon vehicles. We have no doubt that it might do so. The power of the legislature to tax is plenary. It is not dependent on any constitutional grant. The power to tax inheres in the State as an attribute of sovereignty, and is without limit except as restricted by the Constitution." *Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627.

*Mississippi*.—*State v. Lawrence*, 105 Miss. 291, 66 So. 745.

*New Jersey*.—*Unwin v. State*, 73 N. J. L. 529, 64 Atl. 163, affirmed 75 N. J. L. 500, 68 Atl. 110.

*New Mexico*.—*State v. Ingalls*, 18 N. Mex. 211, 135 Pac. 1177.

*New York*.—*Pratt Institute v. City of New York*, 183 N. Y. 151, 75 N. E.

cise directly through the means of a statute regulating the use of the public highways by automobilists. Or the State may delegate certain powers in this respect to municipal divisions of the State, who may thereby be authorized to pass suitable regulations for the registration and licensing of motor vehicles.<sup>19</sup>

After a delegation of the power to a municipality, it may resume its control over the subject by abrogating the authority of the municipality.<sup>20</sup> Constitutional provisions, however, may override the legislative authority, so that it cannot deprive a municipal corporation of the power of licensing vehicles or otherwise regulating their use within the municipality.<sup>21</sup>

The taxing and licensing power of the State or municipal divisions thereof is limited, so far as vehicles in the military service of the United States are concerned; but the fact that one is engaged in running auto busses between a military camp and a nearby city does not necessarily absolve him from the duty of acquiring a license under a State law and paying the license fee on vehicles used for the purpose.<sup>22</sup>

1119, 5 Ann. Cas. 198; *People v. MacWilliams*, 91 N. Y. App. Div. 176, 86 N. Y. Suppl. 357; *People ex rel. Hainer v. Keeper of Prison*, 121 App. Div. 645, 106 N. Y. Suppl. 314, affirmed 190 N. Y. 315, 83 N. E. 44; *Buffalo v. Lewis*, 123 App. Div. 163, 108 N. Y. Suppl. 450, affirmed 192 N. Y. 193, 84 N. E. 809; *People v. Schoepflin*, 78 Misc. 62, 137 N. Y. Suppl. 675.

*Oklahoma*.—*Ex parte Shaw*, 157 Pac. 900; *Ex parte Mayes*, 167 Pac. 749.

*Oregon*.—*Briedwell v. Henderson*, 195 Pac. 575.

*Pennsylvania*.—*Commonwealth v. Densmore*, 29 Pa. Co. Ct. 217; *Commonwealth v. Hawkins*, 14 Pa. Dist. Rep. 592; *Matter of Automobile Acts*, 15 Pa. Dist. Rep. 83.

*South Carolina*.—*Lillard v. Melton*,

103 S. Car. 10, 87 S. E. 421.

*South Dakota*.—*In re Hoffert*, 34 S. Dak. 271, 148 N. W. 20, 52 L. R. A. (N. S.) 949.

*Tennessee*.—*Wilson v. State*, 224 S. W. 168.

*Texas*.—*Ex parte Parr*, 82 Tex. Cr. 525, 200 S. W. 404; *Atkins v. State Highway Dept. (Civ. App.)*, 201 S. W. 226.

*Washington*.—*City of Seattle v. King*, 74 Wash. 277, 133 Pac. 442; *State v. Collins*, 94 Wash. 310, 162 Pac. 556.

19. See sections 97-100.

20. Section 99.

21. *People v. McGraw*, 184 Mich. 233 150 N. W. 833.

22. *Ex parte Marshall (Fla.)*, 77 So 869.

**Sec. 97. Power of municipal corporations — in general.**

The registration and licensing of motor vehicles is primarily within the control of the Legislature,<sup>23</sup> and the only power lodged in municipal divisions is such as has been delegated by the Legislature to the municipalities.<sup>24</sup>

The right of a city to levy a license fee upon automobiles can be received only from the Legislature, and must be exercised within the limits of the power conferred.<sup>25</sup> By virtue of some statutory provisions, a city is expressly authorized to license vehicles.<sup>26</sup> And under general laws and special charter provisions giving municipalities control and regulation of the streets, it may be stated as a general rule, that, unless the power over the registration and licensing of motor vehicles is expressly excluded, municipal corporations will have such power.<sup>27</sup> Moreover, it is held that a general authority to regulate vehicles on the municipal streets may be sufficient basis to justify an ordinance requiring the licensing of motor vehicles and the payment of license fees.<sup>28</sup> Thus, an act which empowered a certain city to "regulate and license all cars, wagons, drays, coaches, omnibuses, and every description of

**23.** Section 96.

**24.** *City of Mobile v. Gentry*, 170 Ala. 234, 54 So. 488; *Heartt v. Village of Downer's Grove*, 278 Ill. 92, 115 N. E. 869; *Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627.

**Counties.**—*In Alabama*, counties are authorized to impose license taxes on commercial vehicles but not on those used for private use. *Mills v. Court of Com'rs (Ala.)*, 85 So. 564; *Johnson v. State (Ala.)*, 85 So. 567. See also, *McClure v. State (Ala. App.)*, 88 So. 35. A similar delegation of power has been sustained in *Arkansas*. *Pine Bluff Transfer Co. v. Nichol*, 140 Ark. 320, 215 S. W. 579.

**25.** *City of Mobile v. Gentry*, 170 Ala. 234, 54 So. 488; *Ex parte Smith*, 33 Cal. App. 161, 164 Pac. 618; *City of Newport v. Merkel Bros. Co.*, 156 Ky. 580, 161 S. W. 549; *City of Hen-*

*derson v. Lockett*, 157 Ky. 366, 163 S. W. 199.

**26.** *Harder's Storage & Van Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245; *Ayres v. City of Chicago*, 239 Ill. 237, 87 N. E. 1073; *White v. Turner (Wash.)*, 195 Pac. 240.

**27.** *Ayres v. City of Chicago*, 239 Ill. 237, 87 N. E. 1073; *People v. Schneider*, 139 Mich. 673, 103 N. W. 172, 12 Det. Leg. N. 32, 69 L. R. A. 345, 5 Ann. Cas. 790; *Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627; *Wasson v. City of Greenville (Miss.)*, 86 So. 450; *Kellaher v. Portland*, 57 Oreg. 575, 112 Pac. 1076; *Ex parte Parr*, 82 Tex. Cr. 525, 200 S. W. 404.

**28.** *People v. Schneider*, 139 Mich. 673, 103 N. W. 172, 12 Det. Leg. N. 32, 69 L. R. A. 345, 5 Ann. Cas. 790. See also, *City of Mayfield v. Carter Hardware Co. (Ky.)*, 230 S. W. 298.

carriages," has been held to authorize the city to impose a license on automobiles, notwithstanding they were unknown when the act was passed.<sup>29</sup> And, under a statute authorizing cities "To regulate and license the use of carts, drays, wagons, coaches, omnibuses, and every description of carriages and vehicles kept for hire and to license and regulate the use of the streets of the town or city by persons who use vehicles or solicit or transact business thereon," it was held that a city may by ordinance levy a license upon automobiles.<sup>30</sup> So, too, a statute authorizing cities to grant licenses for lawful purposes and to fix the amount to be paid therefor, has been held sufficient authority for an ordinance licensing vehicles for hire.<sup>31</sup>

### **Sec. 98. Power of municipal corporations — licensing power annulled by State.**

The Legislature having the control of the licensing of motor vehicles throughout the State,<sup>32</sup> may delegate such power to municipalities or it may reserve it to itself. Or, having once delegated such authority, its control over the subject is not exhausted, and it may resume its authority by abrogating the power theretofore granted to municipal officials.<sup>33</sup> Thus, in some States it is provided by statute that municipal corporations shall not pass regulations for the licensing of motor vehicles.<sup>34</sup> Or the right to pass regulations may be subject to limitations.<sup>35</sup> The Legislature may provide that the owner of vehicles shall display thereon no number plate other than

29. *Commonwealth v. Hawkins*, 14 Pa. Dist. Rep. 592. Compare *Washington Elec. Vehicle Transp. Co. v. District of Columbia*, 19 App. D. C. 462.

30. *City of Mobile v. Gentry*, 170 Ala. 234, 54 So. 488.

31. *Seattle v. King*, 74 Wash. 277, 133 Pac. 442. See sections 138-142 as to power of municipalities to regulate vehicles used for hire.

32. Section 96.

33. *Ex parte Shaw* (Okla.), 157 Pac. 900; *Ex parte Phillips* (Okla.), 167 Pac.

221.

34. *Barrett v. New York*, 189 Fed. 268; *City of Lincoln v. Dehner*, 268 Ill. 175, 108 N. E. 991; *Hiler v. City of Oxford*, 112 Miss. 22, 72 So. 837; *State v. Fink* (N. Car.), 103 S. E. 16; *Ex parte Shaw* (Okla.), 157 Pac. 900; *City of Muskogee v. Wilkins* (Okla.), 175 Pac. 497; *City of Bellingham v. Cissna*, 44 Wash. 397, 87 Pac. 481.

35. *Anderson v. Wentworth*, 75 Fla. 300, 78 So. 265.



the one issued by the State officials.<sup>36</sup> As a general proposition, the State statutes give the authorities of municipal divisions greater power over vehicles used for hire, such as jitneys and taxicabs, than over automobiles and business cars.<sup>37</sup> Constitutional provisions may affect the power of the Legislature. For example, it has been held that a provision of a constitution to the effect that the right of all cities to the reasonable control of their streets is reserved to them, precludes a statute to the effect that local authorities shall have no power to pass or enforce an ordinance requiring from an automobile owner or chauffeur any license or permit for the use of streets.<sup>38</sup>

**Sec. 99. Power of municipal corporations — abrogation of municipal powers by subsequent general statute.**

It is evident that it is wiser to have a State system for the registration and licensing of motor vehicles, than to permit each separate municipality to have control over the subject. In recent years the tendency of legislation has been to take the licensing power from municipalities and to lodge it in the State authorities. Hence, though municipalities have from time to time been authorized to license the operation of motor vehicles within their territorial limits, it has generally been held that a State statute prescribing a uniform system of registration and licensing throughout the State has the effect of repealing the powers of municipalities and of abrogating all local regulations theretofore enacted.<sup>39</sup> The result reached

36. *City of Chicago v. Francis*, 262 Ill. 331, 104 N. E. 662; *City of St. Louis v. Williams*, 235 Mo. 503, 139 S. W. 340; *Brazier v. Philadelphia*, 15 Pa. Dist. Rep. 14. See also section 124.

37. Section 136.

38. *People v. McGraw*, 184 Mich. 233, 150 N. W. 836.

39. *Helena v. Dunlap*, 102 Ark. 131, 143 S. W. 138; *Pratt Institute v. City of New York*, 183 N. Y. 151, 75 N. E. 1119, 5 Ann. Cas. 198; *Buffalo v. Lewis*, 192 N. Y. 193, 84 N. E. 809; *State v. Fink* (N. Car.), 103 S. E. 16; *Frishie*

*v. City of Columbus*, 80 Ohio St. 686, 89 N. E. 92. See also, *Shreveport v. Stringfellow*, 137 La. 552, 68 So. 951; *Heartt v. Village of Downer's Grove*, 278 Ill. 92, 115 N. E. 869; *Ex parte Phillips* (Okla.), 167 Pac. 221.

*Pennsylvania*.—In *Commonwealth v. Hawkins*, 14 Pa. Dist. Rep. 592, the court upheld the validity of an ordinance (passed by the city of Pittsburg under the power conferred by the special Act of April 1, 1886 [P. L. 565, sec. 71], to regulate and license every description of carriages) which makes

may be thought to be contrary to the canon of construction that a general act does not impliedly repeal a local or special act; but this rule of construction does not generally apply when it is evident that the general act was intended to cover the entire subject. Where a later act covers the whole subject of earlier acts and embraces new provisions, and the act plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the whole subject then considered by the Legislature and to prescribe the only rules in respect thereto, it will operate as a repeal of all former statutes relating to such subject matter, even if the former acts are not in all respects repugnant to the new act.<sup>40</sup> In some

it unlawful for any person to operate, or cause to be operated, upon the streets of the city, an automobile, motor vehicle, or other conveyance or wagon, the motive power of which shall be electricity, steam, gasoline, or any source of energy other than human and animal power except upon the conditions, *inter alia*, of the payment by the owner of an annual license fee of six dollars if the vehicle is intended to carry one or two persons, and a fee of ten dollars if intended to carry more than two persons. The court said that the license imposed was not unreasonable, and was uniform upon different kinds of the several classes of vehicles named; and that was all the law required in that respect.

The power conferred upon the city of Pittsburg, Pennsylvania, by the special Act of April 1, 1868 (P. L. 565), to impose a license upon automobiles used in the city streets was not repealed by the Act of April 23, 1903 (P. L. 268), regulating the use of automobiles throughout the State, as the later act contains no repealing clause, and by the provision of the seventh section, to the effect that the amount of license prescribed by the act shall not apply to any city or other municipality in which the authorities have imposed a

license fee for the same purpose, indicates an intention to preserve to the municipalities any authority previously conferred upon them authorizing the licensing of vehicles. *Commonwealth v. Hawkins*, 14 Pa. Dist. Rep. 592.

40. *Pratt Institute v. City of New York*, 183 N. Y. 151, 75 N. E. 1119, 5 Ann. Cas. 198.

In Illinois it was held that, though the object of a statute was to take the subject of the regulation of the speed and operation of automobiles out of the hands of the local authorities and to pass a law of general and uniform regulation applicable alike to all municipalities of the State and its effect was to abrogate all municipal ordinances designated to regulate the use of motor vehicles passed prior to the time such law went into force and to deprive such municipalities of the power to pass such regulating ordinances in the future, yet a Wheel Tax Ordinance, imposing a tax upon different kinds of vehicles, including automobiles, is within the power of a municipality to subsequently pass where by statute power is conferred upon "The city council in cities, and president and board of trustees in villages . . . to direct, license, and control all wagons and other vehicles, conveying loads within the city, or any

jurisdictions, the repeal of the State law will not have the effect of reviving the municipal regulation on the subject.<sup>41</sup>

**Sec. 100. Power of municipal corporations — territorial application of ordinance.\***

The powers of municipalities, as a general rule, extend only within their territorial limits. Thus, where a statute provided that any person desiring to operate an automobile in a city must procure a license from the license commissioner thereof, and if he desired to operate it in the county outside the city limits he should procure a license from the county clerk of such county, it was held that the owner of an automobile was required to take out a license in each and every county over the roads of which he desired to operate his automobile.<sup>42</sup> One carrying passengers for hire, though procuring a license in the city where its principal business is conducted, may be required to take out a license under the regulations of other cities through which he may transport passengers.<sup>43</sup> Considerable difficulty may be experienced relative to the powers of municipalities over vehicles traveling between points within the city and points outside of its boundaries. In one State, it has been held that a licensing regulation applies to motor vehicles using the municipal streets for travel between points within and points without its limits.<sup>44</sup> But in another State, the application of a regulation in such cases has been denied.<sup>45</sup> Where one is engaged in carrying passengers between two points both outside of a city, though the course of travel passes through the city, it has been held that his acts do not constitute a "business transacted and carried on in such city," within the meaning of a statute permitting the city to license such business; and the fact that he may

particular class of such wagons, and other vehicles, and prescribe the width and tire of the same, the license fee, when collected, to be kept as a separate fund and used only for paying the cost and expense of street or alley improvement or repair." *Ayres v. City of Chicago*, 239 Ill. 237, 87 N. E. 1073.

41. *Frisbie v. City of Columbus*, 80

*Ohio St.* 686, 89 N. E. 92.

42. *State v. Cobb*, 113 Mo. App. 156, 87 S. W. 551.

43. *Opydyke v. City of Anniston* (Ala. App.), 78 So. 634.

44. *City of Cartersville v. Blystone*, 160 Mo. App. 191, 141 S. W. 701.

45. *McDonald v. City of Paragould*, 120 Ark. 226, 179 S. W. 335.

incidentally stop in the city does not change the situation.<sup>46</sup> A resident of a municipality cannot object to an ordinance because it would impose burdens on non-residents.<sup>47</sup>

### Sec. 101. Constitutionality of regulations — in general.

Regulations relative to the registration and licensing of motor vehicles must be in accord with the State and Federal constitutions, whether the regulation is one enacted by the Legislature of the State or by a municipal body.<sup>48</sup> But, except in peculiar instances or under unusual constitutional requirements, the regulations have generally been sustained.<sup>49</sup> For

46. *Ex parte Smith*, 33 Cal. App. 161, 164 Pac. 618, wherein it was said: "The business conducted by petitioner, as alleged in violation of the ordinance, is that of transporting passengers for hire, not in the city, but between termini both of which are outside thereof, incidental to, connected with, and as a part of which a number of facts other than transportation, such as soliciting business, taking on and discharging passengers, collecting fares, and caring for their welfare enroute, are necessary to be performed. The transportation of the passengers over any particular part of the public highway is one of the incidents of the business, but it no more constitutes the business than does the collection of their fares. Hence it cannot be said that the carrying of passengers for hire from Los Angeles to Bakersfield by means of a motor vehicle operated over the public highway, a part of which extends through Tropic, where no stops are made, nor any of the incidental acts of such transportation performed other than traveling along the streets, constitutes a business "transacted and carried on in such city." Adopting the contrary view urged by respondent, the conclusion must logically follow that a physician, grocer, plumber, indeed, every one engaged in a professional

calling or business in one city, having occasion to make a professional call or deliver goods to a purchaser, to do which required him to travel upon the highways through other cities, could under a like provision of the ordinance to that here involved be subjected to a tax in the guise of a license levied upon the theory that such use of the streets constituted a business transacted and carried on in the different cities through which he passed. While the use of the streets may be regulated, the city has no power to convert them into toll roads, and thus exact tribute from those who in the conduct of business elsewhere have occasion to use them solely as highways."

47. *Wasson v. City of Greenville* (Miss.), 86 So. 450.

48. *Pointing out constitutional provision violated.*—Where it was attempted to question the constitutionality of the Missouri Automobile Act of 1903, which required a license on the part of the persons desiring to operate an automobile, the court declined to consider the question, because neither the article nor the section of the constitution claimed to have been violated was pointed out or referred to in the defendant's motions or briefs. *State v. Cobb*, 113 Mo. App. 136, 87 S. W. 551.

49. Section 97.

example, the requirement that a number plate shall be attached to the machine so as to identify it, does not violate the constitutional guarantee against unreasonable searches or the provision that no person shall be compelled to be a witness against himself or deprived of his liberty or property without due process of law.<sup>50</sup> A statute providing that the "license tax" imposed shall be paid to the "tax collector" of the county, is not in conflict with a constitutional provision to the effect that the county judge shall issue all licenses required by law to be issued in the county.<sup>51</sup> But, under a constitutional provision forbidding the imposition of taxes on counties or the inhabitants thereof for county purposes, the Legislature cannot enact a law imposing certain taxes in the form of license fees on the owners of motor vehicles and distributing part of such moneys to the road fund of the several counties.<sup>52</sup> But, when the license fee is not a tax, but merely a regulatory requirement under the police power, there is no objection to a division of the fees among municipalities.<sup>53</sup>

## Sec. 102. Constitutionality of regulations — title.

Constitutions in most States contain provisions respecting the titles of proposed laws, and an act which is not properly entitled is void. Thus, it is sometimes required that acts shall contain but one subject and that shall be expressed in the title.<sup>54</sup> But an act for the regulation of motor vehicles and

50. *People v. Schneider*, 130 Mich. 673, 103 N. W. 172, 12 Det. L. N. 32, 69 L. R. A. 345, 5 Ann. Cas. 790; *People v. MacWilliams*, 91 N. Y. App. Div. 176, 86 N. Y. Suppl. 357.

51. *Jackson v. Neff*, 64 Fla. 326, 60 So. 350.

52. *Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685, wherein it was said: "The Motor Vehicle Act imposes a tax upon the inhabitants and property in every county and city and county in the State for the purpose, among others, of creating a fund, one-half of which, less expenses of administration, shall be paid into the road funds of

the counties presumably for use upon the public roads under county supervision. It has been held that license taxes for county purposes are within the inhibitions of the section of the Constitution last cited, and that the whole subject of county taxes has been delegated to the local authorities."

53. *Ex parte Shaw* (Okla.), 157 Pac. 900.

54. See *People v. Sargent*, 254 Ill. 514, 98 N. E. 959.

**Defective title of Act.**—See *Commonwealth v. Densmore*, 13 Pa. Dist. Rep. 639, 29 Pa. Ct. Rep. 217, holding that the provisions of the Pennsylvania Act,

entitled in that manner, is not invalid because it also provides for the disposition of license fees received under the statute.<sup>55</sup> Constitutional provisions relative to the entitling of acts, do not generally apply to municipal ordinances.<sup>56</sup>

### Sec. 103. Constitutionality of regulations — interference with interstate commerce.

So long as there is no national legislation relative to the registering and licensing of motor vehicles, a State statute

April 23, 1903 (P. L. 268), requiring the owners of automobiles to take out license, was so uncertain that a conviction for the violation could not be sustained in view of the fact that there is nothing in the act as to what the license shall contain, and that the title of the act refers to the licensing of "operators" and not "owners" of automobiles. See also *In re Automobile Acts*, 15 Pa. Dist. Rep. 83.

55. *Smith v. Commonwealth*, 175 Ky. 286, 194 S. W. 367; *Jasnowski v. Board of Assessors of City of Detroit*, 191 Mich. 287, 157 N. W. 891; *Commonwealth ex rel. Bell v. Powell*, 249 Pa. St. 144, 94 Atl. 746. "Because subsection 14 and section 27 provide for the payment of the license fees into the State road fund and the title of the act provides only for the regulations, licensing, and governing the use of motor vehicles, it is insisted that the title of the act is only broad enough to justify an act strictly for the regulation of motor vehicles and that the payment of the license fees into the State road fund is the setting apart of the fees for a revenue purpose—that is, the improvement of the public highways—and for that reason the act relates to two subjects and therefore is void. Without, at this point, entering into any discussion as to whether the statute is one enacted in the exercise of the police power or is really a statute enacted for revenue purposes, only, under the

guise of an exercise of the police power, it will be first determined whether the statute, in any of its provisions, is contrary to section 51 of the Constitution, and the other questions involved will be hereafter adverted to. The use of motor vehicles consists in driving them upon the highways of the State. No other use is contemplated for such vehicles. To "license" necessarily means to grant a privilege which is otherwise withheld. To license a vehicle must be either to grant the privilege of its own ership or its use. The title of the act contemplates licensing the use of them, or else the expression in it to "govern the use of motor vehicles" would be without signification or meaning. Hence the patent meaning of the title is to regulate, permit, and govern the use of motor vehicles upon the roads. Such a title relates to only one subject. To the ordinary mind, to license the privilege of using property, in a certain way, contemplates the exacting of fees or a tax for such privilege. The general rule often declared in determining whether a legislative act is invalid under the provisions of section 51 of the Constitution is, if all the provisions of an act relate to the same subject, are naturally connected, and are not foreign to the subject expressed in the title, it is sufficient." *Smith v. Commonwealth*, 175 Ky. 286, 194 S. W. 367.

56. *Ex parte Parr*, 82 Tex. Cr. 525, 200 S. W. 404.

on the subject is not contrary to the commerce clause of the Federal constitution, although vehicles engaged in interstate commerce may be more or less affected thereby.<sup>57</sup> A State has the power to enact a motor vehicle law which will impose a license fee on non-residents who may use the highways of such State.<sup>58</sup> But is doubtful if a municipality can impose a license fee for a jitney or bus which is used solely for the carriage of passengers from a city in one State to a city in another.<sup>59</sup>

#### **Sec. 104. Constitutionality of regulations — prohibition of use of highways until registration.**

Where the State has enacted a registration system for motor vehicles, it may properly enact that no person shall

57. *Hendrick v. Maryland*, 235 U. S. 610, 622, 35 S. Ct. 140, wherein it was said: "The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the States for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well-known, in order to meet this demand and accommodate the growing traffic the State of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order, and the protection of those within its own jurisdiction the State put into effect the above-described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly in-

jurious. In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse-power of the engines—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the State's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress."

58. *Kane v. State of New Jersey*, 242 U. S. 160, 37 S. Ct. 30.

59. *Commonwealth v. O'Neil*, 233 Mass. 535, 24 N. E. 482.

drive a motor vehicle upon the public highways without having the same properly registered.<sup>60</sup> But where the owner of an automobile has duly registered the same but, on account of the failure of the State authorities has not received a number plate, it has been held that he can operate the machine under the plates for the previous year.<sup>61</sup>

**Sec. 105. Constitutionality of regulations — license fees beyond cost of registration.**

The courts are not in agreement as to the effect of fixing the license fees at a sum greater than is necessary for the supervision of motor vehicles and the enforcement of the statute. Where the license fees imposed by a statute are greater than

60. See *Matter of Automobile Acts*, 15 Pa. Dist. Rep. 83.

61. *State v. Gish*, 168 Iowa, 70, 150 N. W. 37, wherein it was said: "Taking the entire legislative act now under consideration, it is manifestly a regulation of the use of motor vehicles and not an attempted prohibition thereof. It ought therefore to be construed consistently with its character in that regard. The gist of the violation, therefore, must be, not the mere use of the motor vehicle by the owner, but the failure of the owner to perform the statutory duties laid upon him as conditions precedent to its use. In order that the owner may be constitutionally precluded from the use of his vehicle, he must himself be found in default in the performance of some statutory duty imposed upon him as a condition precedent to its use. To compel the owner to desist from the use of his vehicle for an indefinite length of time because of the inability of the official machinery of the State to furnish him the number plates, as contemplated by the statute, would, of itself, amount to a very practical penalty, which might operate more seriously upon him than the maximum fine imposed by the statute. If the legislature is without power to impose upon him a direct penalty for the

mere default or failure of another, the statute ought not to be construed so as to impose an indirect penalty upon him under the same circumstances and without any default on his own part. The owner's right to the use of his vehicle after complying with the statutory duties imposed upon him is a substantial property right. It is common knowledge that the daily business of thousands of people in the State is dependent upon the daily use of such vehicles. It is a matter of public notoriety, also, that the machinery provided by the State for the furnishing of number plates has sometimes proved inadequate to meet the demands upon it, and that the Secretary of State, without fault on his own part, has been unable sometimes to furnish number plates to those entitled to them without long delay. The construction of the statute which is contended for by the State would require many thousands of vehicles to stand unused waiting for some belated factory to perform its broken contract with the Secretary of State. These considerations should not be overlooked in ascertaining the legislative intent, because these are conditions which arise naturally out of the practical operation of the law."



is required for the enforcement of the regulations imposed by the statute; the act cannot always be construed solely as a police regulation, but as to the excess received in some States, the statute is considered as a revenue measure,<sup>62</sup> and its validity is determined according to the rules which apply to revenue acts, and not by those rules which apply to police regulations.<sup>63</sup> Under the constitutions of some States, a license fee cannot be imposed for the purpose of raising revenue;<sup>64</sup> and a fee which is unreasonable as a police regulation is uncollectible.<sup>65</sup> The question of what constitutes a reasonable

62. *Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685. See also section 94.

63. *Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685; *City of Muskogee v. Wilkins* (Okla.), 175 Pac. 497. "The Attorney-General contends that, because a police measure will produce a vast amount of revenue that fact cannot affect the validity of the act if the power to pass either a police or a revenue law existed at the time of its passage. That the act was passed, in part as a police measure, there can be small doubt. Its title characterizes it as an act 'to regulate the use and operation of vehicles,' and many of its provisions are regulatory in their nature. That its exactions go far beyond the reasonable limits of a mere police measure we have no doubt. It must be conceded, of course, that the term 'police power' is a very broad and flexible one and that the courts are by no means narrow and 'technical' (as the common expression is) in their definition of that power, but where the legislature has clearly transgressed its authority and has passed a measure for purposes not within the reasonable scope of laws for the preservation of the public safety, health, or comfort, the courts have been compelled so to declare. The necessary expense involved in the regulatory provisions of the Motor Vehicle Act cannot be very great. The small initial appropriations for the extra clerical and

other help to be employed in the State Treasurer's office and by the department of engineering indicate that the legislature anticipated no great outlay in the collection of fees, ascertainment of horse power of motor vehicles, supply of stationery, numbers, and other things necessary in the carrying out of the purely police features of the statute. The repair of public roads is not a police measure, yet it is evident that the bill was passed for the principal purpose of raising revenue for use in the upkeep of such highways." *Ex parte Schuler*, 167 Cal. 232, 139 Pac. 685.

64. *Ex parte Mayes* (Okla.), 167 Pac. 749.

65. *Vernor v. Secretary of State*, 179 Mich. 157, 146 N. W. 338; *State v. Lawrence*, 105 Miss. 58, 61 So. 975. "A license is issued under the police power of the authority which grants it. If the fee required for the license is intended for revenue, its exaction is an exercise of the power of taxation. . . . To be sustained, the act we are here considering must be held to be one for regulation only, and not as a means primarily of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license, and the regulation of the business to which it applies. . . . Anything in excess of an

fee in such States is a matter which depends largely upon legislative discretion,<sup>66</sup> but is, nevertheless, a question of fact depending on the particular circumstances, and if the amount is out of proportion to the expense involved, it will be declared to be a tax.<sup>67</sup> It will be presumed that the amount of a license fee is reasonable, unless the contrary appears upon the face of the law itself or is established by proper evidence.<sup>68</sup> Of course, if the Legislature has power to raise revenue by license taxes, there is no necessity for drawing a fine line of demarcation between police regulations and revenue acts.<sup>69</sup>

In other States, it is thought that, by reason of the injurious effects of motor vehicles to the public highways, an increased license fee which will furnish a fund for the repair and maintenance of the public highways is within the police power of regulation; and its validity is determined according to its status as a police regulation rather than as a revenue act. In the latter case, the State may impose a license which will not only pay the expense of administration and supervision of the law, but will leave a surplus to go into the general fund of the State for the maintenance of highways.<sup>70</sup>

amount which will defray such necessary expense cannot be imposed under the police power, because it then becomes a revenue measure." *Vernor v. Secretary of State*, 179 Mich. 157, 146 N. W. 338.

66. *Vernor v. Secretary of State*, 179 Mich. 157, 146 N. W. 338.

67. *Henderson v. Lockett*, 157 Ky. 366, 163 S. W. 199; *Vernor v. Secretary of State*, 179 Mich. 157, 146 N. W. 338.

68. *Vernor v. Secretary of State*, 179 Mich. 157, 146 N. W. 338.

69. *State v. Ingalls*, 18 Mex. 211, 135 Pac. 1177.

70. *Smith v. Commonwealth*, 175 Ky. 286, 194 S. W. 367; *Saviors v. Smith* (Ohio), 128 N. E. 269; *Atkins v. State Highway Dept.* (Tex. Civ. App.), 201 S. W. 266. Compare *City of Henderson v. Lockett*, 157 Ky. 366, 163 S. W. 199. See also *Kane v. State of New*

*Jersey*, 242 U. S. 160, 37 S. Ct. 30.

"The principal, which it seems is enumerated, is that it is within the police power of the State to exact a license tax in excess of the costs of regulation and supervision, where the subject is one within the police power, and to apply the excess to the remedying of the extraordinary and baleful effects of the exercise of the taxed privilege, as the application of the tax upon the privilege of keeping dogs to paying for their destruction of sheep, and the tax upon the privilege of operating motor vehicles upon the highways to repairing the damages to such highways, which are peculiarly the work of such vehicles, and in excess of that wrought by other vehicles. This line of cases has held that the regulation of the use of the motor vehicles upon the public highways was authorized under the police

**Sec. 106. Constitutionality of regulations — double taxation.**

“Double” taxation is condemned by the courts. Double taxation occurs when the same property is taxed twice by the same government during the same period.<sup>71</sup> But the fact that motor vehicles are subject to an *ad valorem* tax on their value and also subject to a license fee for the operation on the public highways, does not constitute double taxation, for the two are levied on separate things, one on property and the other on a privilege to use the highways.<sup>72</sup>

power, and that a license fee could be exacted in excess of the cost of the registration and supervision of the vehicles, where the funds arising from the license taxes were devoted exclusively to the improvement and repairing of the public highways, and that it was proper to levy a graduated license tax in accordance with the horse power of the vehicle, which would be a tax upon each of them reasonably commensurate with its power of destruction to the highways. This is upheld upon the principle that such a graduated license tax in excess of the necessary cost of registration and supervision of the vehicles is in the nature of a toll exacted of the vehicles for the privilege of the use of the roads, and a tax in proportion to their power of destruction was a just and reasonable basis upon which to levy the tax. The requirement that the motor vehicle should contribute to the upkeep of the public highways in proportion to their power to destroy them, in excess of other vehicles, which are used upon the roads, appeals to the sense of justice and fairness; and hence we conclude that it is within the police power of the State and is a valid exercise of that power to enact a statute such as the one in question, where the

primary purpose is for the regulation and control of motor vehicles, and to impose a license tax upon their use of the public highways, where the tax, after the expenses of the registration and supervision are satisfied, goes exclusively to the upkeep of the highways and to remedy the injuries, which the vehicles have caused, provided the license tax is not an unreasonable one, and the one fixed by the statute does not appear to be unreasonable, when compared with what is exacted in many other States. *Smith v. Commonwealth*, 175 Ky. 286, 194 S. W. 367.

**71.** *Smith v. Commonwealth*, 175 Ky. 286, 194 S. W. 367.

**72.** *Alabama*.—*State v. Strawbridge* (Ala. App.), 76 So. 479; *Hudgens v. State*, 15 Ala. App. 156, 72 So. 605.

*Arkansas*.—*Pine Bluff Transfer Co. v. Nichol*, 140 Ark. 320, 215 S. W. 579.

*California*.—*Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685.

*District of Columbia*.—*Mark v. District of Columbia*, 37 App. D. C. 563, 37 L. R. A. (N. S.) 440.

*Florida*.—*Jackson v. Neff*, 64 Fla. 326, 60 So. 350.

*Illinois*.—*Harder's Storage & Van Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245.

### Sec. 107. Constitutionality of regulations — exemption from other taxation.

As a general proposition the State has plenary power in deciding what property shall be exempt from taxation.<sup>73</sup> Thus, the Legislature may, as a general proposition, enact, that, when the owner has paid the required license fee for the registration of his automobile, he shall be exempt from further taxation on the machine.<sup>74</sup> Such a statute will bar other taxation of motor vehicles by municipal corporations, but it will not necessarily preclude a municipality from imposing a license fee on hackmen.<sup>75</sup> In this connection it is also decided

*Kentucky*.—"Double taxation, however, only arises when the same property is taxed twice, when it ought to have been taxed but once, and the second tax must be imposed upon the same property by the same authority during the same taxing period. . . . The license tax, however, authorized by the statute in question is not a tax upon the property in the motor vehicle, but it is a tax upon the privilege of using the vehicle upon the public roads. It has been continuously held, both in this State and elsewhere, that a license tax for the exercise of a privilege is not double taxation, although the property, which is used in enjoying the privileges, bears an ad valorem tax, and there is no constitutional objection to the levying of both." *Smith v. Commonwealth*, 175 Ky. 286, 194 S. W. 367.

*New Mexico*.—*State v. Ingalls*, 18 N. Mex. 211, 135 Pac. 1177.

*Tennessee*.—*Wilson v. State*, 224 S. W. 168.

See also section 94.

73. "It is within the power of the legislature to exempt from other forms of taxation property which pays a specific tax, and this is true whether the specific tax is levied upon the property itself or upon the right to use the property in a certain way."

*Jasnowski v. Board of Assessors of City of Detroit*, 191 Mich. 287, 157 N. W. 891. See also sections 62, 63.

74. *Achenbach v. Kincaid*, 25 Idaho, 768, 140 Pac. 529; *Ex parte Kessler*, 26 Idaho, 764, 146 Pac. 113; *Jasnowski v. Board of Assessors of City of Detroit*, 191 Mich. 287, 157 N. W. 891; *State ex rel. City of Fargo v. Wetz* (N. Dak.), 168 N. W. 835, 5 A. L. R. 731; *Ex parte Shaw* (Okla.), 157 Pac. 900. See also *Matter of Bozeman*, 7 Ala. App. 151, 61 So. 604, 63 So. 201. "It may well be assumed that the legislature gave heed to the growing demand among the people of the State for the improved highways and concluded that the motor vehicles, which were largely responsible for that demand, should bear the expense of the betterments, and accordingly imposed this form of contribution. The question as to whether this tax should be in lieu of, or in addition to, all other forms of taxation, was one which appealed to the discretion of the legislature. Having exercised that discretion, it is not for the courts to declare that it did not execute it wisely or justly." *Jasnowski v. Board of Assessors of City of Detroit*, 191 Mich. 287, 157 N. W. 891.

75. *State v. Jarvis*, 89 Vt. 239, 95 Atl. 541. See also section 139.

in *California* that under a constitutional provision taxing property used in the operation of their business by public service corporations and providing that "such taxes shall be in lieu of all other taxes and licenses, State, county and municipal," such a corporation is exempt from the payment of a license tax upon motor vehicles used by it in the operation of its business.<sup>76</sup>

**Sec. 108. Constitutionality of regulations — taxation not based on value of property.**

Constitutional provisions in some States require that taxes shall be levied on a uniform and equal rate of assessment on all property in the State according to its money value. Of course, license fees for the operation of motor vehicles are not levied on such machines according to their money value, but are levied according to their use or their horse power or some other system which differentiates machines of different sizes and classes. But so long as the courts can say that the license fee is not a tax — and this is the view taken unless the fee is so large that it seems designed to afford revenue as such<sup>77</sup> — the statute imposing it is enforceable.<sup>78</sup> Constitutional provisions of that nature are construed as applicable only to property taxes, and not to occupation, privilege, or license taxes.<sup>79</sup> But, when the tax is raised for revenue, not

76. *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 143 Pac. 700.

77. Section 105.

78. *Idaho*—*Ex parte Kessler*, 26 Idaho, 764, 146 Pac. 113.

*Mississippi*.—*State v. Lawrence*, 108 Miss. 291, 66 So. 745. "It is also argued that the act is void because there is a lack of uniformity and equality according to value in the property which is sought to be taxed. As we have already said, it is not the property taxed, but the privilege of using the property, motor vehicles and cycles, on the public roads which is taxed. The equality and uniformity clause of the Constitution applies only to ad valorem

taxes for general purposes, and has no relation to privilege taxes." *State v. Lawrence*, 108 Miss. 291, 66 So. 745.

*New Mexico*.—*State v. Ingalls*, 18 N. Mex. 211, 135 Pac. 1177.

*North Dakota*.—*State ex rel. City of Fargo v. Wetz*, 168 N. W. 835, 5 A. L. R. 731.

*Oklahoma*.—*Ex parte Shaw*, 157 Pac. 900.

*Texas*.—*Atkins v. State Highway Dept.* (Civ. App.), 201 S. W. 226.

*Washington*.—*State v. Collins*, 94 Wash. 310, 162 Pac. 556.

79. *State v. Collins*, 94 Wash. 310, 162 Pac. 556.

for regulation, an entirely different constitutional situation is presented.<sup>80</sup>

### Sec. 109. Discrimination — in general.

One of the objections frequently made to automobile legislation is that it is discriminatory and imposes burdens on the automobile which are not imposed on travelers in general, or that it imposes greater burdens on some automobilists than on others. The Federal Constitution prohibits the States to enact laws which deny to persons the equal protection of the State laws. This constitutional provision makes it illegal for any State to arbitrarily pick out one class of persons and legislate against them concerning any subject. But such discrimination must be arbitrary, not based upon any logical or reasonable cause for distinction in order to be illegal. Legislation affecting merely one class, so long as those in the same class are affected alike, is not objectionable, if the classification is founded upon a reasonable basis.<sup>81</sup> Exact equality in the operation of the regulation or in the classification cannot be attained, for that is impossible; but the classification is proper if it is made on a reasonable basis.<sup>82</sup> The classification need not be either logically appropriate or scientifically accurate. It is enough if it acts impartially within the class.<sup>83</sup> It is clear that motor vehicles may be put into a distinct class and regulations adopted which will apply to no other class of conveyances.<sup>84</sup>

### Sec. 110. Discrimination — between motor vehicles and other conveyances.

A motor vehicle is unlike any other means of transportation used on public highways, and hence there is no constitutional objection, so far as the claim of special or class legislation is

80. *Ex parte Mayes* (Okla.), 167 Pac. 749.

81. *Hudgens v. State*, 15 Ala. App. 156, 72 So. 605; *Helena v. Dunlap*, 102 Ark. 131, 143 S. W. 138; *Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627; *Kellaher v. Portland*, 57 Ore. 575, 112 Pac. 1076.

82. *Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627; *Kellaher v. Portland*, 57 Ore. 575, 112 Pac. 1076.

83. *Mark v. District of Columbia*, 37 App. D. C. 563, 37 L. R. A. (N. S.) 440.

84. Section 110.

concerned, in making a registration system or other regulations applicable to such machines and not to other means of travel.<sup>85</sup> The automobile is in a class by itself, and the users of such machines are in a class by themselves; and legislation in recognition of this condition is based upon a solid, easily recognized distinction.<sup>86</sup> Automobiles may be excluded from a scheme of municipal taxation in the exercise of the power of a municipal corporation to classify vehicles for the purpose of a vehicle tax ordinance.<sup>87</sup> But it has been held to be an unreasonable discrimination to impose a license fee on horse-drawn delivery wagons and trucks without imposing a fee on those operated by their own motive power.<sup>88</sup>

### Sec. 111. Discrimination — different sizes of machines.

There is a logical connection between the weight and power of different motor vehicles and the damage to the highways or

**85. Arkansas.**—*Helena v. Dunlap*, 102 Ark. 131, 136, 143 S. W. 138.

**California.**—*Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685.

**Illinois.**—*Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 3 N. Cas. 487, 108 Am. St. Rep. 196; *Westfalls, etc., Express Co. v. City of Chicago*, 280 Ill. 318, 117 N. E. 439; *Slade v. City of Chicago*, 1 Ill. Cir. Ct. Rep. 520.

**Massachusetts.**—*Commonwealth v. Boyd*, 188 Mass. 79, 74 N. E. 255.

**Michigan.**—*People v. Schneider*, 139 Mich. 673, 103 N. W. 173, 12 Det. L. N. 32, 69 L. R. A. 345, 5 Ann. Cas. 790.

**Mississippi.**—*State v. Lawrence*, 108 Miss. 291, 66 So. 745.

**New Jersey.**—*Unwin v. State*, 73 N. J. L. 529, 64 Atl. 163, affirmed *State v. Unwin*, 75 N. J. L. 500, 68 Atl. 110.

**New Mexico.**—*State v. Ingalls*, 18 N. Mex. 211, 135 Pac. 1177.

**New York.**—*People v. MacWilliams*, 91 App. Div. 176, 86 N. Y. Suppl. 357.

**Ohio.**—*Allen v. Smith*, 84 Oh. St. 283, 95 N. E. 829, Ann. Cas. 1912 C.

611.

**Pennsylvania.**—*Commonwealth v. Densomer*, 13 Pa. Dist. Rep. 639.

**South Dakota.**—*In re Hoffert*, 34 S. Dak. 271, 148 N. W. 20, 50 L. R. A. (N. S.) 949.

The Missouri law of 1903, p. 162, relating to the operation and speed of automobiles on the highway of the State, fixing the amount of license, and prescribing a penalty for violating the same, is not unconstitutional as class legislation, in that it discriminates against certain users of the highway. *State v. Swagerty*, 203 Mo. 517, 102 S. W. 483, 10 L. R. A. (N. S.) 601, 11 Ann. Cas. 725.

**86. Westfalls, etc., Express Co. v. City of Chicago, 280 Ill. 318, 117 N. E. 439; *Slade v. City of Chicago*, 1 Ill. Cir. Ct. Rep. 520; *Allen v. Smith*, 84 Ohio St. 283, 95 N. E. 829, Ann. Cas. 1912 C. 611, construing Act May 11, 1908, 99 Ohio Laws, 538.**

**87. Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. 1027.**

**88. Kellaher v. Portland, 57 Oreg. 575, 112 Pac. 1076.**

to other travelers which may be occasioned through their operation.<sup>89</sup> Hence, it is not an unjust discrimination to grade the license fees for motor vehicles according to the horse power of the machines; the greater the horse power, the larger the fee.<sup>90</sup> So, too, an excise tax on automobiles in the District of Columbia, graduated according to the seating capacity of the machines, has been sustained.<sup>91</sup>

### Sec. 112. Discrimination — vehicles used for different purposes.

The different uses to which motor vehicles may be put, justifies a classification of the machines along such lines, and the imposition of larger fees on vehicles used for some purposes than against those used for other purposes.<sup>92</sup> Hence the license fee for a business truck may be different from those imposed on other motor vehicles.<sup>93</sup> Or tractors may be exempted

**89.** *Ex parte* Schuler, 167 Cal. 282, 139 Pac. 685. See also, *Pine Bluff Transfer Co. v. Nichol*, 140 Ark. 320, 215 S. W. 579.

**90.** *United States*.—*Hendrick v. State of Maryland*, 235 U. S. 610, 35 S. Ct. 140; *Kane v. State of New Jersey*, 242 U. S. 160, 37 S. Ct. 30.

*Alabama*.—See *Kenamer v. State*, 150 Ala. 74, 43 So. 482; *Bozeman v. State*, 7 Ala. App. 151, 61 So. 604.

*California*.—*Ex parte* Schuler, 167 Cal. 282, 139 Pac. 685.

*Idaho*.—*In re Kessler*, 26 Idaho, 764, 146 Pac. 113.

*Kentucky*.—*City of Henderson v. Lockett*, 157 Ky. 366, 163 S. W. 199; *Smith v. Commonwealth*, 175 Ky. 286, 194 S. W. 367.

*Missouri*.—*State ex rel. McClung v. Becker* (Mo.), 233 S. W. 54.

*New Jersey*.—*Kane v. State*, 81 N. J. L. 594, 80 Atl. 453, Ann. Cas. 1912 D. 237; *Cleary v. Johnston*, 79 N. J. L. 49, 74 Atl. 538.

*South Carolina*.—*Lillard v. Melton*, 103 S. Car. 10, 87 S. E. 421. "The apportionment on a basis of horse

power has a direct and natural relation to the privilege granted, the use of the highway, and since the license relates to all persons in a class, and operates uniformly upon all therein, there is no unlawful discrimination." *Lillard v. Melton*, 103 S. Car. 10, 87 S. E. 421.

*Texas*.—*Atkins v. State Highway Dept.* (Civ. App.), 201 S. W. 226.

**91.** *Mark v. District of Columbia*, 37 App. D. C. 563, 37 L. R. A. (N. S.) 440. See also *State v. Amos*, 76 Fla. 26, 79 So. 433, as to the license fees based on seating capacity.

**92.** *Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627; *In re Hofert*, 34 S. D. 271, 148 N. W. 20, 52 L. R. A. (N. S.) 949.

**93.** *Pine Bluff Transfer Co. v. Nichol*, 140 Ark. 320, 215 S. W. 579; *Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627. A license fee charged against vehicles used for pleasure may be sustained although no charge is made against commercial vehicles. *Ogilvie v. Harley*, 141 Tenn. 392, 210 S. W. 645.



while other motor vehicles and trailers are taxed.<sup>94</sup> And a larger fee may be imposed on a motor vehicle used for hire than is required of the owner of a machine used without charge.<sup>95</sup> So, too, a municipality may be exempted from the payment of a license fee for a motor vehicle used by the police or fire department, but required to pay a fee for one used for other purposes; the classification in this case being based on the distinction which exists between machines used in the governmental powers of the municipality and those used in its proprietary powers.<sup>96</sup>

### Sec. 113. Discrimination — dealers in different class.

A motor vehicle law is not discriminatory because it places dealers and manufacturers of vehicles in a separate class and imposes upon them a license fee which is more or less than is charged against other owners of such machines.<sup>97</sup> Thus, a system of license fees may exact from dealers a fee of \$50 if they operate not more than five automobiles and \$10 for every motor vehicle in excess of five so operated.<sup>98</sup> So, too, such a statute may levy a tax on individual owners of motor vehicles of twenty-five cents per horse power and twenty-five cents per hundred weight and then levy a flat rate of \$10 per car on manufacturers for cars not used for the private purposes of manufacturers.<sup>99</sup> And a registration system is not unconstitutional as lacking uniformity, because it provides that it shall not apply to motor vehicles which manufacturers and vendors may have in stock for sale and not used for private use or hire.<sup>1</sup>

94. *Saviers v. Smith* (Ohio), 128 N. E. 269.

95. *Jackson v. Neff*, 64 Fla. 326, 60 So. 350; *Heartt v. Village of Downer's Grove*, 278 Ill. 92, 115 N. E. 869; *State v. Ferry Line Auto Bus Co.*, 99 Wash. 64, 168 Pac. 893. See chapter IX as to licensing of vehicles used for hire.

96. *State v. Collins*, 94 Wash. 310, 162 Pac. 556.

97. "No doubt the legislature took into consideration the fact that motor cars in the possession of dealers are

usually kept for sale and are not used in the ordinary way, but merely for purposes of 'demonstration' and exhibition to intending purchasers. Dealers are therefore placed in a class by themselves." *Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685.

98. *Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685.

99. *Jasnowski v. Board of Assessors of City of Detroit*, 191 Mich. 287, 157 N. W. 891.

1. *People v. MacWilliams*, 91 N. Y.

**Sec. 114. Discrimination — non-residents.**

Regulations relative to the registration and licensing of motor vehicles generally contain exceptions in favor of non-residents. Thus, the Legislature frequently exempts non-residents of the State from the payment of license fees when their owners have complied with the registration laws of the State of their residence. And municipal corporations sometimes enact licensing regulations which are applicable to owners residing within the municipality, but not those living outside of the municipal limits. The validity of an exception of this nature is universally sustained.<sup>2</sup> On the contrary, a city ordinance requiring a license fee from all users of the city streets has been held unreasonable as to the vehicles of

App. Div. 176, 86 N. Y. Suppl. 357; Commonwealth v. Densmore, 29 Pa. Co. Ct. 219.

2. *Arkansas*.—Fort Smith v. Scruggs, 70 Ark. 549, 69 S. W. 679, 91 Am. St. Rep. 100, 58 L. R. A. 921. "But it is said that, conceding that the legislature had the power to permit cities to levy a toll for the use of the streets, it should be imposed equally upon all who use the streets, and that this act is void for the reason that it discriminates in favor of those who dwell outside of the city, and permits the tax to be levied upon residents only. It is doubtless true that the legislature could not arbitrarily select certain citizens upon whom to impose the tax, while exempting others in like situation. But the rule of equality only requires that the tax shall be collected impartially of all persons in similar circumstances; and this statute applies equally to all persons of the class taxed. As a class, residents of the city use the streets more, and are more benefited by having them kept in good repair, than those who do not live in the city. It is true that non-residents of the city also use the streets with their wagons and other vehicles, and it may be true that certain of them

use the streets as much or more than certain of the residents of the city, but, as a class, they do not use the streets as much as residents of the city, and this furnishes a reasonable basis for the distinction made in the act between the two classes. The requirement of the statute that the tax must be imposed on residents of the city only is but an adoption by the legislature of the common policy of making each community keep up its own highways. This does not discriminate unjustly in favor of those who live beyond the city limits, for they have to keep other highways which the people of the city may in turn use free of charge. For this reason we think that it was within the discretionary powers of the legislature to make this distinction, and that it does not invalidate the act. After a full consideration of the questions presented we are of the opinion that the enactment of this statute was a valid exercise of legislative power." Fort Smith v. Scruggs, 70 Ark. 549, 69 S. W. 679, 91 Am. St. Rep. 100, 58 L. R. A. 921.

*California*.—*Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685.

*Illinois*.—*Heartt v. Village of Dower's Grove*, 278 Ill. 92, 115 N. E. 869.

non-residents.<sup>3</sup> But it is within the power of a State to impose a license fee and other regulations on the machine of a non-resident while it is operated within the State.<sup>4</sup> The exemption generally continues for but a few weeks or months after the vehicle comes within the locality, and, if it remains longer than the specified time, it must be registered in the same manner as is required of the vehicles of residents.<sup>5</sup> In some jurisdictions, a motorist who continues to operate his machine after the expiration of the period of exemption, becomes a trespasser upon the highways.<sup>6</sup> Where the statute provides that automobiles of non-residents may be operated upon the highways for ten days "continuously," at the expiration of which time they shall be subject to registration, it was held that where there was not a continuous operation of the vehicle for ten days within the State, it was not subject to registration, although it had been operated within the State more than ten days in the aggregate.<sup>7</sup>

### Sec. 115. Discrimination — non-resident exemption based on reciprocity.

Several States have considered legislation providing for the exemption of non-resident automobilists registered in their

*Indiana*.—Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. 1027.

*Kentucky*.—City of Newport v. Merkel Brothers Co., 156 Ky. 580, 161 S. W. 549.

*Minnesota*.—See Park v. City of Duluth, 134 Minn. 296, 159 N. W. 627.

*Mississippi*.—State v. Lawrence, 108 Miss. 291, 66 So. 745.

*South Carolina*.—Lillard v. Melton, 103 S. Car. 10, 87 S. E. 421. "The objection that there is an unjust discrimination in the provision which imposes upon resident vehicles a license, while those of other counties and States may temporarily use the highways without incurring liability for the payment thereof, is wholly without merit. The right to tax the residents of a municipality for the maintenance of roads and streets, without the imposi-

tion of such a tax upon non-residents who use such highways temporarily, has never been questioned or denied in any jurisdiction of which we are aware. On the contrary, the right to impose such a license or tax is generally recognized." Lillard v. Melton, 103 S. Car. 10, 87 S. E. 421.

3. Pegg v. City of Columbus, 80 Ohio St. 367, 89 N. E. 14.

4. Kane v. State of New Jersey, 242 U. S. 160, 37 S. Ct. 30.

5. *Ex parte* Schuler, 167 Cal. 232, 139 Pac. 685; Burns v. Bay State Ry. Co., 77 N. H. 112, 88 Atl. 710.

6. Dudley v. Northampton St. Ry. Co., 202 Mass. 443, 89 N. E. 25, 23 L. R. A. (N. S.) 561n.

7. Burns v. Bay State Ry. Co., 77 N. H. 112, 88 Atl. 710.

home States, provided these latter States grant the same privilege in return. Such legislation would seem to be unconstitutional, because the reciprocity condition conflicts directly with that clause of the Federal Constitution which prohibits a State to discriminate against non-residents merely because their home State does not reciprocate the privileges granted. The State has the right to require all non-resident automobilists to take out a local automobile license, but it cannot pick out and discriminate against motorists whose home State does not grant exemption privileges to non-residents.

The theory of this legislation seems to be founded on the fact that a State may regulate the right of a foreign corporation to do business within its jurisdiction, and may compel it to take out a local license. Retaliatory legislation depriving corporations of another State of the right to do business unless a similar privilege is granted by that other State has been common in this country, and does not conflict with the Constitution, since a corporation has no right to migrate into another State unless permission is given it to do so. Consequently, the State can entirely prohibit the corporation from entering its jurisdiction, which includes the right of prohibiting entry into its jurisdiction under certain conditions. Automobilists, however, are not corporations. Every citizen of this country has the inviolable right to travel into and through any State he wishes as long as he complies with the laws governing the local inhabitants. Any law discriminating against non-residents under certain conditions, depending upon the action of the home State of these non-residents, is thought to be null and void.<sup>8</sup>

8. A non-resident who asserts that such a statute discriminates against residents of the particular jurisdiction within which he resides must show a compliance with the laws of his domicile in this respect, where the statute

complained of requires a compliance by non-residents with the laws of their State. *Hendrick v. Maryland*, 235 U. S. 610, 35 S. Ct. 140. See also, *Kane v. State of New Jersey*, 242 U. S. 160, 37 S. Ct. 30.

**Sec. 116. Registration by particular classes of owners — corporations and partnerships.**

Under an automobile law which requires all automobiles and motorcycles to be registered by the owner or persons in control, and prohibiting any person to operate such a vehicle until he shall first have obtained a license, which he must keep with him when operating the machine, it has been held that a corporation or partnership owning a vehicle covered by the statute, must register the automobile in the corporate or firm name, but the license is not to be issued to the corporation or firm as such, it being personal to the operator.<sup>9</sup> Where an automobile is owned by two partners, both of whom are licensed, and the machine carries the number of one of the licensed partners, and both are occupants of the machine, the operation of the machine by the partner whose license is not carried may be proper.<sup>10</sup> Under the *Massachusetts* statute for the registration of motor vehicles, upon the change in personnel of a partnership, an equivalent change must be made in the registration of its machine.<sup>11</sup> And, under such statute, if it is jointly owned, it should be registered in the names of all of the joint owners.<sup>12</sup>

**Sec. 117. Registration by particular classes of owners — registration in trade name.**

Inasmuch as a corporation, firm or individual may adopt a trade name under which business may be transacted, a registration in the name so adopted may be proper, provided, of course, a fictitious name cannot be adopted by an individual, under the guise of a trade name, for the purpose of concealing his identity. So a plaintiff who has thus registered his automobile may recover for injuries due to the negligence of another and his right to recover will not be defeated by the fact that the plaintiff has failed to comply with a statute requiring a certificate of certain facts to be filed by such a trader. the

9. *Emerson Troy Granite Co. v. Pearson*, 74 N. H. 22, 64 Atl. 582.

10. *Yeager v. Winston Motor Carriage Co.*, 53 Pa. Super. Ct. 202.

11. *Rolli v. Converse*, 227 Mass. 162, 116 N. E. 507.

12. *Shufelt v. McCartin* (Mass.), 126 N. E. 362.

statute being intended solely for the information and protection of creditors with whom he might contract.<sup>13</sup>

**Sec. 118. Registration by particular classes of owners — dealers.**

Regulations may be prescribed for the registration of dealers which are not applicable to other owners of motor vehicles without creating an illegal discrimination.<sup>14</sup> Where a statute provides for a registration by dealers, it must be made by the one actually contemplated by the statute.<sup>15</sup> So, under a statute containing a provision for the issuance of a license to such persons and defining a dealer as "every person who is engaged in the business of buying, selling or exchanging motor vehicles, on commission or otherwise and every person who lets for hire two or more motor vehicles," it was held that registration in the name of one carrying on a garage business as agent for an owner was not sufficient; but that registration in the name of the principal, the actual owner, was necessary.<sup>16</sup> Under a motor vehicle law providing that "Every person, firm, association or corporation manufacturing or dealing in motor vehicles may, instead of registering each motor vehicle so manufactured or dealt in, make a verified application for a general distinctive number for all the motor vehicles owned or controlled by such manufacturer or dealer. . . . Such number plate or duplicate thereof shall be displayed by every motor vehicle of such manufacturer or dealer when the same is operated or driven on the public highways. . . . Nothing in this subdivision shall be construed to apply to a motor vehicle operated by a manufacturer or dealer for private use or for hire," it was held that "personal use" included not incidental to the business of manufacturing or dealing in motor vehicles and that a dealer in transporting merchandise from the business place of the firm to one of its customers violated the law when he did not have a separate registry number issued for that particular

13. *Crompton v. Williams*, 216 Mass. 184, 103 N. E. 298.

14. Section 113.

15. See *Skene v. Graham*, 116 Me. 202, 100 Atl. 938.

16. *Gould v. Elder*, 219 Mass. 396, 107 N. E. 59.

vehicle.<sup>17</sup> And, under a statute providing that every automobile dealer, liveryman, or manufacturer, instead of registering each car owned or controlled by him, might apply for and obtain a general distinguishing number or mark under which every motor vehicle owned or controlled by him, until sold or loaned, for a period of more than five successive days, should be regarded as registered, it was held, that, although the statute was not designed to allow others, under cover of the dealer's general number or distinguishing mark, to operate cars belonging to or controlled by themselves, yet an automobile, while in the exclusive possession and control of a dealer for sale, might be loaned by him to its owner for an afternoon's use without impairing the validity of its registration under the dealer's general number or mark, provided the arrangement between them was entered into in good faith and not as a mere cover to enable the owner to operate his own car and escape the payment of the registration fee.<sup>18</sup> On the other hand it has been held that a machine covered by a Dealer's license is operating without a license when it is used for pleasure purposes.<sup>19</sup> A statute as to dealers may apply to dealers in used machines.<sup>20</sup>

17. *People ex rel. Howe v. Hanna*, 136 N. Y. Suppl. 162, 26 N. Y. Cr. R. 324. Magistrate Freschi said in this case: "Each and every car operated by a manufacturer or dealer for his own personal use and pleasure, in no way connected with or relating to the business of manufacturing or dealing in motor vehicles, must have a separate and distinctive number for each motor vehicle so owned and controlled by him. A general distinctive number in all other cases is proper. The intent of the law is plain. A manufacturer or dealer, who permits a car to be operated for a private use or for hire without having a separate number, aside from the distinctive manufacturer's number, violates the law. Personal use includes anything and everything not incidental to the business of manufacturing or dealing in

motor vehicles. The defendant in my opinion was engaged in using and operating the motor vehicle in question for the private business and use of Healy & Co., in that he did transport merchandise from the business place of said firm to one of their customers, and to that extent his acts were in the nature of an express or delivery business. The fact that no charge was made for such delivery does not, in my opinion, alter the case."

18. *Shaw v. Connecticut Co.*, 86 Conn. 409, 85 Atl. 536. See also, *Brown v. Chevrolet Motor Co.*, 39 Cal. App. 738, 179 Pac. 697; *Koonovsky v. Oullette*, 226 Mass. 474, 116 N. E. 243.

19. *Cobb v. Cumberland County Power & Light Co.*, 117 Me. 455, 104 Atl. 844.

20. *Matter of Retail Dealers License* (Iowa), 183 N. W. 440.

### Sec. 119. Registration by particular classes of owners — by purchaser of machine.

Upon the sale of a motor vehicle, the statutes require that it be licensed in the name of the purchaser. In some States it has been provided that unless the vehicle is registered according to the statute within ten days after the sale, the sale is invalid. But, the failure of the purchaser to procure the required registration does not make the sale void *ab initio*, for the contract is valid when made. The effect of the statute in such a case is to attach to every sale a contingent condition subsequent, under which the sale may become abortive on failure to comply with the statutory requirements with reference to registration. It has been held that the seller can recover the machine as well as the use of it by the purchaser, but that he cannot recover on a note given for part of the purchase price.<sup>21</sup> Inasmuch as the registration laws merely afford to the owner of a motor vehicle a license, and not a contract,<sup>22</sup> the right to operate a machine is a personal right and is not transferable. Hence, upon the sale of a machine the purchaser must generally have it registered in his name.<sup>23</sup> Where a machine is sold under a contract of conditional sale with a reservation of ownership until complete payment is made, it is held that, under a statute requiring the registration to be in the name of the "owner," it may be registered in the name of the conditional purchaser.<sup>24</sup> The word "owner" may be broad enough to include, not only the persons in whom the legal title is vested, but also bailees, mortgagees in possession and vendees under conditional contracts of sale who have acquired a special property which confers ownership as between them and the general public.<sup>25</sup> A purchaser may be required to procure registration in his name, although he is a dealer and has a dealer's license.<sup>26</sup>

21. Swank v. Moison, 85 Oreg. 662, 166 Pac. 962.

22. Section 93.

23. Foshee v. State, 15 Ala. App. 113, 72 So. 685.

24. Brown v. New Haven Taxicab Co., 92 Conn. 252, 102 Atl. 573; Downey v. Bay State St. Ry. Co., 225

Mass. 281, 114 N. E. 207; Hurnanen v. Nicksa, 228 Mass. 346, 117 N. E. 325.

25. Downey v. Bay State Street Ry., 225 Mass. 281, 114 N. E. 207.

26. Briedwell v. Henderson (Oreg.), 195 Pac. 575.



**Sec. 120. Registration by particular classes of owners — issuance of blank licenses to automobile organization.**

State highway commissioners are not authorized to issue automobile licenses in blank to automobile organizations who desire to pay for them and to issue them to persons entitled to receive them from time to time, for the power to issue licenses cannot be delegated to such organizations.<sup>27</sup>

**Sec. 121. Registration by particular classes of owners — death of owner.**

Where the owner of a machine dies after making an application for a license and before the license goes into effect, the license will not inure to the benefit of his representatives or family.<sup>28</sup>

**Sec. 122. Disposition of license moneys.**

Considerable difficulty has been experienced as to the disposition which shall be made of license fees collected under a motor vehicle registration statute. Ordinarily such funds may be used to defray the expenses of the enforcement of the law, and the balance, if any, may be placed in a general fund for the care and maintenance of the highways.<sup>29</sup> Or the fund may be divided between the State and local divisions.<sup>30</sup> Or the State may authorize municipalities to collect license fees within the municipality and to place them in a municipal highway fund for the care of the streets.<sup>31</sup> Provisions of the Constitution may, however, interfere with the discretion of the Legislature in this matter. Thus, a proposed distribution of

27. Opinion of Atty. Gen'l, 35 Pa. Co. Ct. 512.

28. Fairbanks v. Kemp, 226 Mass. 75, 115 N. E. 240.

29. Florida.—State *ex rel.* Lunig v. Johnson, 71 Fla. 363, 72 So. 477.

Illinois.—People v. Sargent, 254 Ill. 514, 98 N. E. 959.

Michigan.—Janowski v. Board of Assessors of City of Detroit, 191 Mich. 287, 157 N. W. 891.

Mississippi.—State v. Lawrence, 108 Miss. 291, 66 So. 745.

Missouri.—Gasconade County v. Gordon, 241 Mo. 569, 145 S. W. 1160.

Pennsylvania.—Commonwealth *ex rel.* Bell v. Powell, 249 Pa. St. 144, 94 Atl. 746.

30. Matter of Bozeman, 7 Ala. App. 151, 61 So. 604, 63 So. 201.

31. Harder's Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245.

a part of the moneys among the counties of the State is illegal, when there is a constitutional provision forbidding the Legislature from imposing taxes on the inhabitants of counties for county purposes.<sup>32</sup> But the fact that the larger part of the license fees are collected within the cities of the State and that the larger portion of the fees is to be spent in the care of rural highways, does not render the distribution unlawful.<sup>33</sup> A constitutional provision forbidding the enactment of a law permitting the payments of licenses to the State and relieving the party making it from the payment of all other license fees, is not violated by a statute imposing a license fee on motor vehicles and exempting them from other license taxes, where the statute expressly provides for the apportionment of the fees between the State and municipalities.<sup>34</sup> The circumstance that the proposed distribution of the licensee moneys is unconstitutional will not necessarily condemn the entire motor vehicle system of registration.<sup>35</sup>

### **Sec. 123. Vehicles to which regulations are applicable.**

Modern motor vehicle statutes generally specify with particularity the vehicles to which they are applicable. But, before the enactment of such exact statutes, some difficulties of construction were presented to the courts. An act empowering certain cities to regulate and license "all cars, wagons, drays, coaches, omnibuses, and every description of carriages," has been construed as authorizing the imposition of license requirements on automobiles, although such vehicles were unknown at the time of the passage of the statute.<sup>36</sup> But, on the contrary, it has been held that a statute imposing a tax on the transportation of "hacks, cabs, omnibuses, and other vehicles for the transportation of passengers for hire" did not include an electric automobile where such was not

32. *Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685.

33. *Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685; *Jasowski v. Board of Assessors of City of Detroit*, 191 Mich. 287, 157 N. W. 891.

34. *Matter of Bozeman*, 7 Ala. App. 151, 61 So. 604, 63 So. 201.

35. *Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685; *People v. Sargent*, 254 Ill. 514, 98 N. E. 959.

36. *Commonwealth v. Hawkins*, 14 Pa. Dist. Rep. 592.

known or in use at the time the act was passed.<sup>37</sup> A buggy, carriage or automobile, when in use upon public streets of a city, whether used for pleasure or for hire, if persons are carried therein, is in use for "carrying a load" within the meaning of a statute.<sup>38</sup> A law requiring the licensing of operators of automobiles, and defining automobiles as all vehicles propelled by other than muscular power, except railroads and railway cars, and motor vehicles running only upon rails or tracks, and road rollers, has been held to include a road locomotive or traction engine used to draw cars.<sup>39</sup> An act for the registration of any "automobile, locomobile, or other vehicle or conveyance of like character, propelled by steam, gas, gasolene, electricity, or any power other than muscular power," requires the registration of motorcycles.<sup>40</sup> One engaged as a contractor in carrying mail for the United States, may be required to procure a license for his vehicle.<sup>41</sup>

#### **Sec. 124. Display of number plate.**

For the purpose of identifying motor vehicles, a registration system may require the owner of an automobile to carry a number plate on the machine.<sup>42</sup> And the State, when enacting a system, may forbid municipalities from requiring other number plates than the one issued by the State.<sup>43</sup> But a

37. *Washington Elec. Vehicle Transp. Co. v. District of Columbia*, 19 App. Cas. (D. C.), 462.

38. *Harder v. Chicago*, 233 Ill. 294, 85 N. E. 255.

39. *Emerson Troy Granite Co. v. Pearson*, 74 N. H. 22, 64 Atl. 582.

40. *Knight v. Savannah Elec. Co.*, 20 Ga. App. 719, 93 S. E. 17.

41. *State v. Wiles* (Wash.), 199 Pac. 749.

42. *Shade v. City of Chicago*, 1 Ill. Cir. Ct. Rep. 520; *Commonwealth v. Boyd*, 188 Mass. 79, 74 N. E. 255.

43. *City of Chicago v. Francis*, 262 Ill. 331, 104 N. E. 662, wherein it was said: "With the extended use of motor vehicles and the long distances traveled by them in short periods of

time, hence the urgent need of a general law which would apply to the whole State, so that laws concerning motor vehicles being propelled about the State should not be left to the ordinances of each individual village or city in the State. The latter course would lead to confusion and in some cases to injustice. Almost any owner of a motor vehicle or motorcycle will frequently pass through several cities or villages in the course of a few hours. If the city of Chicago can compel the owner of an automobile to affix the tag of that municipality, every other city and village in the State can by ordinance do likewise. The legislature evidently had this in mind, as well as other matters which

statute regulating the licensing, operating, etc., of motor vehicles, and providing *inter alia* that not more than one State license number shall be carried upon the front or back of the vehicle, and that a "license number obtained in any other place or State shall be removed from said vehicle while the vehicle is being used within this commonwealth," was held not to conflict with nor supersede an ordinance which provided for the licensing, regulation, and operation of motor vehicles within a municipality, for both the act and the ordinance could stand together, and, for motor vehicles operated within the said city, both State and city licenses must be obtained and both license tags displayed, a municipality not being within the meaning of the word "place" as used in the act.<sup>44</sup> Under a statute forbidding any person to operate or drive a motor vehicle on the public highways "unless such vehicle shall have a distinctive number assigned to it by the secretary of state and a number plate issued by the secretary of state with a number corresponding to that of the certificate of registration conspicuously displayed" on the front and rear of such vehicle, it is held that one who drives a motor vehicle without having such distinctive number thus displayed is guilty of a violation of law without regard to the question of

would lead to confusion unless corrected, when the law of 1911 was passed. The exception, from the law, of motor trucks and motor-driven commercial vehicles, which would necessarily be used locally, emphasizes the intent of the law in regard to motor vehicles like the one used by plaintiff in error in this case. It is undoubtedly necessary for municipalities to establish and enforce traffic regulations, and the reasonableness of municipal ordinances enforcing such regulations would depend upon the circumstances and conditions in such municipalities. Under the law a municipality may make and enforce reasonable traffic and other regulations, except as to the rate of speed, not inconsistent with the provisions of the State law regulating the

use of motor vehicles when conditions warrant them."

Under a statute in Missouri providing the manner in which the registration number of all motor vehicles registered in the office of the Secretary of State should be displayed, and further providing, "And provided that said owner shall not be required to place any other mark of identity upon his motor vehicle," an ordinance passed by the municipal assembly of the city of St. Louis providing also for the display of identification numbers and the size thereof was held invalid as being in conflict with the statute. *City of St. Louis v. Williams*, 235 Mo. 503, 139 S. W. 340.

44. *Brazier v. Philadelphia*, 15 Pa. Dist. Rep. 14.

criminal intent.<sup>45</sup> But, where upon the re-registration of a vehicle, the State fails to furnish the number plates, it is held that he may operate the machine under the plates issued during the previous year.<sup>46</sup>

**Sec. 125. Effect of non-registration in actions for injuries — Massachusetts rule.**

The courts are not entirely in harmony as to the effect which shall be given to the non-registration of motor vehicles, when injuries are occasioned by or to such machine or to the occupants thereof. The question is somewhat similar to the one presented when an unlicensed chauffeur receives an injury while he is unlawfully operating a motor vehicle, though, on account of a difference in the statute, a different conclusion may be reached in case of an unlicensed chauffeur.<sup>47</sup> The courts of *Massachusetts* take a position on the question which is opposed to the great weight of authority. It is there held that a motor vehicle not properly registered is a nuisance and trespasser upon the highways of the State, and that, as a general rule, if the machine or an occupant receives an injury from another vehicle or from a defect in the highway, the non-registration will preclude a recovery for the injuries.<sup>48</sup> Thus, it is held that a person riding in an unregistered automobile is not entitled to the rights of a traveler and cannot avail himself of the violation of an act "for the better protection of travelers at railroad crossings," and requiring a

45. *People v. Schoepflin*, 78 Misc. (N. Y.) 62, 137 N. Y. Suppl. 675. Compare *Axtell v. State* (Tex. Cr.), 216 S. W. 394.

46. *State v. Gish*, 168 Iowa, 70, 150 N. W. 37.

47. *Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404, 35 L. R. A. (N. S.) 701. See also section 226.

48. *Dudley v. Northampton Street Ry. Co.*, 202 Mass. 443, 89 N. E. 25, 23 L. R. A. (N. S.) 561n, followed in *Dean v. Boston Elevated Railroad Co.*, 217 Mass. 495, 108 N. E. 616; *Crompton v. Williams*, 216 Mass. 184, 103 N. E. 298; *Holden v. McGillicuddy*,

215 Mass. 563, 102 N. E. 923; *Holland v. City of Boston*, 213 Mass. 560, 100 N. E. 1009; *Love v. Worcester Consolidated Street Railway*, 213 Mass. 137, 99 N. E. 960; *Chase v. New York Central & Hudson River Railroad*, 208 Mass. 137, 94 N. E. 377; *Trombley v. Stevens-Duryea Co.*, 206 Mass. 516, 92 N. E. 764; *Feeley v. Melrose*, 205 Mass. 329, 91 N. E. 306, 21 L. R. A. (N. S.) 1156, 137 Am. St. Rep. 445; *Dowey v. Bay State St. Ry. Co.*, 225 Mass. 281, 114 N. E. 207; *Rolli v. Converse*, 227 Mass. 162, 116 N. E. 507; *Wentzell v. Boston Elev. Ry. Co.*, 230 Mass. 275, 119 N. E. 652.

signal from an engine approaching a traveled way or place.<sup>49</sup> But the fact that the machine is a trespasser does not preclude him from recovery in all cases, for, if it can be shown that the act causing injury to the machine or occupant was a reckless, wanton or wilful act, recompense for the injuries may be recovered.<sup>50</sup> The rule may work to render the driver of an unlicensed automobile liable for injuries to another traveler.<sup>51</sup> Where an automobile is not registered in accordance with the statutory requirements, the owner cannot lawfully operate it upon the highway, nor can he legally authorize or permit a third person so to do and he is liable for the consequences of the operation of such a vehicle by one whom he has permitted to use it whether the latter is acting within the scope of his employment or is using the car in connection with his own business or pleasure.<sup>52</sup> If, however, the owner of an unregistered automobile has neither given any permission nor consent to its use by another, either express or implied, then no liability will attach to him for its operation by such person.<sup>53</sup> The situation in *Massachusetts* was changed to some

49. *Chase v. New York Central & Hudson River Railroad*, 208 Mass. 137, 94 N. E. 377.

50. *Holland v. Boston*, 213 Mass. 560, 100 N. E. 1009; *Wentzell v. Boston Elev. Ry. Co.* (Mass.), 119 N. E. 652; *United Transp. Co. v. Hass*, 91 Misc. (N. Y.) 311, 155 N. Y. Suppl. 110, affirmed 155 N. Y. Suppl. 1145 (discussing the *Massachusetts* rule). "There is but small doubt that an unregistered automobile is a trespasser upon the highway, and it must be true that the operator or occupant is in no better condition to recover than a person would be who was violating the law in walking on the track of a railroad, but even a person thus trespassing, as against what would really be found to be a willful, wanton and reckless act of another, is entitled to some protection." *United Transp. Co. v. Hass*, 91 Misc. (N. Y.) 311, 155 N. Y. Suppl. 110, affirmed 115 N. Y. Suppl. 1115, wherein the *Massachusetts* rule

was discussed.

**Wanton negligence not established.**—Failure of a motorman to see an automobile before he did and to bring his car to a stop quicker while evidence of negligence fails to reach the kind of conduct required to warrant a recovery by plaintiffs who were, by reason of the automobile being unlicensed, trespassers upon the highway. *Dean v. Boston Elevated Railway Co.*, 217 Mass. 495, 105 N. E. 616.

51. *Fairbanks v. Kemp*, 226 Mass. 75, 115 N. E. 240; *Koonovsky v. Ouellette*, 226 Mass. 474, 116 N. E. 243; *Hurmanen v. Nicksa*, 228 Mass. 346, 117 N. E. 325; *Gowdek v. Cudahy Packing Co.*, 233 Mass. 105, 123 N. E. 398; *Evans v. Rice* (Mass.), 130 N. E. 672.

52. *Evans v. Rice* (Mass.), 130 N. E. 672.

53. *Gould v. Elder*, 219 Mass. 396, 107 N. E. 59; *Gowdek v. Cudahy Packing Co.* (Mass.), 123 N. E. 398.

extent by a statute in 1915 which provides in effect that the violation shall not be a defense unless it is shown that the person injured or killed, or the owner of the property injured, knew or had reason to know that the provisions of the statute were being violated. Hence, it is now the law that the chauffeur of a machine may sometimes recover for his injuries in a case where the owner would be denied recovery for damages to the machine.<sup>54</sup>

In *Connecticut* it was held, that, in the absence of any statutory provision to that effect, the use of an unregistered and unnumbered automobile upon the public highways as required by statute was not unlawful, and did not preclude the owner from recovering damages of a city for injuries to himself and to the car which were caused by a defect in the highway due to the city's negligence.<sup>55</sup> But, by a subsequent statute enacted in that State, it was expressly provided that no recovery shall be had by the "owner, operator, or any passenger of a motor vehicle" which is not registered as required by the act "for any injury to person or property received by reason of the operation of such motor vehicle upon the public highways of this State."<sup>56</sup> The word "operation" as used in such

54. *Rolli v. Converse*, 227 Mass. 162, 116 N. E. 507.

55. *Hemming v. City of New Haven*, 82 Conn. 661, 74 Atl. 892, 18 Ann. Cas. 240; 25 L. R. A. (N. S.) 734n, wherein the court said: "The plaintiff was violating the statute relating to the registration of automobiles, but that fact does not relieve the defendant. The statute imposed an obligation upon the plaintiff to register his automobile and for its violation prescribed a penalty. The statute goes no further and it cannot be held that the right to maintain an action for damages resulting from the omission of the defendant to perform a public duty is taken away because the person injured was at the time his injuries were sustained disobeying a statute law which in no way contributed to the accident. A traveler with an unregistered and

unnumbered automobile is not made a trespasser upon the street, neither does it necessarily follow that the property which he owns is outside of legal protection when injured by the unlawful act of another. . . . The registration of plaintiff's machine was of no consequence to the defendant. His failure to register and display his number in no way contributed to cause the injury. The accident would have happened if the law in this respect had been fully observed. The plaintiff's unlawful act was not the act of using the street but in making a lawful use of it without having his automobile registered and marked as required by law. The statute contains no prohibition against using an unlicensed and unnumbered automobile upon the highway and streets of the State."

56. *Stroud v. Board of Water*

statute includes such stops as the vehicle would ordinarily make, and the owner of an unlicensed automobile may not recover for injuries thereto received by a truck running into it while it is standing by the side of the highway.<sup>57</sup> But an unlicensed machine is not in "operation" on the highway when it is towed by another vehicle.<sup>58</sup> Under the statute, the burden is upon the owner of the machine, when seeking to recover his injuries, to show the vehicle was properly registered.<sup>59</sup>

In *Maine*, the statute forbidding the operation of motor vehicles on the public highways unless they are registered and licensed according to the statute, is very similar to the *Massachusetts* law, and it has to some extent received a similar construction.<sup>60</sup> The statute renders unlawful all travel in an un-

Com'rs of City of Hartford, 90 Conn. 412, 97 Atl. 336; *Brown v. New Haven Taxicab Co.*, 92 Conn. 252, 102 Atl. 573.

57. *Stroud v. Board of Water Com'rs of City of Hartford*, 90 Conn. 412, 97 Atl. 336, wherein it was said: "The word 'operation' cannot be limited, as the plaintiff claims it should be, to a state of motion controlled by the mechanism of the car. It is self-evident that an injury may be received after the operator has brought his car to a stop, and may yet be received by reason of its operation. The word 'operation,' therefore, must include such stops as motor vehicles ordinarily make in the course of their operation. It is also clear that the words 'received by reason of the operation' do not refer merely to injuries proximately caused by such operation. That cannot be so, because the whole purpose of section 19 is to prevent a recovery in cases where the owner, operator, or passenger of the illegally registered car would otherwise be entitled to one; and no such recovery could in any event be had if the operation of the illegally registered car was in a legal sense the proximate

cause of the injury. In order to give any reasonable effect to section 19, it must be understood as requiring the owner, operator, or passenger of a motor vehicle, not registered in accordance with sections 2 or 3 of the act, to assume all the ordinary perils of operating it on the highway. In this case the plaintiff's car was as much in the ordinary course of operation on the highway at the time of the injury as if it had been used for shopping, calling, or delivering merchandise. One so using the highway necessarily incurs the risk of injury from the negligence of fellow travelers, as well while his vehicle is at rest as while it is in motion, and the injury complained of in this case was received 'by reason of' the operation of the plaintiff's illegally registered car on the highway, within the plain intent of the act."

58. *Dewhirst v. Connecticut Co.* (Conn.), 114 Atl. 100.

59. *Dewhirst v. Connecticut Co.* (Conn.), 114 Atl. 100.

60. *McCarthy v. Inhabitants of Town of Leeds*, 115 Me. 134, 98 Atl. 72, wherein the court expressed its views as follows: "An examination



licensed machine, and when the action is against a municipality and is based on the unsafety of the highway, the person injured cannot recover.<sup>61</sup> Even an infant child riding in the machine is barred from recovery in such a case.<sup>62</sup> But it is held in an action for injuries received from a collision with a street car, that the non-registration will not necessarily bar a recovery.<sup>63</sup>

In *Canada* different conclusions may be drawn in different provinces, as the question is determined by the reading of the regulations in the several provinces and territories.<sup>64</sup>

### Sec. 126. Effect of non-registration in actions for injuries — general rule.

The general rule as to the effect of non-registration of a motor vehicle is not in agreement with the doctrine promul-

of the decided cases, we think, clearly shows that, when the statute provides for the registration of automobiles and fixes a penalty for their operation upon the highways and streets of the State, unless registered, their operation upon the highways and streets while unlawful, does not of itself bar the owner from recovering damages for injuries sustained by reason of defective highways, because the violation of the law does not contribute to the injury; but if, in addition to the penalty provided by law, the statute prohibits the use upon the highway of an unregistered auto, the operation of the auto upon the prohibited streets and highways is such an unlawful act that, by reason of the prohibition, its operation is a trespass, and cities or towns are not obliged to keep their ways safe for trespassers to travel upon in violation of law. The language of section 11 of the act of 1911 clearly and plainly prohibits their use upon the highways of the State unless registered, as required by the act, and unless so construed the purpose of the legislature to protect persons lawfully using the highway will fail; and the plain and unambiguous language of section 11

would be disregarded, which is a violation of all rules of law for the construction of statutes, and we hold that the plaintiff was prohibited by statute from using the auto on the highway, it being unregistered as required by section 8, c. 162 of the Laws of 1911, and the town owed him no duty to keep the way safe and convenient for him to travel upon. His rights were only the rights of a trespasser upon the land of another.<sup>7</sup> See also *Lyons v. Jordan*, 117 Me. 117, 102 Atl. 976.

61. *Blanchard v. City of Portland* (Me.), 113 Atl. 18.

62. *McCarthy v. Town of Leeds*, 116 Me. 275, 101 Atl. 448.

63. *Cobb v. Cumberland County Power & Light Co.*, 117 Me. 455, 104 Atl. 844.

64. See *Constant v. Pigott*, 15 D. L. R. (Canada) 358; *Etter v. City of Saskatoon*, 39 D. L. R. (Canada) 1; *Greig v. Merritt*, 11 D. L. R. (Canada) 852; *Buck v. Eaton*, 17 O. W. N. (Canada) 191, in effect following the *Massachusetts* rule. But see *Godfrey v. Cooper*, 46 O. L. R. (Canada) 565, indicating a contrary rule.

gated by the courts of *Massachusetts*. The great weight of authority supports 'the view that in cases of injury to the machine or the occupants from the negligence of third persons, the failure to obey the law with reference to the registration and licensing of the machine is not a proximate cause of the injury and has no effect upon 'the recovery for the damages sustained.<sup>65</sup> And so, too, in case of an injury to another

**65. Alabama.**—*Armstrong v. Sellers*, 182 Ala. 582, 62 So. 28; *Stovall v. Corey-Highlands Land Co.*, 189 Ala. 576, 66 So. 577. "The fact that the plaintiff's motorcycle was not registered in compliance with the law of the State had no causal connection with the injury of which the plaintiff complains, and can in no way be avoidable to the defendant, under the issues presented in this case. The fact that the motorcycle was not registered in no way affected the general duty, which the defendant owed to the plaintiff, to so operate its automobile while traveling upon the public highway as not to negligently injure the person or property of another." *Stovall v. Corey-Highlands Land Co.*, 189 Ala. 576, 66 So. 577. "It matters not to the defendant whether the automobile was or was not registered in compliance with the laws of the State, which require all automobiles to be registered. If the automobile was not registered, the owner thereof may be guilty of a violation of one of the criminal laws of the State, but that fact in no way affected the general duty, which the defendant owes to the law, so to operate its cars as not to negligently injure the person or property of any person. The mere fact, if it be a fact, that the automobile was not registered had no causal connection with the injury of which the plaintiff complains, and that fact, if it be a fact, in no way contributed to the injury to the automobile." *Birmingham*

*Railway, Light and Power Co. v. Actna Accident & Liability Co.*, 184 Ala. 601, 64 So. 44.

*California.*—*Shimoda v. Bundy*, 24 Cal. App. 675, 142 Pac. 109, wherein it was said: "Our conclusion is that one who violates an ordinance wherein a penalty is fixed for non-compliance with its provisions, may be subjected to the penalties therein prescribed, but he cannot, in addition thereto, be deprived of his civil right to recover damages, perhaps in many thousands of dollars, sustained by reason of the negligence or wrong of another, where such violation bore no relation to the injury and did not contribute in the remotest degree thereto."

*Florida.*—*Atlantic Coast Line Railroad Company v. Weir*, 63 Fla. 69, 58 So. 641, Ann. Cas. 1914 A. 126, 41 L. R. A. (N. S.) 307; *Porter v. Jacksonville Electric Co.*, 64 Fla. 409, 60 So. 188.

*Georgia.*—*Central of Georgia Ry. Co. v. Moore*, 149 Ga. 581, 101 S. E. 668; *Central of Georgia Ry. Co. v. Moore*, (Ga. App.) 102 S. E. 168. *Compare*, *Knight v. Savannah Elec. Co.*, 20 Ga. App. 719, 93 S. E. 17.

*Illinois.*—See *Crosson v. Chicago, etc., Co.*, 158 Ill. App. 42.

*Iowa.*—*Phipps v. City of Perry*, 178 Iowa, 173, 159 N. W. 653 (motorcycle); *Wolford v. City of Grinnell*, 179 Iowa 689, 161 N. W. 686.

*Kansas.*—*Anderson v. Sterrit*, 95 Kan. 483, 148 Pac. 635.

traveler, the fact that the defendant's automobile was not properly registered is not to be considered a proximate cause of the injury, and the liability of the owner of the unregis-

*Kentucky*.—*Moore v. Hart*, 171 Ky. 725, 188 S. W. 861.

*Minnesota*.—*Armstead v. Lounsberry*, 129 Minn. 34, 151 N. W. 542, 544, wherein the court said: "Plaintiff had not complied with this law. Defendant contends that he was therefore a trespasser upon the street, and that the only duty the traveling public owed to him was a duty not to willfully or wantonly injure him. We do not concur in this contention. The fact that a person who sustains injury at the hands of another is at the time engaged in violation of some law may have an important bearing upon his right to recover. His violation of the law may be evidence against him, and in some cases may wholly defeat recovery. . . . But it is not every violation of the law that is even material evidence against him. The right of a person to maintain an action for a wrong committed upon him is not taken away because he was at the time of the injury disobeying a statute law which in no way contributed to his injury. He is not placed outside all protection of the law, nor does he forfeit all his civil rights merely because he is committing a statutory misdemeanor. The wrong on the part of the plaintiff, which will preclude a recovery for an injury sustained by him, must be some act or conduct having the relation to that injury of a cause to the effect produced by it. . . . A collateral unlawful act not contributing to the injury will not bar a recovery. . . . Plaintiff's violation of law in this case is of this collateral character. There was no relation of cause and effect between the unlawful act and the collision. The registration of plaintiff's automobile was of

no consequence to defendant. The law providing for such registration was not for the prevention of collisions and had no tendency to prevent collisions. There is no pretense that the registration of plaintiff's automobile would have had any tendency to prevent this collision. Plaintiff's failure to obey the law in no way contributed to his injury and could not bar his right of recovery."

*Missouri*.—*Luckey v. Kansas City*, 169 Mo. App. 666, 155 S. W. 873; *Dixon v. Boeving* (Mo. App.), 208 S. W. 279.

*Pennsylvania*.—*Yeager v. Winston Motor Carriage Co.*, 53 Pa. Super. Ct. 202.

*Rhode Island*.—*Marquis v. Messler*, 39 R. I. 563, 99 Atl. 527.

*Vermont*.—*Gilman v. Central Vermont Ry. Co.*, 107 Atl. 122.

*Virginia*.—*Southern Ry. v. Voughans Adm'r*, 118 Va. 692, 88 S. E. 305, L. R. A. 1916 E. 1222.

*Washington*.—*Switzer v. Sherwood*, 80 Wash. 19, 141 Pac. 181, wherein it was said: "Had the respondent violated some part of the regulative part of the statute, and his injury had resulted therefrom, unquestionably he could not recover, regardless of the negligence of the appellants, as long as such negligence was not wanton. But the violation of the revenue part is an offense against the State, solely, and it alone may enforce the penalties. In other words, before the violation of the statute by the person injured will constitute a defense to the negligent act of the person injuring him, there must be shown some causal connection between the act involved in the violation of the statute and the act causing the injury."

tered machine will not be established solely on that ground.<sup>66</sup> Clearly, therefore, the failure of the owner to register the machine will not bar the remedy of one riding therein as a passenger or guest.<sup>67</sup>

### Sec. 127. Effect of non-registration in actions for injuries — burden of proof.

In an action by the owner or occupant of an automobile to recover for injuries alleged to be due to the negligence of the defendant, the plaintiff is not required to show that the automobile was duly registered according to law. This is a matter of defense, the burden of establishing which rests upon the defendant.<sup>68</sup> Although, under the *Massachusetts* law declaring that no person, except as therein provided, shall operate an automobile upon a public highway unless licensed so to do, and unless the automobile is registered under the act, a person without a license so operating an unregistered automobile would not be a traveler except as a violator of the law, and could not recover from the town for a defect in the

*Wisconsin*.—*Derr v. Chicago, M. & St. P. Ry. Co.*, 163 Wis. 234, 157 N. W. 753. "We find nothing in these statutes to indicate that the legislature intended to deprive a person, who is injured while driving an unregistered car on a highway, of the protection of the law that is accorded to other travelers under the same circumstances. To bar such an injured person from invoking his rights of a traveler on the highway, it must appear that his violation of the law was a proximate cause of the injury suffered. No such relationship exists here. The plaintiff's violation of law had no proximate casual relation as defined in the law of negligence, and hence in no way contributed to cause the injury." *Derr v. Chicago, M. & St. P. Ry. Co.*, 163 Wis. 234, 157 N. W. 753.

66. *Lindsay v. Cecchi*, 3 Boyce (Del.) 133, 80 Atl. 523; *Hyde v. McCreery*, 145 N. Y. App. Div. 729, 130 N. Y. Suppl. 269; *Black v. Moree*, 135

Tenn. 73, 185 S. W. 682. *Mumme v. Sutherland* (Tex. Civ. App.), 198 S. W. 395. See also *Brown v. Chevrolet Motor Co.*, 39 Cal. App. 738, 179 Pac. 697; *Dervin v. Frenier*, 91 Vt. 398, 100 Atl. 760.

67. *Hines v. Wilson* (Ga. App.), 102 S. E. 646; *Chambers v. Minneapolis, etc., Ry. Co.*, 37 N. Dak. 377, 163 N. W. 824. See also, *Godfrey v. Cooper*, 46 O. L. R. (Canada) 565.

68. *Conroy v. Mather*, 217 Mass. 91, 104 N. E. 487; *Dean v. Boston Elevated Railway Co.*, 217 Mass. 495, 105 N. E. 616; *Doherty v. Ayer*, 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 816, 125 Am. St. Rep. 355; *Shaw v. Thielbahr*, 82 N. J. L. 23, 81 Atl. 497; *Lyons v. Jordan*, 117 Me. 117, 102 Atl. 976.

A complaint need not allege in a common law action against the operator of an automobile that it was registered under the statute. *McNeil v. Webeking*, 66 Fla. 407, 63 So. 728.

road, yet proof that a person is so licensed and that his automobile is registered is not a condition precedent to his recovery for damages caused by a defect in a road, but it is a matter of defense to show a failure to comply, since presumptions both of law and fact are in favor of innocence, and where one would avoid liability on the ground of a violation of law by the plaintiff, he must prove the violation.<sup>69</sup> And in an action against a street railway company for injury to the occupants of an automobile struck by one of its cars, the burden of proof is sustained by the production in court of public records kept by a State highway commission showing that the automobile was unregistered at the time of the injury, which records are not attacked by the plaintiff.<sup>70</sup>

### Sec. 128. Certificate as evidence of ownership.

Under a statute requiring the owner of an automobile to file in the office of the Secretary of State a statement of his name and address, together with a brief description of every such vehicle owned by him, and requiring him to obtain from such official a numbered certificate which shall contain the name of the owner of such vehicle and that he has registered in accordance with the law, the certificate so issued is *prima facie* evidence of ownership and is sufficient to sustain a verdict against such person for injuries caused by the automobile unless contradicted by competent evidence.<sup>71</sup> Where a

69. *Doherty v. Inhabitants of Ayer*, 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 816; *Feeley v. City of Melrose*, 205 Mass. 329, 91 N. E. 306, 27 L. R. A. (N. S.) 1156, 137 Am. St. Rep. 445. See also *Dean v. Boston Elevated Railway Co.*, 217 Mass. 495, 105 N. E. 616.

70. *Dean v. Boston Elevated Railway Co.*, 217 Mass. 495, 105 N. E. 616.

71. *Delano v. La Bounty*, 62 Wash. 595, 114 Pac. 434. As to the liability of owner for injuries arising from the use of the machine by another, see chapter XXIII.

A certified copy of the application for a State license may be received on the issue of the ownership of an automobile, although the application was not verified as required by the law. *Windham v. Newton*, 200 Ala. 253, 76 So. 24.

In New York it has been decided that proof that a license number on an automobile was registered in the office of the Secretary of State in the name of the defendant is competent evidence of ownership, and raises a *prima facie* case that the automobile at the time of the accident was being operated either by the owner or his

statute simply provides that for the purposes of the issuance, transfer and revocation of certificates and the enforcement of the penal provisions of the act, automobiles shall be identified by their register numbers, and their owner or owners ascertained from the certificate, the common law controls and there is no presumption from a person's mere physical possession and operating of an automobile that he is the owner, or the servant or agent of the owner. Such person may have hired or borrowed it or have wrongfully appropriated it to his own use, and in either event an owner would not be chargeable for the misconduct or negligence of such person in operating it.<sup>72</sup> It is, however, held that a license tag, known as a dealer's tag, issued and accepted at a lower rate than an ordinary license and upon condition that "it should not be used for any other purpose than testing or demonstrating the vehicle to a prospective purchaser, or in removing the same from place to place for the purpose of sale," is *prima facie* evidence that, at the time of an accident, either the dealer or someone acting under his authority was operating the car, and he has the burden of showing that it was not so operated.<sup>73</sup>

servant. The court said that it was well settled in that State that ownership implies possession and control, and that proof of ownership of a vehicle makes out a *prima facie* case against the defendant owner in an action to recover damages for injuries sustained through the negligent use thereof, as it will be presumed that the owner was, either in person or through his agent, in control of the vehicle at the time of the accident. *McCann v. Davison*, 145 N. Y. App.

Div. 522, 130 N. Y. Suppl. 473. In an action for an injury to an automobile it is decided that testimony by the one who had operated the car as chauffeur identifying it should not be excluded by the mere fact that he did not recall the license number. *Renault Taxi Service v. Park Carriage Co.*, 125 N. Y. Suppl. 518.

**72.** *Tromley v. Stevens-Duryea Co.*, 206 Mass. 516, 92 N. E. 764.

**73.** *Haring v. Connell*, 244 Pa. 439, 90 Atl. 910.

**CHAPTER IX.****PUBLIC CARRIAGE FOR HIRE, JITNEYS, TAXICABS, ETC.****SECTION 129. Scope of chapter.**

130. Definitions.

131. Status of carriages for hire—jitney.

132. Status of carriages for hire—taxicab.

133. Status of carriages for hire—sight-seeing automobile.

134. Status of carriages for hire—furnishing of cars from garage on order.

135. Governmental regulation of carriage for hire—in general.

136. Governmental regulation of carriage for hire—greater power than over other classes of vehicles.

137. Governmental regulation of carriage for hire—discrimination.

138. Powers of municipalities—in general.

139. Powers of municipalities—abrogation of municipal powers.

140. Powers of municipalities—reasonableness of municipal regulation.

141. Powers of municipalities—enactment of ordinance.

142. Powers of municipalities—territorial limits.

143. State regulatory commissions.

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146. Licenses—nature of license.

147. Licenses—license fees.

148. Licenses—conflict of State and municipal licensing systems.

149. Licenses—plying for hire.

150. Licenses—effect of failure to have license.

151. Licenses—transfer of license.

152. Licenses—licensing of chauffeurs.

153. Exclusion from streets.

154. Restriction to certain streets.

155. Bonds—power to require proprietor to give bond.

156. Bonds—inability to furnish bond.

157. Bonds—character of sureties.

158. Bonds—extent of surety's liability.

159. Bonds—liability for accident outside of municipality.

160. Hack stands—in general.

161. Hack stands—sight-seeing automobiles.

162. Hack stands—taxicab service for hotel.

163. Hack stands—soliciting passengers.

164. Routes and schedules.

165. Punishing passenger for failure to pay fare.

166. Taximeters.

167. Rate of fare.

168. Miscellaneous regulatory matters.

169. Liability for injury to passenger—in general.

170. Liability for injury to passenger—assault on passenger.

- SECTION 171. Liability for conduct of driver.  
172. Imputation of negligence of driver to passenger.  
173. Rights of proprietor of vehicle.

### Sec. 129. Scope of chapter.

It is the purpose of this chapter to contain a discussion of certain matters which relate exclusively to vehicles used for public hire. It includes jitneys, taxicabs, omnibuses, and all other vehicles which are used for the general transportation of passengers for a compensation. Such subjects as the governmental regulation of such vehicles, their status, and the liability of their proprietors for injuries to passengers, are covered herein, but the general powers of the State and municipal corporations to regulate all kinds of vehicles, is the subject of discussion in other chapters.<sup>1</sup> While the liability for injuries to passengers is treated in this chapter, the liability to other travelers such as pedestrians,<sup>2</sup> cyclists,<sup>3</sup> and persons in other vehicles,<sup>4</sup> will be found in other parts of this work. So, too, resource to other chapters should be made for questions arising out of the frightening of horses,<sup>5</sup> and collisions with street railway<sup>6</sup> and railroad cars.<sup>7</sup> Another chapter is devoted to the questions which arise out of the private hire of motor vehicles.<sup>8</sup>

### Sec. 130. Definitions.

The term "public automobile" means an automobile engaged in the service of the public as a common carrier; not one that is used by the government in some one of its branches or departments, but a motor vehicle which carries the public for hire, like any other common carrier. The term includes taxicabs, automobile bus or stage lines, and sightseeing automobiles. Besides these, there are a number of automobile lines that make a business of transporting freight between points in the *United States*.

1. See chapters V and VI.
2. Chapters XVII and XVIII.
3. Chapter XIX.
4. Chapter XVI.

5. Chapter XX.
6. Chapter XXII.
7. Chapter XXI.
8. Chapter X.



A "jitney" has been defined as "a self-propelled vehicle, other than a street car, traversing the public streets between certain definite points or termini, and as a common carrier conveying passengers at a five cent or some small fare, between such termini or intermediate points, and so held out, advertised and announced."<sup>9</sup> And in some regulations relative to jitneys, they are classed and defined as common carriers of passengers.<sup>10</sup>

The term "taxicab" is a coined name "to describe a conveyance similar to a hackney carriage by electric or steam power, and held for public hire at designated places, subject to municipal control."<sup>11</sup> A public hack ordinance which declares "Any vehicle that has a taxicab meter affixed and uses the streets and avenues of the city of New York for the purpose of carrying passengers for hire shall be deemed a public hack and licensed under this ordinance," is constitutional.<sup>12</sup> There can be no exclusive proprietary right in the use of the word "taxicab," no matter who coined the word. The word "taxicab" is public property; it is descriptive of a chattel and is the commonly used name by which automobile hacks possessing fare registering machines are known to the public. Any person or corporation, conducting a hacking business and using taximeters on them, possesses the right to call the vehicles "taxicabs," and advertise the service as conducted by the use of "taxicabs." The fact that the word has been registered as a trademark does not alter the case. With as much reason could a manufacturer of automobile trucks call his vehicles "auto trucks," and claim exclusive rights to the use of the abbreviated word.<sup>13</sup>

9. *City of Memphis v. State*, 133 Tenn. 83, 179 S. W. 651.

"A jitney is an automobile."—*Ex parte Bogle*, 78 Tex. Cr. 1, 179 S. W. 1193. See also *Jitney Bus Assoc. of Wilkesbarre v. Wilkesbarre*, 256 Pa. St. 462, 100 Atl. 954.

10. *Ex parte Bogle*, 78 Tex. Cr. 1, 179 S. W. 1193.

11. *Donnelly v. Philadelphia & Reading Co.*, 53 Pa. Super. Ct. 78.

12. *Mason-Seaman Transp. Co. v. Mitchell*, 89 Misc. (N. Y.) 230, 153 N. Y. Suppl. 461.

13. *Right to use word "taxicab."*—No sign, symbol, or form of words can be appropriated as a valid trade-mark which, from the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose. See vol. 23 Am. & Eng. Encyc. Law (2d Ed.), p. 359.

**Sec. 131. Status of carriages for hire — jitney.**

A common carrier of property is defined as "one who, by virtue of his business or calling, undertakes, for compensation, to transport personal property from one place to another, either by land or water, and deliver the same, for all such as may choose to employ him, and every one, who undertakes to carry and deliver, for compensation, the goods of all persons indifferently, is, as to liability, to be deemed a common carrier. One holding out to the public as ready to undertake for hire the transportation of goods, and so inviting custom of the public, is a common carrier."<sup>14</sup> Common carriers of passengers are those who undertake to carry all persons indifferently for passage, so long as there is room and there is no legal excuse for refusing. To constitute one a common carrier of passengers it is necessary that he hold himself out to the public as such. The distance to be traveled by the passenger, or his destination, do not affect the question as to whether the carrier is or is not a common carrier of passengers.<sup>15</sup> But one carrying a certain number of co-employees to and from work each day for an agreed compensation, and carrying no other persons, is not a "common carrier."<sup>16</sup>

Within such definition, a jitney is clearly a common carrier of passengers.<sup>17</sup> And, in some jurisdictions, regulations governing the use of jitneys expressly define a jitney as a common carrier of passengers.

**Sec. 132. Status of carriages for hire — taxicab.**

A hackney coach is a term long used in *England*, meaning a public carriage for hire which stands in the streets and also those kept for hire in stables. The test in determining the character of the particular vehicle engaged in transportation is, whether the carriage is held out for the general accommodation of the public.<sup>18</sup> A taxicab is held to constitute a

14. 1 Moore on Carriers, 19.

15. 2 Moore on Carriers, 944.

16. *Towers v. Wildason* (Md.), 109 Atl. 471.

17. *Hutson v. DesMoines*, 176 Iowa, 455, 156 N. W. 883.

18. **Hackney carriages and public conveyances.**—In *England* it has been held that an ordinary omnibus running along a fixed route is a hackney carriage, within the meaning of statutes and ordinances. See *Hickman v. Birch*.

hackney coach.<sup>19</sup> Like other hackney coaches or public hacks, it is classed as a common carrier of passengers,<sup>20</sup> and has the rights of common carriers and is subject to public regulation as such.<sup>21</sup> To fasten upon the proprietor of a taxicab the character of a public carrier, it is not material whether he ply his vocation within the limits of a town or from one town to another.<sup>22</sup>

A taxicab is not exempt property under a statute exempting, "Two horses, two oxen, or two mules, and their harnesses, one cart or wagon, one dray or truck, one coupe, one hack or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster or other laborer habitually earns his living."<sup>23</sup>

24 Q. B. D. 172. But a hackney coach is not a wagon, according to decisions in California and Nevada, see *Quigley v. Gorham*, 5 Cal. 418, 63 Am. Dec. 139; *Edgecomb v. His Creditors*, 19 Nev. 149, 154, 7 Pac. 533. It has also been held in the State of New York that a hotel omnibus conveying guests to and from a station free of charge is not a "public conveyance." See *City of Oswego v. Collins*, 38 Hun (N. Y.) 17. In *Allen v. Tunbridge*, L. R. 6, C. P. 481, it was held that a brougham, the owner of which, by agreement with a railway company, attended the company's station for the conveyance of passengers, was a hackney carriage.

In the class of common carriers of passengers are included not only railroads, horse, dummy, electric, and cable street railways, and steamboat companies, but proprietors of stage coaches, city omnibus lines, hackmen, and ferryman, including the proprietors of taxicabs and other motor vehicles engaged in public transportation. See 5 Am. & Eng. Encyc. of Law (2d Ed.),

184. The taxicab is a common carrier, and because it is a common carrier, there are important rights and liabilities connected with its operation.

19. *Gassenheimer v. District of Columbia*, 26 App. Cas. (D. C.) 557.

20. *Boland v. Gay*, 201 Ill. App. 359; *McKellar v. Yellow Cab Co.* (Minn.), 181 N. W. 348; *Van Hoeffen v. Columbia Taxicab Co.*, 179 Mo. App. 591, 162 S. W. 694; *Anderson v. Fidelity & Casualty Co.*, 228 N. Y. 475, 127 N. E. 584, 9 A. L. R. 1544, *affirming*, *Anderson v. Fidelity & Casualty Co.*, 183 N. Y. App. Div. 170, reversing 100 Misc. 411, 166 N. Y. Suppl. 640; *Primrose v. Casualty Co.*, 232 Pa. St. 210, 81 Atl. 212; *Donnelly v. Philadelphia & Reading Co.*, 53 Pa. Super. Ct. 78; *State v. Jarvis*, 89 Vt. 239, 95 Atl. 541; *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18; *Brown Shoe Co. v. Hardin*, 77 W. Va. 611, 87 S. E. 1014.

21. Section 135.

22. *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174, 4 A. L. R. 1480.

23. *Matter of Wilder*, 221 Fed. 476.

**Sec. 133. Status of carriages for hire — sight-seeing automobile.**

Sightseeing automobiles by reason of the services offered and rendered are to be regarded as common carriers and owe to the public the same degree of care to transport them in safety as any other common carrier of passengers owes.<sup>24</sup>

**Sec. 134. Status of carriages for hire — furnishing of cars from garage on order.**

The business of a garageman furnishing cars from his place of business on the specific order of a customer, is different from the general taxicab or jitney business. The garageman in such a case is not deemed to be a common carrier.<sup>25</sup> The business of furnishing cars for hire, however, is held to be one which is subject to State regulation.<sup>26</sup>

**Sec. 135. Governmental regulation of carriage for hire — in general.**

Under its police power of regulation, there is no doubt of the general power of the State and municipal corporations to regulate the use of motor vehicles carrying passengers for a compensation.<sup>27</sup> This general power extends to the regula-

24. *McFadden v. Metropolitan St. Ry. Co.*, 161 Mo. App. 552, 144 S. W. 168, holding such carriers owe to their passengers the highest degree of care.

25. *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 36 S. Ct. 583, modifying 43 App. D. C. 120. But see *State v. Jarvis*, 89 Vt. 239, 95 Atl. 541.

26. *City of San Antonio v. Besteire* (Tex. Civ. App.), 209 S. W. 472.

27. *United States*.—*Nolan v. Riechman*, 225 Fed. 812.

*Arkansas*.—*Willis v. City of Ft. Smith*, 121 Ark. 606, 182 S. W. 275.

*Kansas*.—*Desser v. City of Wichita*, 96 Kans. 820, 153 Pac. 1194. "Jitneys and similar vehicles run, not upon tracks laid at their owner's expense, but upon the public streets, with no burden of providing depots or

waiting station, or outlay, except the mere cost of vehicles and their operation. No doubt persons thus operating these conveyances for hire must be classed and are common carriers. Being such, they are, of legal necessity, subject to regulation and control as are other common carriers of passengers for hire." *Desser v. City of Wichita*, 96 Kans. 820, 153 Pac. 1194.

*Maryland*.—*Smith v. State*, 100 Atl. 778.

*Massachusetts*.—*Commonwealth v. Slocum*, 230 Mass. 180, 119 N. E. 687.

*Nevada*.—*Ex parte Counts*, 39 Nev. 61, 153 Pac. 93.

*New Jersey*.—*Gillard v. Manufacturers Casualty Ins. Co.*, 93 N. J. L. 215, 107 Atl. 446.

*New York*.—*Mason-Seaman Transp.*

tion of jitneys,<sup>28</sup> auto buses,<sup>29</sup> taxicabs,<sup>30</sup> and other forms of vehicles used for the carriage of persons for hire. The

Co. v. Mitchell, 89 Misc. 230, 153 N. Y. Suppl. 461; *Yellow Taxicab Co. v. Gaynor*, 82 Misc. 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 App. Div. 893.

*Oklahoma*.—*Ex parte* Mayes, 167 Pac. 749.

*Oregon*.—*Cummins v. Jones*, 79 Oreg. 276, 155 Pac. 171.

*Texas*.—*Greene v. San Antonio* (Civ. App.), 178 S. W. 6; *Peters v. City of San Antonio* (Civ. App.), 195 S. W. 989; *Ex parte* Bogle, 78 Tex. Cr. 1, 179 S. W. 1193; *Booth v. Dallas* (Civ. App.), 179 S. W. 301; *Ex parte* Parr, 82 Tex. Cr., 525, 200 S. W. 404.

*Vermont*.—*State v. Jarvis*, 89 Vt. 239, 95 Atl. 541.

*Washington*.—*Seattle v. King*, 74 Wash. 277, 133 Pac. 442; *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837; *State v. Ferry Line Auto Bus Co.*, 93 Wash. 614, 161 Pac. 467; *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18; *Hatfield v. Lundin*, 98 Wash. 657, 168 Pac. 516.

**28.** *United States*.—*Nolan v. Riechman*, 225 Fed. 812; *Lutz v. City of New Orleans*, 235 Fed. 978.

*Arkansas*.—*Willis v. City of Ft. Smith*, 121 Ark. 606, 182 S. W. 275. "The jitney bus business, transporting people for hire, for a uniform five-cent fare, in low-priced or second-hand automobiles, over definite routes in cities or towns, is of but recent origin, but the regulation of the business followed hard upon its development by acts of the legislature in some instances and by ordinances of the municipalities, in which they operated in others." *Willis v. City of Ft. Smith*, 121 Ark. 606, 182 S. W. 275.

*Georgia*.—*Hazelton v. City of At*

*lanta*, 144 Ga. 775, 87 S. E. 1043; *Hazelton v. City of Atlanta*, 147 Ga. 207, 93 S. E. 202.

*Iowa*.—*Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883.

*Louisiana*.—*LeBlanc v. New Orleans*, 138 La. 243, 70 So. 212; *New Orleans v. Le Blanc*, 139 La. 113, 71 So. 248.

*Maryland*.—*Smith v. State*, 130 Md. 482, 100 Atl. 778.

*Nevada*.—*Ex parte* Counts, 39 Nev. 61, 153 Pac. 93.

*New Jersey*.—*West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190.

*New York*.—*Public Service Com'n, Second Dist. v. Booth*, 170 N. Y. App. Div. 590, 159 N. Y. Suppl. 140.

*Oregon*.—*Thielke v. Albee*, 76 Oreg. 449, 150 P. 854; *Cummins v. Jones*, 79 Oreg. 276, 155 Pac. 171.

*Pennsylvania*.—*Jitney Bus Assoc. of Wilkesbarre v. Wilkesbarre*, 256 Pa. St. 462, 100 Atl. 954.

*Tennessee*.—*City of Memphis v. State*, 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916 B. 1151.

*Texas*.—*Greene v. San Antonio* (Civ. App.), 178 S. W. 6; *Auto Transit Co. v. City of Ft. Worth* (Civ. App.), 182 S. W. 685; *Peters v. City of San Antonio* (Civ. App.), 195 S. W. 989; *City of Dallas v. Gill* (Civ. App.), 199 S. W. 1144; *Gill v. City of Dallas* (Civ. App.), 209 S. W. 209; *Ex parte* Bogle, 78 Tex. Cr. 1, 179 S. W. 1193.

*Washington*.—*State ex rel. Case v. Howell*, 85 Wash. 294, 147 Pac. 1159; *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837; *State v. Ferry Line Auto Bus Co.*, 93 Wash. 614, 161 Pac. 467; *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18; *Hadfield v. Lundin*, 98 Wash. 657, 168 Pac. 516; *Puget Sound Tract. L. & P. Co. v. Grassmeyer*, 102 Wash. 482, 173

owners of such vehicles are classed as common carriers,<sup>31</sup> and hence are under the same governmental control as other carriers of passengers for hire.<sup>32</sup> Reasonable regulations relative to the carriage of passengers for hire in motor vehicles, do not constitute a taking of property without due process of law, though they may interfere with the business of persons engaged in that occupation.<sup>33</sup> The fact that the regulations have a tendency to give street railway companies a monopoly of the transportation of passengers, is not an objection to their validity.<sup>34</sup>

Pac. 504; *State ex rel. Shafer v. City of Spokane*, 109 Wash. 360, 186 Pac. 864.

*West Virginia*.—*Ex parte Dickey*, 85 S. E. 781.

29. *Ex parte Lee*, 28 Cal. App. 719, 153 Pac. 992; *Booth v. Dallas* (Tex. Civ. App.), 179 S. W. 301; *Auto Transit Co. v. City of Ft. Worth* (Tex. Civ. App.), 182 S. W. 685; *State v. Ferry Line Auto Bus Co.*, 99 Wash. 64, 168 Pac. 893.

30. *Sanders v. City of Atlanta*, 147 Ga. 819, 95 S. E. 695; *Pugh v. City of Des Moines*, 176 Iowa, 593, 156 N. W. 892; *Swann v. City of Baltimore*, 132 Md. 256, 103 Atl. 441; *Yellow Taxicab Co. v. Gaynor*, 82 Misc. 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 App. Div. 893; *Mason-Seaman Transp. Co. v. Mitchell*, 89 Misc. (N. Y.) 230, 153 N. Y. Suppl. 461; *Ex parte Par*, 82 Tex. Cr. 525, 200 S. W. 404; *Seattle Taxicab & Tr. Co. v. Seattle*, 86 Wash. 594, 150 Pac. 1134.

31. Sections 131-134.

32. *Desser v. City of Wichita*, 96 Kan. 820, 153 Pac. 1194.

33. *Auto Transit Co. v. City of Ft. Worth* (Tex. Civ. App.), 182 S. W. 685; *Gill v. City of Dallas* (Tex. Civ. App.), 209 S. W. 209; *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837; *Hadfield v. Lundin*, 98 Wash. 657, 168 Pac. 516. "The principal contention, however, is based on the other pro-

visions of the Constitutions cited, which provide that no person shall be deprived of his property without due process of law. The courts have never attempted to define with precision the meaning of the phrase 'due process of law,' or its equivalent from the Magna Charta, 'the law of the land.' This, not because of uncertainty as to the meaning, but rather because of the inability to encompass within the brief terms necessary to a definition all of the multifarious matters to which the phrase is applicable. Broadly speaking, its purpose is to protect the individual against arbitrary action on the part of the State; that is, to secure the citizen against any arbitrary deprivation of his rights relating to his life, liberty, or property. As applied to legislative enactments, it was not intended to subject them to the opinion of the court as to their merit or wisdom, but only in so far as to ascertain whether by the terms of the enactment the individual citizen affected is deprived of some right expressed in the fundamental law, or which 'inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and opportunity to be heard in his defense.' " *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837.

34. *Ex parte Bogle*, 78 Tex. Cr. 1,

**Sec. 136. Governmental regulation of carriage for hire —  
greater power than over other classes of vehicles.**

The State and municipal power of regulation is greater over vehicles using the public streets to convey passengers for hire, than over vehicles used for the business or pleasure purposes of the driver. Regulations which might be an unreasonable infringement of the common right to use the highways in the one case, would be proper when applying to one seeking to use the highways as a carrier of passengers.<sup>35</sup> This was well explained in one case,<sup>36</sup> wherein it was said: "The right of a citizen to travel upon a highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all; while the latter is special, unusual, and extraordinary. As to the former, the extent of legislative power is that of regulation; but, as to the latter, its power is broader. The right may be wholly denied, or it may be permitted to some and denied to others, because of its extra-

179 S. W. 1193, wherein it was said: "His last contention is that, the arbitrary power preceding the issuance of license and the power reserved by the city to cancel it and throw him out of business at any time discourages the investment necessary to go into business, and tends to, and does, prevent competition and results in building up a monopoly in behalf of the street car company. We think it unnecessary to discuss this general attack of the ordinance. We see nothing in it that would sustain the relator's contention. On the contrary, we see from it only the proper and reasonable regulation of the business and the proper requisites of persons only who should be authorized by the city to operate jitneys on its streets. It may be that some persons would experience some difficulty in complying with the ordinance, but no more

so than any other like hazardous and dangerous business."

**Injunction by street railway company.**—The operation of a jitney in defiance of lawful regulations may constitute a nuisance, and a street railway company injured by the wrongful acts may procure an injunction. *Puget Sound Traction L. & P. Co. v. Grassmeyer*, 102 Wash. 482, 173 Pac. 504. See also, to same effect: *United Traction Co. v. Smith*, 115 Misc. 73. But see, *Public Service Ry. Co. v. Reinhardt* (N. J. Eq.) 112 Atl. 850, holding that an injunction would not be granted at the suit of the street railway.

<sup>35</sup> *LeBlanc v. New Orleans*, 138 La. 243, 70 So. 212; *Cummins v. Jones*, 79 Oreg. 276, 155 Pac. 171.

<sup>36</sup> *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915 F. 840.

ordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities. A distinction must be made between the general use, which all of the public are permitted to make of the street for ordinary purposes, and the special and peculiar use, which is made by classes of persons in the pursuit of their occupation or business, such as hackman, drivers of express wagons, omnibuses, etc."<sup>37</sup> Thus a larger license fee may be imposed on a machine used for hire than is charged against other classes of vehicles.<sup>38</sup> And jitneys may be excluded from certain streets in a municipality when such a regulation would be unreasonable as to pleasure cars.<sup>39</sup> So, too, municipalities may have greater control over vehicles used for hire than over others. And the fact that there is greater regulatory power over carriages used for hire, may justify a regulation prohibiting the granting of licenses for such machines to aliens.<sup>40</sup>

### **Sec. 137. Governmental regulation of carriage for hire — discrimination.**

Jitneys used for the carriage of passengers for hire may constitute a proper class for regulation, and the fact that a regulation does not apply to vehicles propelled by other forms of power or to motor vehicles used for other purposes, does not constitute special or class legislation.<sup>41</sup> As was said in

<sup>37</sup> See also, to the same effect: *Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883; *Hadfield v. Lundin*, 98 Wash. 657, 168 Pac. 516; *State ex rel. Shafer v. City of Spokane*, 109 Wash. 360 186 Pac. 864.

<sup>38</sup> *Jackson v. Neff*, 64 Fla. 326, 60 So. 350. See also section 112.

<sup>39</sup> *Peters v. San Antonio* (Tex. Civ. App.), 195 S. W. 989; *Gill v. City of Dallas* (Tex. Civ. App.), 209 S. W. 209.

<sup>40</sup> *Morin v. Nunan*, 91 N. J. L. 506, 103 Atl. 378.

<sup>41</sup> *United States*.—*Nolan v. Reichman*, 225 Fed. 812; *Lutz v. City of New Orleans*, 235 Fed. 978.

*Arkansas*.—*Willis v. City of Ft. Smith*, 121 Ark. 606, 182 S. W. 275.

"It is next contended that the ordinance is discriminatory class legislation in restraint of trade and denying to the operators of jitneys and jitney busses the equal protection of the law contrary to provisions of the Constitution. It is insisted that the jitneys, as operated, are not more dangerous than taxicabs, or other motor vehicles used and kept for hire, and that they should no more be required to give the bond than such vehicles and street cars operated upon the streets of the city. When a classification of subjects is made by legislation, such classification must rest on some substantial difference between the classes created and others to which it does not apply, but, where the stat-



one case,<sup>42</sup> when the court distinguished the jitney from other carriers, "The record does not disclose the character of the business conducted by the other kinds of common carriers

ute or ordinance appears to be founded upon a reasonable basis and operates uniformly upon the class to which it applies, it cannot be said to be arbitrary and capricious." *Willis v. City of Ft. Smith*, 121 Ark. 606, 182 S. W. 275.

*California*.—*Ex parte Cardinal*, 170 Cal. 519, 150 Pac. 348.

*Georgia*.—*Hazelton v. City of Atlanta*, 144 Ga. 775, 87 S. E. 1043.

*New Jersey*.—*West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190. "Auto busses as defined in the act differ . . . from street railways in that the latter are confined to a certain portion of the street where their rails are, and cannot by varying their course endanger life or limb in any other portion of the street, and run, moreover, on a way fitted specially for their purpose at their own expense, while auto busses may use any portion of a way provided at public expense. These differences are necessary and inherent. Other differences exist in fact to the common knowledge of all. Street railways require a considerable, often a very large capital, and an investment in fixed plant, which affords at least some security for the payment of damages for bodily injury or death incident to their operation. The owner of an auto bus need own nothing else, and in case of injury to others by reason of his negligence may readily remove all his property from the jurisdiction of the court. *West v. Asbury Park* (N. J.), 99 Atl. 190.

*New York*.—*Public Service Commission v. Booth*, 170 N. Y. App. Div. 590, 159 N. Y. Suppl. 140; *Yellow Taxicab Co. v. Gaynor*, 82 Misc. (N. Y.) 94, 143 N. Y. Suppl. 279; affirmed on opinion below, 159 App. Div. 893.

*Oregon*.—*Thielke v. Albee*, 76 Oreg. 449, 150 P. 854.

*Tennessee*.—*City of Memphis v. State*, 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916 B. 1151.

*Texas*.—*Greene v. San Antonio* (Civ. App.), 178 S. W. 6; *Ex parte Sullivan* (Tex. Cr.), 178 S. W. 537; *Ex parte Bogle*, 78 Tex. Cir. 1, 179 S. W. 1193. "We can readily understand that greater danger may be caused to the public by the operation of numerous motor busses continuously throughout the day, over and along crowded streets filled with congested traffic, and without limitation as to the street or streets, or parts thereof, over which they may operate, than from the operation of taxicabs and other rent cars, which are required to occupy a fixed place or stand when not in operation, and which, when transporting passengers, do not ordinarily run over the streets on which the heaviest traffic exists, or from the operation of a street railway along a fixed track and on steel rails." *Auto Transit Co. v. City of Ft. Worth* (Tex. Civ. App.), 182 S. W. 685.

*Washington*.—*State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837; *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18; *McGlothern v. City of Seattle* (Wash.), 199 Pac. 457. "It is well settled that the equal protection of the Fourteenth Amendment to the Federal Constitution does not take from the state the right or power to classify the subjects of legislation; it is only arbitrary and unreasonable classification, classification as to which there is no just difference or distinction between the class affected and others, that is thus prohibited. *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. Ed. 364. So

enumerated by the appellant, and, of course, the court has only such knowledge of the matter as is possessed by the generality of mankind. In so far as we are advised, we think there is a wide distinction between the class of business done by jitney busses and that done by the other carriers named. Street cars are so far distinct as to be in a class by themselves, and any regulation applicable to a jitney bus could hardly be applicable to their situation. Auto stages operate on regular schedules between fixed points, usually between one city or town and another. Auto busses and horse carriages ordinarily carry passengers between given points, usually to and from depots, docks or other landings, and hotels. Sightseeing automobiles are operated more in the nature of private conveyances than as public carriers, and their business bears no relation to the business of a jitney bus. Taxicabs, livery rigs, and the like operate from fixed stands and are put into use on hire. The jitney bus differs from each of these. It is operated continuously upon the streets, usually in the most congested parts, soliciting and taking up passengers wherever they can be found. It is never for hire at all; all that is offered is a seat and an opportunity to ride to some point within the limit of its operations. Its unrestricted use is fraught with danger, not only to the passenger it carries, but to others using the streets for their own purposes. Being a common carrier, it is a subject of regulation, and we are constrained to believe that its business is such as to make it a subject of separate classification. This being true, the city council of a municipality may lawfully exact regulations applicable to its business which it does not make applicable to the business of other common carriers, without violating either of the constitutional provisions before cited."

under the State Constitution it is likewise well settled that classification for the purposes of legislation is not prohibited. The limitation imposed avoids only that which is done without any reasonable basis; such classification as is unreasonable and arbitrary." Allen

v. City of Bellingham, 95 Wash. 12, 163 Pac. 18.

*West Virginia*.—*Ex parte* Dickey, 76 W. Va. 576, 85 S. E. 781.

42. Allen v. City of Bellingham, 95 Wash. 12, 163 Pac. 18.

The fact that a regulation applies to the proprietors of vehicles for hire, but not to street railway companies, does not afford ground for an attack upon its constitutionality.<sup>43</sup> Nor does the fact that carriers of the United States mail are exempted from the provisions of the law render it void.<sup>44</sup> And a jitney regulation may be sustained, though it does not apply to automobiles privately owned or used,<sup>45</sup> and even

43. *Hutson v. Des Moines*, 173 Iowa, 455, 156 N. W. 883; *West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190; *Thielke v. Albee*, 76 Oreg. 449, 150 Pac. 854; *Ex parte Bogle*, 78 Tex. Cr. 1, 179 S. W. 1193; *Auto Transit Co. v. City of Ft. Worth* (Tex. Civ. App.), 182 S. W. 685; *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837; *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18; *State ex rel. Shafer v. City of Spokane*, 109 Wash. 360, 186 Pac. 864. "Contrasting the jitney with street railway cars, to ascertain whether there be arbitrary classification: The street railway, by reason of its having tracks at definite places assigned it by municipal authority, on which tracks its traffic must move, is less liable to cause injury; and the substantial nature of its cars, and particularly the fixity, permanency, and great cost of its roadbed, afford an anchored indemnity in respect of its liability for negligence. Other marks for differentiation, appearing in the above outline of considerations, imputable to the legislative mind, need not be reiterated." *City of Memphis v. State*, 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916 B. 1151.

44. *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837, wherein it was said: "Nor does the fact that carriers of the United States mails are exempted from the provision of the act render it void. These perform a service sufficiently differentiated from the ordinary carrier of passengers as to form a class of themselves, and legislation affecting other classes of

carriers is not of necessity required to include them. The situation suggested in the appellant's brief, namely, that of a large corporation obtaining a contract to carry the mails and thus monopolizing the jitney traffic in a city, because not subject to the burden of the act, is hardly possible of consummation. The act is not capable of a construction which would permit the owner of a vehicle who has a contract to carry the mails to run it promiscuously over the streets of the city in the carriage of passengers when not engaged in the prosecution of his contract. As we view the act, such an owner can carry passengers without a violation of the provisions of the act only while actually transporting the mails over a route most convenient between the mail stations; otherwise he will fall within its provisions."

45. *City of Memphis v. State*, 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916 B. 1151; *Auto Transit Co. v. City of Ft. Worth* (Tex. Civ. App.), 182 S. W. 685. "We come now to the test of the law made by the circuit judge, and which led him to denounce the classification—the inclusion of jitney automobiles and the exclusion of automobiles privately owned and used. We think that such a classification is easily sustainable by reason of the applicability of many of the considerations above enumerated. The privately owned vehicle ordinarily has but a single destination, at which it comes to rest. Its use is not urged to or towards the limit in order to the reaping of profits. We are

though it does not apply to taxicabs or imposes greater obligations on the jitney.<sup>46</sup> Thus, it is proper to pass a statute which regulates merely the motor buses which charge fifteen

unable to see the merit in the distinction taken by the circuit judge, when he intimated the opinion that a classification of the jitney from privately used automobiles might be sustained only so far as indemnity for damages done to passengers was concerned. Most of the dangers that surround such passengers in a substantial sense beset also the users of the street." *City of Memphis v. State*, 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916 B. 1151.

46. *United States*.—"While the 'jitney' and the taxicab are physically the same, yet the services they perform materially differ. The service of the one is designed to accommodate persons traveling along distinct routes and at a rate of fare common to all, but the service of the other is intended for the accommodation of persons whose destinations involve varying distances and lines of travel and presumably at varying prices. The two kinds of services would signify substantial difference in numbers of vehicles needed to meet the respective demands, and so the dangers attending the operation of the 'jitney' presumably would materially exceed those arising in the taxicab service." *Nolan v. Riechman*, 225 Fed. 812.

*Arkansas*.—*Willis v. City of Ft. Smith*, 121 Ark. 606, 182 S. W. 275.

*Georgia*.—*Hazelton v. City of Atlanta*, 144 Ga. 775, 87 S. E. 1043.

*New Jersey*.—*West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190. "The business differs from that of the ordinary hired cabs in that the latter do not stop between termini, charge, or are supposed to charge, each passenger with the cost of his transportation, and hence may avoid crowded streets, are under no temptation to race for passengers, and do not require a special and expen-

sive roadway, while auto busses, defined as they are in the act, charge a price that can only pay the necessary running expenses when many passengers are carried, and must, in order to succeed, run where the streets are crowded, and are naturally under a temptation to secure as many passengers as possible, even by dangerous racing with one another, and by reason of size and power require a specially constructed and expensive roadway." *West v. Asbury Park* (N. J. Eq.), 99 Atl. 190.

*Oregon*.—*Thielke v. Albee*, 76 Oreg. 449, 150 Pac. 854.

*Tennessee*.—*City of Memphis v. State*, 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916 B. 1151. "The jitney holds itself out to accommodate persons who purpose traveling along a distinct route chosen by the operator. Operators of taxicabs have not the temptation or necessity, we may assume, of choosing the most traveled streets, since those less traveled afford them better opportunities to serve the object their owners have in view. It may be that a larger investment is ordinarily required to enter the taxicab business than the other, and that the conveyances would be less in number on this account, as well as because of the greater fare charged, not to mention other differences to be drawn from the above summary." *City of Memphis v. State*, 133 Tenn. 83, 179 S. W. 631.

*Texas*.—*Ex parte Bogle*, 78 Tex. Cr. 1, 179 S. W. 1193; *Booth v. Dallas* (Civ. App.), 179 S. W. 301; *Auto Transit Co. v. City of Ft. Worth* (Civ. App.), 182 S. W. 685.

*Washington*.—*Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18; *State ex rel. Shafer v. City of Spokane*, 109 Wash. 360, 186 Pac. 864.

cents or less.<sup>47</sup> Aliens may be denied the right to use the streets for the purpose of carrying passengers for hire, although citizens are granted the privilege.<sup>48</sup>

### Sec. 138. Powers of municipalities — in general.

Primarily, the control of the public highways, including the regulatory power over vehicles used for hire, is lodged in the Legislature. The Legislature sometimes exercises this power directly, by passing statutes covering the subject. But it may delegate its power in this respect to local municipalities, who thereby become authorized to pass reasonable regulations as to the conduct of jitneys and other vehicles used for hire.<sup>49</sup> What the Legislature may do itself in the matter of regulation and control of the streets in a municipality, it may dele-

47. Public Service Com'n, Second Dist. v. Booth, 170 N. Y. App. Div. 590, 159 N. Y. Suppl. 140. "It is further urged that this statute, relating only to busses which charge fifteen cents or less, discriminates between them and busses charging a higher rate, and that there is no reasonable ground for the statutory discrimination; that the statute permits a bond to be required for the safety not only of the passengers but the public, when like provisions are not made with reference to other vehicles operated for hire, and that the statute imposes a tax upon the jitney which is not imposed upon other vehicles carrying passengers for hire, and that these discriminations are illegal and in violation of the defendant's constitutional rights. Many circumstances exist which place the jitney in a different class from the motor vehicle which carries passengers by the hour, or from one fixed place to another. The jitney, by reason of its low fare and the manner of its operation, comes in direct competition with the street cars, which are common carriers and require a certificate of convenience and necessity. The jitney, by moving rapidly from place to place upon either side of the

street, in picking up passengers in competition with the street cars or other jitneys, presents a menace to its passengers and the people upon the street which is greater than that from the ordinary cab or vehicle; and other reasons may have seemed to the legislature to require that these busses be put in a class by themselves. We cannot say that the classification is unreasonable; upon the contrary, it seems reasonable." Public Service Commission v. Booth, 170 N. Y. App. Div. 590, 159 N. Y. Suppl. 140.

48. Morin v. Nunan, 91 N. J. L. 506, 103 Atl. 378.

49. Nolan v. Riechman, 225 Fed. 812; *Ex parte* Cardinal, 170 Cal. 519, 150 Pac. 348; Hutson v. Des Moines, 176 Iowa, 455, 156 N. W. 883; Swann v. City of Baltimore, 132 Md. 256, 103 Atl. 441; Commonwealth v. Sloeum, 230 Mass. 180, 119 N. E. 687; Commonwealth v. Theberge (Mass.), 121 N. E. 30; Burgess v. City of Brockton (Mass.), 126 N. E. 456; Greene v. San Antonio (Tex. Civ. App.), 178 S. W. 6; City of Dallas v. Gill (Tex. Civ. App.), 199 S. W. 1144; *Ex parte* Dickey, 76 W. Va. 576, 85 S. E. 781.

gate to a municipality to do itself.<sup>50</sup> While municipalities have this power only when they have received a delegation thereof from the State, it will be found, as a general proposition, that, except where a municipality has been expressly denied the right, it can pass ordinances regulating jitneys and other motor vehicles used as carriers.<sup>51</sup> The obligation rests on municipalities to guard the public from danger, and

50. *Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883.

51. *United States*.—*Nolan v. Riechman*, 225 Fed. 812.

*Alabama*.—*City of Montgomery v. Orpheum Taxi Co.* (Ala.), 82 So. 117.

*Arkansas*.—"Municipal corporations can only exercise such powers as are expressly granted to them by the legislature and as are necessarily implied for effecting the purposes for which the grant of power was made and as incident thereto." *Willis v. City of Ft. Smith*, 121 Ark. 606, 182 S. W. 275.

*Connecticut*.—*State v. Scheidler*, 91 Conn. 234, 99 Atl. 492.

*Illinois*.—*City of Chicago v. Gall*, 195 Ill. App. 41.

*Iowa*.—*Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883.

*Kansas*.—*Desser v. City of Wichita*, 96 Kan. 820, 153 Pac. 1194.

*Louisiana*.—"The streets of the cities and towns in Louisiana being among the things that are 'public' and 'for the common use,' no individual can have a property right in such use for the purposes of his private business, unless, speaking generally, that business being in the nature of a public service or convenience, such as would authorize the grant, the right has been granted by the State, which alone has the power to make or authorize it, or, by the particular city or town acting under the authority of the State, and in such case the right can be exercised only in accordance with the conditions of the grant; that is to say, an individual seeking, but not possessing, a right of

that kind, may accept the grant, with the conditions imposed by the offer, in which case he becomes bound by the conditions, or he may refuse to accept the conditions, in which case there is no grant, and without the grant so offered, or some other, from the authority competent to make it, he can never acquire the right to make use of a street as his place of business. What he may do, if anything, in the way of litigation, to compel the municipality or the State to make him a grant that will be satisfactory to him, is apart from this immediate inquiry." *LeBlanc v. City of New Orleans*, 138 La. 243, 70 So. 212.

*Maryland*.—*Swann v. City of Baltimore*, 132 Md. 256, 103 Atl. 441.

*Massachusetts*.—*Commonwealth v. Theberge*, 231 Mass. 386, 121 N. E. 30.

*New Jersey*.—*Fonsler v. Atlantic City*, 70 N. J. L. 125, 56 Atl. 119; *West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190; *Morin v. Nunan*, 91 N. J. L. 506, 103 Atl. 378.

*New York*.—*Mason-Seaman Transp. Co. v. Mitchell*, 89 Misc. 235, 153 N. Y. Suppl. 461.

*Oklahoma*.—*Ex parte Halt*, 178 Pac. 260.

*Oregon*.—*Cummins v. Jones*, 79 Oreg. 276, 155 Pac. 171.

*Pennsylvania*.—*Jitney Bus Assoc. of Wilkesbarre v. Wilkesbarre*, 256 Pa. St. 462, 100 Atl. 954.

*Texas*.—*Booth v. Dallas*, (Civ. App.), 179 S. W. 301; *Auto Transit Co. v. City of Ft. Worth* (Civ. App.), 182 S. W. 685; *Peters v. San Antonio* (Civ. App.), 195 S. W. 989; *Craddock v. City*

therefore the regulation of vehicles using the streets as common carriers is clearly within the police power.<sup>52</sup> Thus, a city or village will have control of the subject under a general grant of the police power to regulate the use of the streets.<sup>53</sup> And a statute empowering any city within the State to grant licenses for lawful purposes and fix the amount of the license fees, justifies an ordinance licensing the use of vehicles for hire.<sup>54</sup> So, too, a city charter granting power to impose a license tax on and to regulate hacks, hackney coaches, and all other vehicles used for hire, is sufficient to justify an ordinance regulating jitneys, although the modern jitney was unknown at the time of the enactment of the charter.<sup>55</sup> A municipal corporation cannot itself engage, or contract with another to engage, in the business of carrying passengers for hire without legislative authority<sup>56</sup> or in contravention of a public statute prohibiting it.<sup>57</sup>

### Sec. 139. Powers of municipalities — abrogation of municipal powers.

Whether a municipality shall have the power to regulate vehicles using the streets for hire, is, in the absence of con-

of San Antonio (Civ. App.), 198 S. W. 634; *Gill v. City of Dallas* (Civ. App.), 209 S. W. 209; *Ex parte Bogle*, 78 Tex. Cr. 5, 179 S. W. 1193.

*Vermont*.—*State v. Jarvis*, 89 Vt. 239, 95 Atl. 541.

*Washington*.—*Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18; *McGlothern v. City of Seattle*, 199 Pac. 457.

52. *New Orleans v. LeBlanc*, 139 La. 113, 71 So. 248.

53. *City of Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917; *Booth v. Dallas* (Tex. Civ. App.), 179 S. W. 301; *Seattle Taxicab & Tr. Co. v. Seattle*, 86 Wash. 594, 150 Pac. 1134. See also *City of Dallas v. Gill* (Tex. Civ. App.), 199 S. W. 1144.

54. *City of Seattle v. King*, 74 Wash. 277, 133 Pac. 442.

55. *Ex parte Counts*, 39 Nev. 61, 153 Pac. 93, wherein it was said: "The

reasoning of the opinion that a motor vehicle, because not in existence at the time of the passage of the act, ought not to be considered as of the same general character as hacks, cabs, and omnibusses because of a difference simply in the motive power, does not appeal strongly to us. It is a matter of public and general knowledge that these motor vehicles have very largely displaced hacks, cabs, and omnibusses propelled by horses, and that there is little or no distinction between the two classes of vehicles, other than in the motive power used. There is no distinction whatever in the purpose of use."

56. *Brooklyn City R. Co. v. Whalen*, 111 Misc. (N. Y.) 348, 181 N. Y. Suppl. 208, affirmed, 191 App. Div. 737, 182 N. Y. Suppl. 283.

57. *State v. Ferry Line Auto Bus Co.*, 93 Wash. 614, 161 Pac. 467.

stitutional limitations, a matter within the control of the Legislature. It may delegate the power to a municipality,<sup>58</sup> and may thereafter resume control of the entire subject by repealing the delegation. Even after a jitney proprietor has received a license from a municipality to run a jitney, the State may step in and abrogate the authority of the municipality and require the jitney owner to procure a license issued by the State.<sup>59</sup> Or, it may enact a law which prohibits municipalities from regulating motor vehicles in general, but nevertheless permits them to license and otherwise regulate jitneys and other vehicles used for hire.<sup>60</sup> In case of a conflict between a system of licensing enacted by the State and one by a municipality, the State system will prevail.<sup>61</sup>

#### **Sec. 140. Powers of municipalities — reasonableness of municipal regulation.**

Speaking in general terms, a municipal ordinance must be reasonable or it will not be enforced.<sup>62</sup> But, when a municipality is given power to pass regulations relative to motor vehicles used for hire, ordinances passed under such authority are presumed to be reasonable, and the courts will not annul them unless it clearly appears that they are unreasonable.<sup>63</sup> When the Legislature expressly authorizes a particular ordinance, it is not for the courts to say that it is unreasonable, for the courts have no veto power in such matters.<sup>64</sup> If an

58. Section 138.

59. Public Service Commission v. Booth, 170 N. Y. App. Div. 590, 159 N. Y. Suppl. 140. See *Ex parte* Phillips (Okla.), 167 Pac. 221.

60. Willis v. City of Ft. Smith, 121 Ark. 606, 182 S. W. 275; State v. Scheidler, 91 Conn. 234, 9 Atl. 492; State v. Fink (N. Car.), 103 S. E. 16; Craddock v. City of San Antonio (Tex. Civ. App.), 198 S. W. 634; *Ex parte* Parr, 82 Tex. Cr. 525, 200 S. W. 404; Allen v. City of Bellingham, 95 Wash. 12, 163 Pac. 18.

61. Sections 77, 98, 99.

Constitutional provisions may forbid the State legislature to abrogate the

regulatory power of municipalities. City of Montgomery v. Orpheum Taxi Co. (Ala.), 82 So. 117.

62. Curry v. Osborne, 76 Fla. 39, 79 So. 293, 6 A. L. R. 108; Jitney Bus Assoc. of Wilkesbarre v. Wilkesbarre, 256 Pa. St. 462, 100 Atl. 954; Parish v. City of Richmond, 119 Va. 180, 89 S. E. 102. And see section 78.

63. Hutson v. Des Moines, 176 Iowa, 455, 156 N. W. 883; Desser v. City of Wichita, 96 Kans. 820, 153 Pac. 1194; *Ex parte* Parr, 82 Tex. Cr. 525, 200 S. W. 404.

64. Swann v. City of Baltimore, 132 Md. 256, 103 Atl. 441.



ordinance is passed by virtue of an express legislative power and substantially follows the powers granted, a court will sustain it regardless of its opinion as to its reasonableness; but, if it is passed by virtue of incidental or implied power granted by the Legislature, the courts will review the question of reasonableness.<sup>65</sup> An ordinance which makes it unlawful for any person to operate a jitney bus on the streets of the city "unless said person shall have had at least thirty days experience in the operation of an automobile in the city and county," is not unreasonable.<sup>66</sup> But a regulation which requires the operator of a jitney to be the owner thereof, has been held to be unreasonable and ineffective.<sup>67</sup> And an ordinance forbidding the driver of a taxicab to be more than ten feet away from his vehicle at any time, has been condemned as unreasonable.<sup>68</sup>

#### **Sec. 141. Powers of municipalities — enactment of ordinance.**

An ordinance granting the right to operate a jitney on certain streets will be ineffective, unless it is passed in the manner prescribed by statute and constitutional provisions. If the law requires that ordinances shall be signed by the mayor, and such procedure is not followed, a street railway company may attack the assumed grant of power and enjoin the operation of the jitney.<sup>69</sup>

#### **Sec. 142. Powers of municipalities — territorial limits.**

A city ordinance imposing a license fee on persons operating vehicles for hire within the city limits, does not include traffic between a point within the city and a point outside its boundary.<sup>70</sup> And, where a city is authorized to license a business "transacted and carried on" in such city, it has been held that it cannot require one to procure a license for carry-

65. *Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883.

66. *Ex parte Cardinal*, 170 Cal. 519, 150 Pac. 348.

67. *Parish v. City of Richmond*, 119 Va. 180, 89 S. E. 102.

68. *City of New Orleans v. Gilly*, 147 La. —, 86 So. 564.

69. *Memphis St. Ry. Co. v. Rapid Transit Co.*, 138 Tenn. 594, 198 S. W. 890.

70. *McDonald v. City of Paragould*, 120 Ark. 226, 179 S. W. 335.

ing passengers between two points without the city though he passes through the city.<sup>71</sup> But cities in other States may have the power to license jitneys passing through their streets.<sup>72</sup> But the law may authorize a city to require a license of one using the streets for the public conveyance of passengers, although the owner of the machine resides in another city where he also pays a license fee for the use of the machine.<sup>73</sup> If the vehicle carries passengers over a State line as a part of its regular route, a serious question arises as to interference with interstate commerce.<sup>74</sup>

### Sec. 143. State regulatory commissions.

The State may delegate certain matters of control over jitneys to public utility commissions. Thus, in *New York*, it has been provided that common carriers, such as jitneys,

71. *Ex parte Smith*, 33 Cal. App. 161, 164 Pac. 618, wherein it was said: "The business conducted by petitioner, as alleged in violation of the ordinance, is that of transporting passengers for hire, not in the city, but between termini both of which are outside thereof, incidental to, connected with, and as part of which a number of acts other than transportation, such as soliciting business, taking on and discharging passengers, collecting fares, and caring for their welfare en route, are necessary to be performed. The transportation of the passengers over any particular part of the public highway is one of the incidents of the business, but it no more constitutes the business than does the collection of their fares. Hence it cannot be said that the carrying of passengers for hire from Los Angeles to Bakersfield by means of a motor vehicle operated over the public highway, a part of which extends through Tropico where no stops are made, nor any of the incidental acts of such transportation performed other than traveling along the streets, constitutes a business 'transacted and carried on in such city.'

Adopting the contrary view urged by respondent, the conclusion must logically follow that a physician, grocer, plumber, indeed, every one engaged in a professional calling or business in one city, having occasion to make a professional call or deliver goods to a purchaser, to do which required him to travel upon the highways through other cities, could under a like provision of the ordinance to that here involved be subjected to a tax in the guise of a license levied upon the theory that such use of the streets constituted 'a business transacted or carried on' in the different cities through which he passed. While the use of the streets may be regulated, the city has no power to convert them into toll roads, and thus exact tribute from those who in the conduct of business elsewhere have occasion to use them solely as highways."

72. *Commonwealth v. Theberge*, 231 Mass. 386, 121 N. E. 30.

73. *Opdyke v. City of Anniston* (Ala. App.), 78 So. 634.

74. *Commonwealth v. O'Neil*, 233 Mass. 535, 24 N. E. 482.

shall procure, not only the consent of the municipalities wherein they operate, but also a certificate of convenience and necessity from the Public Service Commission for the operation of the route or vehicle to be operated.<sup>75</sup> This statute has

75. *Public Service Commission v. Mount Vernon Taxicab Co.*, 101 Misc. (N. Y.) 497, 168 N. Y. Suppl. 83; *Niagara Gorge R. Co. v. Gaiser*, 109 Misc. (N. Y.) 38, 178 N. Y. Suppl. 156; *Public Service Com'n v. Hurtgan*, 154 N. Y. Suppl. 897, 91 Misc. 432. See also *Thielke v. Albee*, 76 Oreg. 449, 153 Pac. 793.

**Bus line operated by city.**—A city cannot operate a bus line without obtaining the certificate from the Public Service Commission. *Brooklyn City R. Co. v. Whalen*, 111 Misc. (N. Y.) 348, 181 N. Y. Suppl. 208.

By section 25 of the **Transportation Corporations Law** as enacted by chapter 495 of the Laws of 1913 it was provided that:

Any person or any corporation who or which owns or operates a stage route or bus line wholly or partly upon and along a highway known as a State route or any road or highway constructed wholly or partly at the expense of the State or in, upon or along any highway, avenue or public place in any city of the first class having a population of seven hundred and fifty thousand or under, shall be deemed to be included within the meaning of the term "common carrier" as used in the public service commissions law, and shall be required to obtain a certificate of convenience and necessity for the operation of the route proposed to be operated, and shall be subject to all the provisions of the said law applicable to common carriers.

Chapter 667 of the Laws of 1915 amended this section so that it now reads as follows:

Any person or any corporation who or

which owns or operates a stage route, bus line or motor vehicle line or route, or vehicles described in the next succeeding section of this act wholly or partly upon and along any street, avenue or public place in any city shall be deemed to be included within the meaning of the term "common carrier" as used in the public service commissions law, and shall be required to obtain a certificate of convenience of the route or vehicles proposed to be operated, and shall be subject to all the provisions of the said law applicable to common carriers.

**Vehicles covered by New York statute.**—"It is plain that certain motor vehicles cannot be lawfully operated in a city without obtaining the consent of the local authorities and a certificate from the Public Service Commission certifying to the public convenience and necessity thereof. It is believed that the statute requires such consent for the operation in a city of either: (a) A bus line; (b) a stage route; (c) a motor vehicle line or route; (d) a vehicle in connection with a bus line, a stage route, a motor vehicle line or route; (e) a vehicle carrying passengers at a rate of fare of 15 cents or less for each passenger within the limits of a city; (f) a vehicle carrying passengers in competition with another common carrier which is required by law to obtain the consent of the local authorities of said city to operate over the streets thereof. The statute is that to lawfully operate any one of the above six specified lines, routes, or vehicles in a city the consent of the local authorities and the certificate of the Public Service Commission must be first obtained, pro-

been held applicable to jitney proprietors who had procured a license for the operation of their machines from a city before the statute went into effect.<sup>76</sup> Under this act it has been held that in passing upon an application for a certificate for the operation of a bus line or stage route from a point within a city over city streets to the city limits as a part of a line extending over country highways, the consent of the city forbidding the carrying of passengers between any two points within the city, the only question presented is whether public convenience and necessity require that the applicant, possessing already the right to bring passengers to the city limits and carry them from the city limits outward, should be permitted to bring them within the city or to pick them up within the city and carry them over the streets to the city limits.<sup>77</sup> It has also been held by the Public Service Commission in that State that where the duty of protecting existing transportation companies against wasteful competition conflicts with the primary duty which the Commission owes to the public, the first-mentioned duty must be deemed subordinate to the other, and certificates of convenience and necessity must issue regardless of the consequence to existing companies.<sup>78</sup> Other States have also given public utility commissions certain powers over the operation of jitneys.<sup>79</sup>

#### **Sec. 144. Licenses — in general.**

The Legislature has ample power to compel the owners of jitneys and other motor vehicles used for the carriage of passengers for hire to procure licenses.<sup>80</sup> And a municipal divi-

vided such line, route, or vehicles are engaged in the business of carrying passengers for hire in the city.''' Public Service Commission v. Hurtgan, 154 N. Y. Suppl. 897, 91 Misc. 432.

76. Public Service Commission v. Booth, 170 N. Y. App. Div. 590, 159 N. Y. Suppl. 140.

77. Matter of Petition of Bartholomew, Opinion Public Service Commission, Second District. Decided Feb. 16, 1916.

78. Matter of Petition of Gray, Opinion Public Service Commission, Second District. Decided October 20, 1915.

79. Chicago Motor Bus Co. v. Chicago Stage Co., 287 Ill. 320, 122 N. E. 477; State Public Utilities Com. v. Bartonville Bus Line, 290 Ill. 574, 125 N. E. 373; Public Utilities Com. v. Jones (Utah), 179 Pac. 745.

80. Hutson v. Des Moines, 176 Iowa, 455, 156 N. W. 883; Smith v. State,

sion of the State, unless its power is restricted by the Legislature, will generally have the power to license such vehicles.<sup>81</sup> A license can be required, not only for jitneys,<sup>82</sup> but also for taxicabs, as well as other vehicles used for hire.<sup>83</sup> The fact

130 Md. 482, 100 Atl. 778; *Public Service Commission v. Booth*, 170 N. Y. App. Div. 590, 159 N. Y. Suppl. 140; *State ex rel. Case v. Howell*, 85 Wash. 294, 147 Pac. 1159; *State v. Ferry Line Auto Bus Co.*, 93 Wash. 614, 161 Pac. 467. "It is too clear for extended discussion that it was competent for the legislature under the police power to regulate the use of the streets and public places by jitney operators, who, as common carriers, have no vested right to use the same without complying with a requirement as to obtaining a permit or license. The right to make such use is a franchise, to be withheld or granted as the legislature may see fit." *City of Memphis v. State*, 133 Tenn. 83, 179 S. W. 631.

**81. *United States*.**—*Nolan v. Riechman*, 225 Fed. 812.

*Arkansas*.—*Willis v. City of Ft. Smith*, 121 Ark. 606, 182 S. W. 275. "The municipal corporation therefore has all the power that belonged to the State for regulation of the operation of machines and instrumentalities of the kind included in the ordinance, and, unless such ordinance was beyond the authority of the State to grant, it was not beyond the power of the city to make. The regulation of such vehicles and traffic comes under the police power, and it is generally recognized that such regulations are a proper exercise of that power. The jitney bus business, transporting people for hire, for a uniform five-cent fare, in low-priced or second-hand automobiles, over definite routes in cities or towns, is of but recent origin, but the regulation of the business followed hard upon its development by acts of the legislature in some instances and by ordinances of municipalities, in

which they are operated in others." *Willis v. City of Ft. Smith*, 121 Ark. 606, 182 S. W. 275.

*California*.—*Ex parte Cardinal*, 170 Cal. 519, 150 Pac. 348.

*Connecticut*.—*State v. Scheidler*, 91 Conn. 234, 99 Atl. 492.

*Georgia*.—*Hazelton v. City of Atlanta*, 207 Ga. 147, 93 S. E. 202.

*Iowa*.—*Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883.

*Kansas*.—*Desser v. City of Wichita*, 96 Kans. 820, 153 Pac. 1194.

*Massachusetts*.—*Commonwealth v. Slocum*, 230 Mass. 180, 119 N. E. 687; *Burgess v. City of Brockton (Mass.)*, 126 N. E. 456.

*Nevada*.—*Ex parte Counts*, 39 Nev. 61, 153 Pac. 93.

*New Jersey*.—*Morin v. Nunan*, 91 N. J. L. 506, 103 Atl. 378.

*New York*.—*People v. Milne*, 86 Misc. 417, 149 N. Y. Suppl. 283; *Mason-Seaman Transp. Co. v. Mitchell*, 89 Misc. 235, 153 N. Y. Suppl. 461.

*Oklahoma*.—*Ex parte Halt*, 178 Pac. 260.

*Texas*.—*Ex parte Bogle*, 78 Tex. Cr. 5, 119 S. W. 1193; *Ex parte Parr*, 82 Tex. Cr. 525, 200 S. W. 404; *Greene v. San Antonio (Civ. App.)*, 178 S. W. 6; *Craddock v. City of San Antonio (Civ. App.)*, 198 S. W. 634; *City of Dallas v. Gill (Civ. App.)*, 199 S. W. 1144.

*Washington*.—*City of Seattle v. King*, 74 Wash. 277, 133 Pac. 442; *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18; *City of Spokane v. Knight (Wash.)*, 172 Pac. 823.

And see section 138.

**82.** See the cases cited in previous notes.

**83.** *Craddock v. City of San Antonio*

that other classes of vehicles are not required to be licensed does not affect the validity of the regulation.<sup>84</sup> The power to grant licenses to vehicles used for hire implies the power to refuse a license to an operator who does not bring himself within the terms of the regulation.<sup>85</sup>

### Sec. 145. Licenses — application to vehicles.

When it is sought to enforce a statute or regulation imposing a license tax on a vehicle used for hire, the question is presented whether the machine involved in the particular case is within the terms of the regulation.<sup>86</sup> The fact that the operator of a vehicle has taken out a license to operate it for hire does not raise any presumption that he is actually engaged in that business.<sup>87</sup> In proceedings to punish for a violation of the regulation, the burden is upon the prosecution to show that the defendant is within the terms of the regulation and has violated it.<sup>88</sup> A regulation imposing a license tax against vehicles used for hire is, under the general canons of construction, to be construed, in case of doubt, against the government and in favor of the citizen. Hence it has been held that a regulation aimed at "hacks, cabs, omnibuses and other vehicles used for the transportation of passengers for hire," did not cover the case of the automobile which was unknown at the time the regulation was passed.<sup>89</sup> On the other hand, it has been held that a motor vehicle furnished by a garage keeper for hire is within an ordinance requiring a license of "hackney carriages," although the ordinance was

(Tex. Civ. App.), 198 S. W. 634; *State v. Jarvis*, 89 Vt. 239, 95 Atl. 541.

84. See section 112.

85. *Commonwealth v. Slocum* (Mass.), 119 N. E. 687.

86. *Smith v. State*, 130 Md. 482, 100 Atl. 778; *State v. Ferry Line Auto Bus Co.*, 93 Wash. 614, 161 Pac. 467; *State v. Ferry Line Auto Bus Co.*, 99 Wash. 64, 168 Pac. 893; *Puget Sound Tract. L. & P. Co. v. Grassmeyer*, 102 Wash. 482, 173 Pac. 504.

**Machines of undertaker.**—Where an

undertaker uses an automobile for the purposes of carrying the family of a deceased to and from the cemetery, it may be said that the machine is used "for hire." *City of Spokane v. Knight* (Wash.), 172 Pac. 823.

87. *City of Chicago v. Gall*, 195 Ill. App. 41.

88. *City of Chicago v. Gall*, 195 Ill. App. 41.

89. *Washington Elec. Vehicle Transp. Co. v. District of Columbia*, 19 App. D. C. 462.

enacted before automobiles were in use.<sup>90</sup> And the fact that the vehicle does not stand in the street when not in use, but is left in a garage, does not make it any the less a "hackney carriage."<sup>91</sup> Under a statute giving a city the power to impose a license tax on "hackney coaches," and all other vehicles used for hire, an ordinance may be passed licensing jitneys.<sup>92</sup> The requirement of a license may apply to an auto bus which is operating under a contract to carry passengers between a military encampment and a nearby city. An ordinance prohibiting the operation of trucks "for hire or reward" does not apply to a delivery truck used by a baker.<sup>93</sup>

### Sec. 146. Licenses — nature of license.

A license to use the public highways for the carriage of passengers for hire is merely a permit to carry on a business which would otherwise be prohibited.<sup>94</sup> The license is not ordi-

90. *State v. Jarvis*, 89 Vt. 239, 95 Atl. 541, where it was said: "It remains to consider whether the respondent's business of carrying passengers for hire was covered by the ordinance. He says that the ordinances do not refer to automobiles; that they were enacted before automobiles were in use, and have not since been changed to include them. That the automobile is a carriage needs no argument. Whether it is a hackney carriage depends upon the use made of it, and not upon its motive power. Such a use as would make a horse-drawn vehicle a hackney carriage would give the same character to an automobile, whether called an auto hack, 'jitney,' or what not. The fact that the ordinances are older than the automobile is without force. The business of operating a carriage over the streets of the city for carrying persons for hire from place to place within the city has all along been the thing to be regulated. Happily the language employed was comprehensive enough to adapt the ordinance to changed conditions without amendment. Reference

to horses in other sections does not restrict the section in question to horse-drawn vehicles."

91. *State v. Jarvis*, 89 Vt. 239, 95 Atl. 541, wherein it was said: "Nor does the fact that the machines employed by the respondent in the business did not stand upon the street when not in use, nor the fact that the respondent did not solicit business on the street, affect the result. While hackney carriages may commonly be let for hire at stands on the street, they are no less such if kept on private grounds or in a garage. . . . As already indicated, it is the use made of carriages, and not the place where they are kept, or the manner of soliciting the business, that brings them within the purview of the statute."

92. *Ex parte Counts*, 39 Nev. 61, 153 Pac. 93.

93. *Ex parte Marshall* (Fla.), 77 So. 869.

94. *City of Chicago v. Gall*, 195 Ill. App. 41; *Burgess v. City of Brockton* (Mass.), 126 N. E. 456; *Public Service Commission v. Booth*, 170 N. Y. App.

narily a contract.<sup>95</sup> Those who make investments for the purpose of using the streets for jitneys under a license to do so, are subject to such other and different burdens as the Legislature may reasonably impose for the safety, convenience or welfare of the public.<sup>96</sup> Hence, after the payment of a license fee charged by a municipality, the State may intervene and abrogate the authority of the municipality in the matter or may impose an additional fee without interfering with any vested rights of the license holder.<sup>97</sup> Or a jitney license or a license to use certain hack stands may be revoked by a municipality,<sup>98</sup> without even notice to the licensee in some cases.<sup>99</sup> And the fact that the license is not a contract does not require that the holder carry out the business for which he is licensed.<sup>1</sup> A jitney or motorbus license is not a franchise.<sup>2</sup> Hence, it is

Div. 590, 159 N. Y. Suppl. 140; *Yellow Taxicab Co. v. Gaynor*, 82 Misc. 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 App. Div. 893; *Auto Transit Co. v. City of Ft. Worth* (Tex. Civ. App.), 182 S. W. 685.

95. *City of Chicago v. Gall*, 195 Ill. App. 41; *Burgess v. City of Brockton* (Mass.), 126 N. E. 456; *Public Service Commission v. Booth*, 170 N. Y. App. Div. 590, 159 N. Y. Suppl. 140; *Yellow Taxicab Co. v. Gaynor*, 82 Misc. 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 App. Div. 893; *Auto Transit Co. v. City of Ft. Worth* (Tex. Civ. App.), 182 S. W. 685.

96. *Nolan v. Riechman*, 225 Fed. 812.

In Canada, it has been held that a by-law of city police commissioners placing further restrictions on the operation of automobiles for hire within the city will not be effective to control an unqualified license already held by the accused which remains unrevoked. *Rex v. Aitcheson*, 25 Can. Cr. Cas. 36, 9 O. W. N. 65.

97. *Public Service Commission v. Booth*, 170 N. Y. App. Div. 590, 155 N. Y. Suppl. 568, wherein it was said: "By the charter and ordinances of the city of Rochester, a hackman or vehicle

for transporting people from place to place for hire cannot operate in the city without a license, and the common council had power to grant such a license by § 86 of the charter of said city (Laws of 1907, chap. 755, as amd. by Laws of 1910, chap. 250). The only effect of the license was to make legal that which without it would be illegal. The legislature of the State therefore, under the police power, in providing for the safety and welfare of the public, may make laws defining what vehicles may be operated in the cities as public conveyances and the terms of operation. The legislature cannot bargain away the police power of the State."

98. *Burgess v. City of Brockton* (Mass.), 126 N. E. 456; *Yellow Taxicab Co. v. Gaynor*, 82 Misc. 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 App. Div. 893.

99. *Burgess v. City of Brockton* (Mass.), 126 N. E. 456.

1. *City of Chicago v. Gall*, 195 Ill. App. 41.

2. *City of Dallas v. Gill* (Tex. Civ. App.), 199 S. W. 1144; *McCutcheon v. Wozencraft* (Tex. Civ. App.), 230 S. W. 733. Compare *City of Memphis v. State*, 133 Tenn. 83, 179 S. W. 651.



not necessary that a municipal ordinance regulating jitneys and requiring a license, be passed with the formalities which are required by the Constitutions and statutes of some States for the granting of franchises.<sup>3</sup>

### Sec. 147. Licenses — license fees.

The power to license motor vehicles for hire carries with it the power to impose a reasonable license fee for such vehicles.<sup>4</sup> The presumption is that a license fee is reasonable in amount, and the burden is placed on the one attacking the regulation to show its unreasonableness.<sup>5</sup> And, inasmuch as governmental control permits the exclusion of jitneys from certain streets,<sup>6</sup> it may impose on one desiring to use specific streets for that purpose a fee which is so large as practically to be prohibitive.<sup>7</sup> Regulations fixing a different rate of fee for different classes of vehicles do not constitute special or class legislation so long as the members of a class receive the same treatment.<sup>8</sup> Thus, an ordinance imposing a larger fee on the operators of jitneys than is required of the proprietor of a taxicab or other vehicle used for hire is not invalid.<sup>9</sup> Nor is a regulation deemed discriminatory because it grades different jitneys according to their seating capacity and

3. *City of Dallas v. Gill* (Tex. Civ. App.), 199 S. W. 1144.

4. *Ex parte Cardinal*, 170 Cal. 519, 150 Pac. 348; *Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883; *Commonwealth v. Slocum*, 230 Mass. 180, 119 N. E. 687; *Greene v. San Antonio* (Tex. Civ. App.), 178 S. W. 6; *Booth v. Dallas* (Tex. Civ. App.), 179 S. W. 301; *Ex parte Parr*, 82 Tex. Cr. 525, 200 S. W. 404; *City of Seattle v. King*, 74 Wash. 277, 133 Pac. 442; *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18.

**Additional charge on change of situation.**—A municipality having the power to charge a license fee for motor busses, may make a further charge of one dollar for additional expenses resulting from a loss of the original cer-

tificate or from a change of the route or seating capacity of the machine. *Booth v. Dallas* (Tex. Civ. App.), 179 S. W. 301.

5. *Ex parte Parr*, 82 Tex. Cr. 525, 200 S. W. 404.

6. Section 153.

7. *Desser v. City of Wichita*, 96 Kans. 820, 153 Pac. 1194.

8. *Auto Transit Co. v. City of Ft. Worth* (Tex. Civ. App.), 182 S. W. 685.

9. *Jackson v. Neff*, 64 Fla. 326, 60 So. 350; *Hazelton v. City of Atlanta*, 144 Ga. 775, 87 S. E. 1043; *Booth v. Dallas* (Tex. Civ. App.), 179 S. W. 301; *Auto Transit Co. v. City of Ft. Worth* (Tex. Civ. App.), 182 S. W. 685; *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18.

charges a larger fee for those with the larger capacity.<sup>10</sup> An ordinance imposing jitney license fees according to the seating capacity of the conveyance is valid, though the municipal charter provides that licenses shall be graduated according to the amount of business done.<sup>11</sup> One license fee may be imposed on vehicles using the streets as common carriers, and another be imposed on the owner thereof for the maintenance of an establishment where vehicles are kept for hire.<sup>12</sup> A provision of the constitution requiring uniformity of taxation applies only to property taxes, not to license fees.<sup>13</sup> A license fee is not classed as a tax unless its main purpose is the production of revenue.<sup>14</sup> If intended as a tax for the production of revenue, its validity is determined according to different principles, for exactions under the guise of license fees cannot be sustained in some States, when their purpose is the raising of revenue.<sup>15</sup> It is not deemed an occupation tax on the business of the owner of the vehicle.<sup>16</sup>

10. *Hazelton v. City of Atlanta*, 144 Ga. 775, 87 S. E. 1043; *Ex parte Bogle*, 78 Tex. Cr. 1, 179 S. W. 1193; *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18.

11. *Ex parte Counts*, 39 Nev. 61, 153 Pac. 93.

12. *District of Columbia v. Fickling*, 33 App. D. C. 371.

13. *Ex parte Bogle*, 78 Tex. Cir. 1, 179 S. W. 1193; *City of Seattle v. King*, 74 Wash. 277, 133 Pac. 442. "The uniform taxation rule enjoined by the Constitution applies only to taxes upon property; it does not require the uniform taxation of business. It would, of course, violate the rule against discrimination to tax one individual or one set of individuals engaging in a given business and exempt another or others engaging in the same business under like circumstances, but it does not forbid the taxation of one business

while others are left exempt when there is such a just difference between the businesses as to permit of classification. Here, as we have found, there is such a just distinction, and we cannot hold the ordinance void because discriminatory." *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18.

14. *Hutson v. Des Moines*, 176 Iowa. 455, 156 N. W. 883; *Commonwealth v. Slocum*, 230 Mass. 180, 119 N. E. 687; *Booth v. Dallas* (Tex. Civ. App.), 179 S. W. 301; *State v. Jarvis*, 89 Vt. 239, 95 Atl. 541.

15. *Ex parte Mayes* (Okla.), 167 Pac. 749; *City of Muskogee v. Wilkins* (Okla.), 175 Pac. 497; *Ex parte Holt* (Okla.), 178 Pac. 260.

And see section 105.

16. *Ex parte Phillips* (Okla.), 167 Pac. 221; *Auto Transit Co. v. City of Ft. Worth* (Tex. Civ. App.), 182 S. W. 685.

### Sec. 148. Licenses — conflict of State and municipal licensing systems.

It is fundamental that a municipal ordinance is ineffective in so far as it conflicts with a State statute.<sup>17</sup> But where a municipal corporation adopts certain regulations for the licensing of motor vehicles for hire, it is a question of some difficulty whether a motor vehicle law passed by the Legislature is in conflict. Some general statutes for the regulation of motor vehicles have had the effect of annulling licensing systems established in municipalities for the regulation of vehicles used for hire.<sup>18</sup> But a motor vehicle law which prohibits in general terms the regulation of automobiles by municipalities has been held not to bar local regulations requiring the procurement of licenses and the payment of license fees for the operation of vehicles for hire.<sup>19</sup> And the fact that the owner of a vehicle has a State license granted in accordance with a motor vehicle law, does not exempt him from the payment of a municipal license fee for the use of such vehicle in the transportation of passengers for hire.<sup>20</sup> So, too, a State statute providing that persons who have paid the registration fee required by the State law shall be exempt from other taxation on a motor vehicle, has been held not to forbid the imposition of a license fee by a municipality when the machine is used as a common carrier.<sup>21</sup> Nor is such the effect

17. *State v. Fink* (N. Car.), 103 S. E. 16; *Ex parte Phillips* (Okla.), 167 Pac. 221. And see section 77.

18. *Ex parte Shaw* (Okla.), 157 Pac. 900; *Ex parte Phillips* (Okla.), 167 Pac. 221.

19. *State v. Scheidler*, 91 Conn. 234, 9 Atl. 492. See also *City of Spokane v. Knight* (Wash.), 172 Pac. 823.

20. *Ex parte Counts*, 39 Nev. 61, 153 Pac. 93; *State v. Jarvis*, 89 Vt. 239, 95 Atl. 541.

21. *State v. Jarvis*, 89 Vt. 239, 95 Atl. 541, wherein it was said: "The respondent contends that persons who pay automobile taxes under the general law have the right to operate them without the further payment of taxes.

The fact that automobiles are exempt from taxation (No. 99, Acts of 1908, § 3), other than the payment of a registration fee gives them no such standing as the respondent suggests. The statute merely exempts them from the local property tax. The right to operate an automobile on the highways of the State acquired by payment or the registration fee is not an absolute right. There is nothing found in the statutes relating to registration and operation of automobiles that in any way abridges the power conferred upon the city council to regulate hackney carriages within the city of Burlington, if they chance to be automobiles."

of a statutory provision providing that local ordinances shall not be passed prohibiting the free use of the public highways.<sup>22</sup> Moreover, it has been held that the promulgation of regulations by the State with reference to vehicles used for hire, does not prohibit a municipality from imposing additional regulations.<sup>23</sup>

### **Sec. 149. Licenses — plying for hire.**

On the trial of a charge of violating a provision of a public hack ordinance forbidding the "plying for hire" of such a vehicle without a license, it is necessary to prove that the accused was "plying for hire." On the question of what constitutes a "plying for hire," it has been said: "The conjunction of a given purpose with given conduct appropriate to effectuate it constitutes 'a plying for hire' within the meaning of the ordinance, namely, the conjunction of the purpose to accept whenever the cab is vacant and unengaged persons who may offer themselves as passengers for hire, coupled with conduct which evidences this purpose—as, for example, the placing of such cab on a public street where it is accessible to those who may wish to hire it, and the solicitation of passengers for hire by the one operating it, by word, act, or by the exhibition of appropriate signs or devices. In this case the defendant's purpose was inferable from his conduct and his conduct was conducive to the effectuation of his purpose. Being actually hired is not the test of whether or not there is a plying for hire. One may ply for hire without being hired. A taxicab, not a public hack, can doubtless lawfully be called for an ascertained patron or hirer to a given place, and may proceed to such place and stop there, although such place be a public hack stand, and remain there subject to the orders of such person so engaging it, provided that no unreasonable use be made by such taxicab of such public stand, and provided that such taxicab is not subject to hire by any person other than such ascertained person or hirer from the time that it is called until the time when it returns to the garage in

<sup>22</sup>. *Allen v. City of Bellingham*, 95 Wash 12, 163 Pac. 18.

<sup>23</sup>. *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18.

which it is kept; and, for the purpose of securing customers taxicab companies may, by agreement, keep representatives in hotels, public restaurants, and other places, but such representatives cannot be permitted to evade the ordinance in question by summoning taxicabs, not public hacks, from such garages to such places ostensibly for ascertained patrons or hirers, but in reality without such, but with a view to having them hired by any one from the public streets."<sup>24</sup>

#### **Sec. 150. Licenses — effect of failure to have license.**

If one operates a motor vehicle for the carriage of passengers for hire without procuring a license as required by a State or municipal regulation, he may be subjected to a criminal prosecution. Moreover, the failure of the owner to procure a jitney license may subject his chauffeur to punishment.<sup>25</sup> And, if the proprietor has failed to secure the proper license, he may be unable to maintain a civil action to recover the fare due for the carriage of a passenger.<sup>26</sup> But according to the view generally prevailing, the absence of the proper license is not a defense to an action by the driver for injuries sustained through the negligence of a third person.<sup>27</sup> This situation is analogous to that where the owner of a machine has failed to register the same or the chauffeur has failed to procure a license, and it is generally held that the failure in this respect is not the proximate cause of an injury sustained by the driver, and he can nevertheless recover for injuries sustained from a defective highway, or from a collision with another vehicle or conveyance.<sup>28</sup> Municipal authorities may be required by mandamus to enforce the law so as to exclude from the streets jitneys which have not procured the necessary consent.<sup>29</sup>

<sup>24</sup>. *People v. Milne*, 87 Misc. 109, 149 N. Y. Suppl. 233.

<sup>25</sup>. *State v. Ferry Line Auto Bus Co.*, 93 Wash. 614, 161 Pac. 467.

<sup>26</sup>. *Ferdon v. Cunningham*, 20 How. Prac. (N. Y.) 154; *Best v. Bauder*, 29 How. Prac. (N. Y.) 489; *Miller v. Burke*, 6 Daly (N. Y.) 171; *Atlantic*

*City v. Fousler* (N. J.), 56 Atl. 119.

<sup>27</sup>. *Southern Ry. Co. v. Vaughn's Adm'r*, 118 Va. 692, 88 S. E. 305, L. R. A. 1916 E. 1222.

<sup>28</sup>. See sections 125-127, 226.

<sup>29</sup>. *People ex rel. Weatherwax v. Watt*, 115 Misc. (N. Y.) 120.

**Sec. 151. Licenses — transfer of license.**

Whether a license to operate a jitney or other motor vehicle is transferable from one vehicle to another depends upon the language of the regulation. It is within the power of the body enacting the regulation to provide that the license shall not be thus transferred.<sup>30</sup> Or the transfer of the license from one car to another car may be permitted, although the transfer from one owner to another is forbidden.<sup>31</sup>

**Sec. 152. Licenses — licensing of chauffeurs.**

Not only may a municipality, as a general rule, require the licensing of machines used for the carriage of passengers for hire, but it may also require that the drivers of such machines obtain a special license.<sup>32</sup> A municipal ordinance regulating taxicabs and other hacks may properly contain a requirement that applicants for a driver's license shall present a sworn testimonial as to his character by two reputable citizens and a further testimonial from his last employer, unless a sufficient reason is given for its omission.<sup>33</sup> Or he may be required to undergo a physical and mechanical examination before he will be allowed to drive a public vehicle.<sup>34</sup> And a municipal ordinance may give the mayor the power to suspend or revoke a driver's license, for such practice is only a reasonable method of securing such continued control over such drivers as is essential to the protection of passengers.<sup>35</sup>

**Sec. 153. Exclusion from streets.**

The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and

30. *City of Dallas v. Gill* (Tex. Civ. App.), 199 S. W. 1144.

31. *Young v. Wilson*, 99 Wash. 159, 168 Pac. 1137.

32. *City of Montgomery v. Orpheum Taxi Co.* (Ala.), 82 So. 117; *Ex parte Sullivan*, 77 Tex. Cr. App. 72, 178 S. W. 357. See also *City of Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917.

Aliens may be denied the right to a license to drive a vehicle for hire.

*Morin v. Nunan*, 91 N. J. L. 506, 103 Atl. 378.

33. *Yellow Taxicab Co. v. Gaynor*, 82 Misc. (N. Y.) 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 N. Y. App. Div. 893.

34. *Booth v. Dallas* (Tex. Civ. App.), 179 S. W. 301.

35. *Yellow Taxicab Co. v. Gaynor*, 82 Misc. 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 App. Div. 893.

business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual and extraordinary. As to the former the extent of legislative power is that of regulation, but, as to the latter, its power is broader, the right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature.<sup>36</sup> In other words, while the right to use the highways for the motor vehicular traffic in the ordinary manner may not be absolutely prohibited,<sup>37</sup> the use of the highways for jitneys and other vehicles for hire may be denied.<sup>38</sup> Thus, a municipality may ordinarily pass an ordinance forbidding the operation of jitneys until further ordinances are enacted on the subject.<sup>39</sup> But it has been said that the regulation of jitneys is not to be carried to the extent of exclusion. "A jitney is an automobile, and by universal custom automobiles are permitted to use the streets of cities, as are other vehicles. The fact that the owners of jitneys derive a profit from their operation makes no difference in their legal status. Much of the traffic upon the city streets is a matter of profit directly or indirectly to those engaged therein. The public highways are for the use of those engaged in commerce or industrial pursuits, no less than for pleasure cars."<sup>40</sup>

### Sec. 154. Restriction to certain streets.

In view of the holding in some States that jitneys may be excluded from all of the streets of a municipality,<sup>41</sup> it is clear

36. *Hadfield v. Lundin*, 98 Wash. 657, 168 Pac. 516; *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781.

37. Section 48.

38. *Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883; *Fifth Ave. Coach Co. v. City of New York*, 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. (N. S.) 744, 16 Ann. Cas. 695; *Greene v. City of San Antonio* (Tex. Civ. App.), 178 S. W. 6; *Peters v. City of San Antonio*

(Tex. Civ. App.), 195 S. W. 989; *Hadfield v. Lundin*, 98 Wash. 657, 168 Pac. 516. See also *Gill v. City of Dallas* (Tex. Civ. App.), 209 S. W. 209.

39. *Cummins v. Jones*, 79 Ore. 276, 155 Pac. 171.

40. *Jitney Bus Assoe. of Wilkesbarre v. Wilkesbarre*, 256 Pa. St. 462, 100 Atl. 954.

41. Section 153.

that it is within the power of a municipality, unless its authority is abridged by State statutes, to restrict the operation of such machines to certain designated streets.<sup>42</sup> This may be done indirectly, as by imposing a license fee for the use of certain streets which is so high that a jitney proprietor is unable to pay it as a business proposition.<sup>43</sup> It may be proper to restrict jitneys to those streets which are not occupied by street car tracks.<sup>44</sup> And such vehicles may be excluded from

42. *Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883; *Desser v. City of Wichita*, 96 Kans. 820, 153 Pac. 1194; *Commonwealth v. Slocum* (Mass.), 119 N. E. 687; *Peters v. City of San Antonio* (Tex. Civ. App.), 195 S. W. 989; *Gill v. City of Dallas* (Tex. Civ. App.), 209 S. W. 209; *State ex rel Shafer v. City of Spokane*, 109 Wash. 360, 186 Pac. 864. "If the municipality has absolute control over the streets, as impliedly admitted by appellants and as decided by almost every court passing upon the question, and the owners of motor vehicles have no right to engage in the business of carriers for hire on the streets without permission from the municipality, it follows in the line of reason and logic that the city can refuse such permit or can grant a license or franchise under such conditions and regulations as may be deemed fit and proper. If the city can ordain that no jitneys can be run for hire in San Antonio, as the authorities unite in saying it can, it certainly can grant the use of some streets and refuse the use of others, for jitney purposes. The power to prohibit certainly carries with it the right to regulate as it may deem proper and reasonable. The owners of jitneys are permitted to conduct their business on the streets through the grace of the city, and because they have been permitted to use certain streets at one time does not give any vested right to use them forever. The power that gave the right can take it away when not invading some vested or contract

right. When the use of the street is given, the convenience of the city, or what is deemed best for the people, is to be consulted, and not the desires of those who desire to convert the streets into their places of business. If the people, the voters of San Antonio, do not approve of the manner of regulation of jitneys, they can elect officers and instruct them to carry out their desires. It is a political question to be determined by the ballots of the people and not by the judiciary." *Peters v. City of San Antonio* (Tex. Civ. App.), 195 S. W. 989.

43. *Desser v. City of Wichita*. 96 Kans. 820, 153 Pac. 1194

44. "Beyond question, the city could vacate one or more of the streets over which he might desire to operate. It cannot only require him to pay a license tax, but it may regulate the manner of his carrying on his enterprise. Why may it not classify motor vehicles by themselves and refuse to permit them to crowd congested portions of the business streets where patrons of another class of vehicles—street cars—must alight and take passage? Suppose, indeed, a company or corporation owning motor vehicles had the facilities and the desire to occupy all the streets to the utter destruction of the street car business. Would the city have nothing to say? Is the municipality a mere automaton, helpless in the presence of crowding and conflicting enterprises and scrambles for business which involve the comfort, the convenience, and the



congested business sections.<sup>45</sup> But it has been said that an exclusion from certain streets without justification upon a reasonable basis may be illegal.<sup>46</sup>

### Sec. 155. Bonds — power to require proprietor to give bond.

As a condition for the issuance of a license for the use of the public highways by a jitney or other vehicle for hire, there is no dispute from the general proposition that the proprietor may be required to give a bond or insurance policy to indemnify the municipality and other travelers.<sup>47</sup> The fact that

safety of the traveling public? Not so." *Desser v. City of Wichita*, 96 Kans. 820, 153 Pac. 1194.

45. *McGlothern v. City of Seattle* (Wash.), 199 Pac. 457.

46. *Curry v. Osborne*, 76 Fla. 39, 79 So. 293, 6 A. L. R. 108.

47. *United States*.—*Nolan v. Riechman*, 225 Fed. 812; *Lutz v. City of New Orleans*, 235 Fed. 978.

*Arkansas*.—*Willis v. City of Ft. Smith*, 121 Ark. 606, 182 S. W. 275.

*Georgia*.—*Hazelton v. City of Atlanta*, 144 Ga. 775, 87 S. E. 1043; *Hazelton v. City of Atlanta*, 147 Ga. 207, 93 S. E. 202.

*Iowa*.—*Hutson v. Des Moines*, 176 Iowa. 456, 156 N. W. 883.

*Louisiana*.—*New Orleans v. Le Blanc*, 139 La. 113, 71 So. 248.

*Massachusetts*.—*Commonwealth v. Sloeum*, 230 Mass. 180, 119 N. E. 687; *Commonwealth v. Theberge*, 131 Mass. 386, 112 N. E. 30.

*Nevada*.—*Ex parte Counts*, 39 Nev. 61, 153 Pac. 93.

*New Jersey*.—*West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190.

*Pennsylvania*.—*Jitney Bus Assoc. of Wilkesbarre v. Wilkesbarre*, 256 Pa. St. 462, 100 Atl. 954.

*Tennessee*.—*City of Memphis v. State*, 133 Tenn. 83, 179 S. W. 651.

*Texas*.—*Greene v. City of San Antonio* (Civ. App.), 178 S. W. 6; *Ex parte Bogle*, 78 Tex. Cr. 1, 179 S. W.

1193; *Auto Transit Co. v. City of Ft. Worth* (Civ. App.), 182 S. W. 685; *Craddock v. City of San Antonio* (Civ. App.), 198 S. W. 634; *City of Dallas v. Gill* (Civ. App.), 199 S. W. 1144; *Western Indemnity Co. v. Berry* (Civ. App.), 200 S. W. 245; *Ex parte Parr*, 82 Tex. Cr. 525, 200 S. W. 404. "We discern nothing in the indemnity obligation, required which would condemn the ordinance as unreasonable. It creates no liability against the operators of automobiles for hire, but simply provides a limited security for the satisfaction of liabilities that may be incurred by the negligence of the licensee or those operating the automobile for him. The tendency of such a provision manifestly is to protect the citizens of the city using the streets in the ordinary way by stimulating caution on the part of those operating the vehicle." *Ex parte Parr*, 82 Tex. Cr. 525, 200 S. W. 404.

*Washington*.—*State ex rel. Case v. Howell*, 85 Wash. 294, 147 Pac. 1159; *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837; *Salo v. Pacific Coast Casualty Co.*, 95 Wash. 109, 163 Pac. 384; *Singer v. Martin*, 96 Wash. 231, 164 Pac. 1105; *Hadfield v. Lundin*, 98 Wash. 657, 168 Pac. 516; *Puget Sound Tract. L. & P. Co. v. Grassmeyer*, 102 Wash. 482, 173 Pac. 504.

**Vehicles other than jitneys.**—An or-

jitneys are required to furnish such an undertaking, while other carriers are exempt from the obligation, does not afford ground for the complaint of class legislation.<sup>48</sup> The requirement is justified on the theory that the investment required for the operation of a jitney is so inconsiderable that persons of small financial responsibility are able to engage in the business, and a bond may therefore be the only method of securing redress to persons who may be injured by the carelessness of the jitney operator.<sup>49</sup> Another reason warranting the requirement of a bond is the fact that it will tend to make the owner more prudent as to the skill of the drivers he may

dinance requiring that the proprietors of motor vehicles, other than jitneys, used for hire, shall give a bond, is sustainable to the same extent as a similar regulation relative to jitneys. *Craddock v. City of San Antonio* (Tex. Civ. App.), 198 S. W. 634, wherein it was said: "The ordinance of which complaint is made was passed for the purpose of regulating the use of the streets of the city by corporations or individuals with public service automobiles, not operating under the jitney ordinance, which prescribes the streets on which they shall or shall not operate, and is not open to any of the objections urged against it. The city seeks to regulate this class of automobiles just as it regulates the class known as jitneys, and it has the same right over its streets in connection with public service cars that transport passengers when and where they may choose, as it has over those whose routes are prescribed and licenses and bonds provided for. If the city can require a jitney to take out a license and give an indemnity bond, why should it not require the same or similar things of the public service cars? They are fully as dangerous, use the streets for a similar business, and no reason can be offered for not regulating their use of the streets that has not been given many times in connection with jitneys.

The jitney transports its passengers along certain named streets of the city at a charge of five cents a passenger. The jitney is required to give a bond in a certain sum for the protection of those who ride upon it. This court has held, and perhaps every court of the Union, considering the question, has held, that cities under their charters have absolute control of their streets so far as the regulation thereof is concerned in connection with the operation of a private business. The service car has no more rights and privileges upon the streets than have jitneys, the rights and privileges of each depending upon grants made to them by the municipality in which they operate."

48. *Nolan v. Reichman*, 225 Fed. 812; *Lutz v. City of New Orleans*, 235 Fed. 978; *Hazelton v. City of Atlanta*, 144 Ga. 775, 87 S. E. 1043; *West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190; *Greene v. San Antonio* (Tex. Civ. App.), 178 S. W. 6; *Ex parte Bogle*, 78 Tex. Cr. 1, 179 S. W. 1193; *Auto Transit Co. v. City of Ft. Worth* (Tex. Civ. App.), 182 S. W. 685; *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837.

49. *West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190; *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837.

employ to operate the machines.<sup>50</sup> The intention of the bond being to protect other travelers, the regulation may properly provide that a person injured by the operation of the machine shall have a cause of action against the principal and surety in the same manner as though the bond ran directly to him.<sup>51</sup> An ordinance fixing the amount of the bond as \$5,000 is not unreasonable or oppressive.<sup>52</sup>

### Sec. 156. Bonds — inability to furnish bond.

The fact that the owner of a jitney is unable to furnish the bond which may be required by a municipal regulation and cannot therefore engage in the business, furnishes no reason why the ordinance should not be enforced, nor are the constitutional rights of the jitney owner thereby infringed.<sup>53</sup>

### Sec. 157. Bonds — character of sureties.

The governmental power over the regulation of jitneys is so extensive that it is generally held that the regulation may provide for a particular form of bond, as, for example, one furnished by a surety company licensed to do business within the State.<sup>54</sup> Such a requirement does not violate the consti-

50. *Lutz v. City of New Orleans*, 235 Fed. 978; *Auto Transit Co. v. City of Ft. Worth* (Tex. Civ. App.), 182 S. W. 685.

51. *Hutson v. Des Moines*, 176 Iowa, 456, 156 N. W. 883; *City of Providence v. Paine*, 41 R. I. 333, 103 Atl. 786; *State ex rel. Case v. Howell*, 85 Wash. 294, 147 Pac. 1159; *Singer v. Martin*, 96 Wash. 231, 164 Pac. 1105.

52. *Hazelton v. City of Atlanta*, 144 Ga. 775, 87 S. E. 1043.

§2500 bond, is not unreasonable. *Commonwealth v. Theberge*, 231 Mass. 386, 121 N. E. 30.

53. *Lutz v. City of New Orleans*, 235 Fed. 978; *Greene v. City of San Antonio* (Tex. Civ. App.), 178 S. W. 6; *Auto Transit Co. v. City of Ft. Worth* (Tex. Civ. App.), 182 S. W. 685; *Had-*

*field v. Lundin*, 98 Wash. 657, 168 Pac. 516; *Puget Sound Tract. L. & P. Co. v. Grassmeyer*, 102 Wash. 482, 173 Pac. 504.

54. *Lutz v. City of New Orleans*, 235 Fed. 978; *New Orleans v. LeBlanc*, 139 La. 113, 71 So. 248; *Auto Transit Co. v. City of Ft. Worth* (Tex. Civ. App.), 182 S. W. 685; *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837. "It is further contended, in this connection, that the act is invalid because of the particular character of the bond required. The requirement is, it will be noticed, that the bond be obtained from a 'good and sufficient surety company licensed to do business in this State,' making no provision for substitutes in any form, or for bonds with other sureties of equal

tutional right of the jitney owner to liberty of contract.<sup>55</sup> And the fact that a particular operator cannot, by reason of limited financial resources or standing, secure a surety bond, will not present ground for the courts to release him from the requirement.<sup>56</sup> But a contrary conclusion has been reached as to such a requirement, and it has been held in one State that a municipal ordinance requiring the bond of a jitney operator to be signed by a surety company is unreasonable.<sup>57</sup>

responsibility. But we know of no constitutional right which such a provision violates. The power to regulate necessarily implies the power to prescribe the form of regulation, and the most that can be successfully contended for, conceding even that it was without the power of the legislature to actually prohibit this form of traffic, is that the requirement be a reasonable one. It is not shown that there were no such companies authorized to do business in this State, and, since the legislature prescribed this form of bond, the court must presume that they had knowledge of the subject-matter upon which it legislated, and must presume, in consequence, that there are such companies, and that bonds are obtainable from them without undue restrictions or unreasonable cost. We cannot therefore know judicially that the requirement is unreasonable." *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837.

55. *Lutz v. City of New Orleans*, 235 Fed. 978. "Does the requirement that the bond be signed by a surety company violate plaintiffs' liberty of contract? Assuredly not. It is shown that a number of surety companies are authorized to do business in the State. It is not shown they exact exorbitant fees, or that the plaintiffs could procure personal surety on a better basis or at all. The only reason plaintiffs cannot procure the surety bonds in compliance with the ordinance is because they cannot deposit cash or collateral equal to

the amount of the bond. Personal surety might make the same requirement. In any event the contrary is neither alleged or proved. Considering the greater desirability of corporate surety in any case, a superiority sometimes recognized by the law itself. . . . it can hardly be said that the provision that the bond must be signed by a surety company is more onerous than would be a requirement of personal surety of equal responsibility." *Lutz v. City of New Orleans*, 235 Fed. 978.

56. *Lutz v. City of New Orleans*, 235 Fed. 978; *Auto Transit Co. v. City of Ft. Worth* (Tex. Civ. App.), 182 S. W. 685.

57. *Jitney Bus Assoc. of Wilkesbarre v. Wilkesbarre*, 256 Pa. St. 462, 100 Atl. 954, wherein the court said: "In the present case the bond required is restricted to one furnished by a surety company, while the evidence shows that it is difficult to procure such a bond from a surety company. Under the circumstances, we think the exclusion of personal sureties is not justifiable or reasonable. The municipality is entitled to require good and sufficient security, but beyond that it should not go. The terms of the ordinance in this respect would forbid the deposit of cash, or a certified check, or municipal bonds, as security by the applicant for a permit, or the acceptance as sureties upon his bond of individual freeholders of unquestioned financial responsibility. We know of no other instance in which,

And it has been held proper to vest the municipal officials with power to require further sureties upon the bond, after determining that the existing ones are insufficient.<sup>58</sup>

### Sec. 158. Bonds — extent of surety's liability.

In an action for injuries received by a traveler from the operation of a jitney, the plaintiff is entitled to recover of the surety on the bond the same items of damages as he is entitled to receive from the principal.<sup>59</sup> The liability of the surety may run to a passenger in the vehicle as well as to pedestrians and travelers in other vehicles,<sup>60</sup> although the amount of the bond is regulated according to the seating capacity of the vehicle.<sup>61</sup> The bond may be one of liability instead of indemnity merely.<sup>62</sup> The surety may be liable, although the machine was operated at the time in question, not by the jitney owner, but by a driver who received a share of the proceeds for his compensation.<sup>63</sup> Or the bond may cover an accident while the driver is running the machine to a repair shop for repairs and is not carrying passengers.<sup>64</sup> But the surety will not ordinarily be liable when the machine is off its usual route and the driver has temporarily discontinued

where security is required by law to be given, an attempt has been made to confine such security to surety companies, to the exclusion of solvent and responsible personal sureties."

58. *Commonwealth v. Slocum*, 230 Mass. 180, 119 N. E. 687.

59. *Singer v. Martin*, 96 Wash. 231, 164 Pac. 1105.

Damage to property, as well as personal injuries, may be recovered against the surety. *Gilland v. Manufacturer's Casualty Ins. Co.*, 92 N. J. L. 146, 104 Atl. 709.

60. *City of Providence v. Paine* (R. I.), 103 Atl. 786; *Interstate Casualty Co. v. Hogan* (Tex. Civ. App.), 232 S. W. 354; *Singer v. Martin*, 96 Wash. 231, 164 Pac. 1105.

61. *City of Providence v. Paine*, 11 R. I. 333, 103 Atl. 786.

62. *Fenton v. Poston* (Wash.), 195

Pac. 31, where it was said: "The test as to whether this is a liability or an indemnity bond seems to be: If the intention of the parties thereto was to protect the assured from liability for damages, or to protect persons damaged by injuries occasioned by the assured as specified in the contract, when such liability should accrue, and be imposed by law (as by a judgment of a competent court), it is a liability bond; if, on the other hand, it is only to indemnify the assured against actual loss by them, that is, for reimbursement to them for moneys they had been obliged to pay and had paid, it would be an indemnity bond only, protecting only the assured."

63. *McDonald v. Lawrence*, 170 Wash. 576, 170 Pac. 576.

64. *Ehlers v. Gold*, 169 Wis. 494, 173 N. W. 325.

the jitney business.<sup>65</sup> And, generally the liability of the company extends only to the vehicle mentioned in the bond.<sup>66</sup>

The liability on the bond may survive the death of the injured person so that his representative or a member of his family may maintain an action thereon.<sup>67</sup> It is not necessary, in order to resort to the remedy against the surety, that a judgment be first recovered against the jitney owner.<sup>68</sup> Or the person injured may sue the surety on the judgment he has recovered against the proprietor;<sup>69</sup> but, where the bond is not to pay a *judgment* recovered against the principal the surety may contest the liability of the principal, although judgment has been rendered against him.<sup>70</sup> Under the regulations in some States, the bond is a continuing liability and each person injured by the operation of the jitney is entitled to recover from the surety up to the full amount of the bond.<sup>71</sup> But, on

65. *Motor Car Indemnity Exch. v. Lilienthal* (Tex. Civ. App.), 229 S. W. 703; *Hemphill v. Romano* (Tex. Civ. App.), 233 S. W. 125.

66. *Downs v. Georgia Casualty Co.*, 271 Fed. 310.

**Marshaling funds.**—When the sums due to various persons exceed the amount of the bond, the court has no authority to marshal the funds for division *pro rata* among such persons. *Turk v. Goldberg* (N. J.), 109 Atl. 732.

67. *Bruner v. Little*, 97 Wash. 319, 166 Pac. 1166.

68. *Gugliemetti v. Graham* (Cal. App.), 195 Pac. 64; *City of Providence v. Paine*, 41 R. I. 333, 103 Atl. 786. "There is nothing in the statute expressly or impliedly requiring the bringing of an action against the principal to determine his liability before an action is commenced on the bond. And there is nothing in the bond which makes the sureties liable only in the event that the principal fails to pay. On the contrary, their liability is unconditional, and, as has already been stated, they may be proceeded against alone. It follows that a person injured by the negligence of a motor bus licensee in the operation of his motor car

has the choice of proceeding in the recovery of damages in whichever manner he considers will be for his advantage, either by bringing an action of trespass on the case, if the licensee be financially responsible, or an action of debt on bond, if he deem that the more prudent course. *City of Providence v. Paine*, 41 R. I. 333, 103 Atl. 786.

69. *Gillard v. Manufacturers Casualty Ins. Co.*, 93 N. J. L. 215, 107 Atl. 446.

70. *Calvitt v. City of Savannah* (Ga. App.), 101 S. E. 129.

71. *Salo v. Pacific Coast Casualty Co.*, 95 Wash. 109, 163 Pac. 384; *Nelson v. Pacific Coast Casualty Co.*, 96 Wash. 43, 164 Pac. 594. "Much discussion is found in the briefs over the question whether a surety can be held liable for a greater amount than the penalty named in the bond. There is a line of cases which hold that, where the action is brought upon a covenant found in the bond, and is not brought for the penalty, which at common law would have been an action of debt, the recovery may exceed the amount of the penalty. It is unnecessary to review these cases, as they are not here applicable. In this case, the action against

the other hand, it has been held that a municipality cannot require a jitney proprietor to furnish a bond which shall have a continuing liability so as to render the surety liable for a sum beyond the penal sum mentioned therein.<sup>72</sup> If bonds in excess of the amount actually required are given by the jitney proprietor, a recovery may be had thereon to their full amount.<sup>73</sup>

### Sec. 159. Bonds — liability for accident outside of municipality.

Under a statute forbidding the operation of jitneys within certain cities unless the owner procures a license and furnishes a bond, it has been held that the surety is not liable for injuries occurring outside of the territorial limits of a city.<sup>74</sup> The bond may be required so that it applies only to

the surety company is not upon a covenant in the bond other than the stipulated penalty. If the bond in this case does not furnish protection to each individual injured, to the extent of the penalty named, then the judgment should be reversed. On the other hand, if it was the intention of the statute, under which the bond is given, to furnish protection to each individual injured, to the extent of the penalty named in the bond, then the judgment should be affirmed. In a statutory bond, in order to determine the extent of the liability, the provisions of the act under which the bond is given are read into, and become a part of, such bond." *Salo v. Pacific Coast Casualty Co.*, 95 Wash. 109, 163 Pac. 384.

**Damages to "two" persons.**—Where a widow shows damages in an action for his death to the deceased and his estate and also her own pecuniary loss, the circumstances may constitute damages to "two persons" within the meaning of a bond conditioned for the payment of damage not exceeding \$2,500 to any one person, or \$5,000 for any one accident. *Ehlers v. Gold*, 169 Wis. 494, 173 N. W. 325.

<sup>72</sup>. *Jitney Bus Assoc. of Wilkesbarre v. Wilkesbarre*, 256 Pa. St. 462, 100 Atl. 954.

<sup>73</sup>. *Western Indemnity Co. v. Murray* (Tex. Civ. App.), 208 S. W. 696.

<sup>74</sup>. *Bartlett v. Lanphier*, 94 Wash. 354, 162 Pac. 533, wherein it was said: "If one reads these sections without having in mind the dominant purpose of the act, which manifestly is to prevent the operation of motor vehicles by carrying passengers for hire in cities of the first class without a permit so to do, and to secure compensation to those negligently injured by such operation in cities of the first class, there will be suggested to the mind of the reader many uncertainties and much ambiguity in the meaning of the language used; but, having this evident dominant purpose of the act in view, we think it must be held that no permit for so operating motor vehicles outside the corporate limits of cities of the first class is required and that the bond required as a condition precedent to the issuance of such permit is not to secure compensation for injuries other than such as occur within the corporate limits of such cities. In other words,

the municipality granting the license, although the line extends beyond the municipal limits.<sup>75</sup>

### **Sec. 160. Hack stands — in general.**

It is within the power of municipal corporations to regulate the place where taxicabs, motor hacks and similar vehicles shall stand when not in employment.<sup>76</sup> Outside of the nature of such vehicles as common carriers which justifies their regulation, a city has power to make reasonable regulations to avoid the obstruction of the streets.<sup>77</sup> As a general proposition, it may select certain places for stands and adopt a form of license to use such places, and it may thereafter revoke such licenses and make other provisions with regard to the hack stands.<sup>78</sup>

### **Sec. 161. Hack stands — sight-seeing automobiles.**

In *New York* it is decided that as a general proposition, an owner or tenant of premises abutting on a public street in the city of New York cannot use the street for private gain, as the streets are for the use of the public, subject to such regulations as the Legislature may adopt or may empower the municipality to make.<sup>79</sup> So, it has been held that the lease of a store

that neither the permit nor the bond has anything to do with the operation of motor vehicles outside the corporate limits of such cities.' See also *Bogdan v. Pappas*, 95 Wash. 579, 164 Pac. 208.

75. *Fischer v. Pallitt* (N. J.), 112 Atl. 305.

76. *Sanders v. City of Atlanta*, 147 Ga. 819, 95 S. E. 695; *Pugh v. City of Des Moines*, 176 Iowa, 593, 156 N. W. 892; *Swann v. City of Baltimore*, 132 Md. 256, 103 Atl. 441; *Yellow Taxicab Co. v. Gaynor*, 82 Misc. 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 App. Div. 893; *Ex parte Stalleups* (Tex. Cr.), 220 S. W. 547.

77. *Sanders v. City of Atlanta*, 147 Ga. 819, 95 S. E. 695; *Pugh v. City of*

*Des Moines*, 176 Iowa, 593, 156 N. W. 892.

**Standing taxicab as nuisance.**—If a taxicab company unreasonably and unlawfully obstructs a public highway it is guilty of a public nuisance, but no action to abate it exists in favor of a private suitor in the absence of some showing of injury or damage peculiar to him. *Hefferon v. New York Taxicab Co.*, 146 N. Y. App. Div. 311, 130 N. Y. Suppl. 710.

78. *Yellow Taxicab Co. v. Gaynor*, 82 Misc. 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 App. Div. 893; *Ex parte Stalleups* (Tex. Cr.), 220 S. W. 547.

79. *United States Restaurant Co. v. Schulte*, 67 Misc. (N. Y.) 633, 124 N. Y. Suppl. 835.



under a hotel carries with it the easements of light, air and access through the public street in front of the premises, but does not include the right to grant a privilege of maintaining a sightseeing automobile at the curb. Although, by reason of a prior license given by the landlord who owns a hotel to a taxicab company to maintain a cab stand in front of said premises and a municipal license granted in conformity therewith, if the use of the street by a sightseeing automobile is interfered with, the tenant of the store cannot be held thereby to suffer a partial eviction. Such a stand is an incident to the use of the premises as a hotel, but a sightseeing automobile is not incidental to the use of the store.<sup>80</sup>

### **Sec. 162. Hack stands — taxicab service for hotel.**

Although a hotel proprietor may have no right to rent an automobile kept standing in front of his hotel except to his guests, he is not to be convicted of unnecessarily obstructing the streets because a machine happened to be rented to one coming into the hotel who proved not to be a guest, where there is no evidence that the machine delayed or hindered traffic along the street.<sup>81</sup> It has been held that an agreement by a hotel company purporting to "lease" the privilege of taxicab service for the hotel for a specified sum is not a lease, but a license, and where such license is not exclusive and it is not shown that irreparable damage will ensue from a breach thereof, and the license has been surrendered by one of the licensees, the plaintiff's partner, his suit for an injunction restraining the hotel from granting a like license to other parties does not lie, for if there was any breach of the agreement the remedy at law is adequate.<sup>82</sup>

### **Sec. 163. Hack stands — soliciting passengers.**

A municipal ordinance may forbid the operators of taxicabs from soliciting customers or passengers for hire upon rail-

<sup>80</sup>. *United States Restaurant Co. v. Columbia*, 25 App. D. C. 179.

*Schulte*, 67 Misc. (N. Y.) 633, 124 N. Y. Suppl. 835.

<sup>81</sup>. *Gassenheimer v. District of* 465.

<sup>82</sup>. *Lynch v. Murphy Hotel Co.*, 130 N. Y. App. Div. 691, 115 N. Y. Suppl.

road premises or docks of transportation companies, or other places. Or it may be required that no person shall solicit passengers for a public hack upon the streets except the driver when sitting on the box of his vehicle.<sup>83</sup> It is the intent of such a regulation to protect the traveling public from annoyance by drivers of taxicabs, and to prevent such drivers from annoying prospective passengers.<sup>84</sup> Such a regulation does not necessarily prohibit drivers from standing their vehicles at such places when they are not soliciting patronage.<sup>85</sup> It may, therefore, be important to determine the exact meaning of the term "soliciting." In one case, a charge was sustained which defined "soliciting" as follows: "'Soliciting' within the meaning of said ordinances, is to ask for and to seek to obtain the right and privilege of passengers to transfer such passengers or their baggage for hire by actual persuasion or persistent entreaty, and that the presence of any of the plaintiff's officers, agents, servants, or employees, either in or not in uniform of the plaintiff, along, or accompanied by any vehicle of the plaintiff, with or without its name thereon, is not 'soliciting' within the meaning of said ordinance." <sup>86</sup>

**83.** *Yellow Taxicab Co. v. Gaynor*, 82 Misc. 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 App. Div. 893.

**84.** *Seattle Taxicab & Tr. Co. v. Seattle*, 86 Wash. 594, 150 Pac. 1134.

**85.** *Seattle Taxicab & Tr. Co. v. Seattle*, 86 Wash. 594, 150 Pac. 1134.

**86.** *Seattle Taxicab & Tr. Co. v. Seattle*, 86 Wash. 594, 150 Pac. 1134, wherein it was said: "We think no valid objection can be made to this definition of the word 'soliciting,' as the same is used in the ordinance in question. As stated above, the purpose of this ordinance was to protect travelers so that they might not be subjected to inconvenience or annoyance, and the words 'soliciting customers or passengers for hire' mean that drivers, when asking persons to become patrons of their cabs, shall be at a certain place or places. The mere fact that the driver of a cab was standing upon

the street, mute, with his cab, could not be construed as soliciting, under the terms of the ordinance. The city plainly did not intend that, if a taxicab driver was sitting upon the seat of his cab at some other place in the city, saying nothing, he would be subject to arrest because he was without the places named in the ordinance. The police officers of the city of Seattle, prior to the bringing of this action, had construed the ordinance to prohibit taxicab drivers from being at any other place than the places mentioned in the ordinance, whether they were actively soliciting or not. The fact that the driver wore a cap or uniform, or upon his cab was a designation of the fact that the cab was for hire, was construed by the police officers as an act of solicitation, for which the driver was arrested. It was to prevent this that the action was brought. We think the

## Sec. 164. Routes and schedules.

The fixing of routes and schedules for jitneys is an appropriate exercise of the regulatory power of States and municipalities.<sup>87</sup> A jitney regulation may properly require the proprietor to maintain a regular schedule of his trips for certain hours.<sup>88</sup> And a jitney owner may be required to operate over a designated route and no other, and on a fixed schedule without repetition in whole or in part of the scheduled trips, and that the machines shall be operated a certain number of hours during each day.<sup>89</sup> And it may also be required that the jitney shall not stop to accept or discharge passengers in congested parts of the city at points other than near the middle of blocks.<sup>90</sup>

## Sec. 165. Punishing passenger for failure to pay fare.

A municipal ordinance making it a misdemeanor to ride in a vehicle used for hire and to refuse to pay the fare therefor, is contrary to a constitutional provision forbidding imprisonment for debt.<sup>91</sup>

court very properly defined what constituted 'soliciting,' within the meaning of the ordinance."

**Solicitation.**—Solicitation of patronage in order to give a vehicle a public character, may be practiced by other means than voice. Any acts or conduct intended and calculated to invite the patronage of intending passengers amounts to solicitation. *State v. Shiffrin*, 78 Conn. 220, 103 Atl. 899.

87. *Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883.

88. *Ex parte Lee*, 28 Cal. App. 719, 153 Pac. 992; *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781; *Booth v. Dallas* (Tex. Civ. App.), 179 S. W. 301.

89. *Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883; *Commonwealth v. Slocum*, 230 Mass. 180, 119 N. E. 687; *West v. Asbury Park* (N. J.), 99 Atl. 190; *Booth v. Dallas* (Tex. Civ. App.), 179 S. W. 301; *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18.

90. *West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190; *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18.

91. *Kansas City v. Pengilly*, 269 Mo. 59, 189 S. W. 380, wherein it was said: "It is urged the fact the taxicab company was a common carrier ought to induce a different conclusion. There is no direct proof supporting the fact assumed. The taxicab company is in no wise at the mercy of its patrons. It may require payment in advance if it so desires, and thus protect itself. Regulations may be imposed upon patrons of carriers and fines may be assessed for their violation, but such regulations must accord with applicable constitutional provisions. Further, the ordinance is not limited to common carriers, but applies, by its terms, to every horse-drawn or power-propelled vehicle hired for the conveyance of goods or passengers. Again, it is not confined to licensed vehicles."

**Sec. 166. Taximeters.**

For some time there have been in operation public vehicles with instruments called "taximeters" attached, that compute the fare to be paid by those carried according to the distance traveled and the time for which the vehicle is engaged. Presumably these instruments are fairly accurate, although there is no safeguard against "short measure" other than that which may be found in the criminal statutes. A taximeter may be too fast or too slow. By municipal ordinances in some cities the matter of taximeters is regulated, provisions being made as to the appointment of inspectors to test and inspect them, as to sealing up the case containing the working parts of the taximeter, as to a certificate of inspection as prerequisite to a license, as to a record being kept of the owner of the vehicle, and of the description of the taximeter and the vehicle, and also numerous other details.

In regulating taxicabs and public hacks, it has been held that a municipal corporation may require the installation of correct taximeters and may impose a punishment for a failure to obey the regulation.<sup>92</sup> The purpose of such a requirement is to enable the passenger to determine the distance traveled and the rate of fare due therefor.<sup>93</sup> And a municipality may make a distinction between classes of vehicles on which taximeters are necessary. Thus, it may impose the requirement as to motor-driven vehicles designed to carry not more than four persons, while the same requirement is not made as to vehicles having a larger carrying capacity.<sup>94</sup>

92. *Yellow Taxicab Co. v. Gaynor*, 82 Misc. (N. Y.) 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 App. Div. 893.

93. *Yellow Taxicab Co. v. Gaynor*, 82 Misc. (N. Y.) 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 N. Y. App. Div. 893. "The requirement that meters shall be used has been shown by experience to be essential in order to check the frauds which might easily be perpetrated upon passengers. The commissioner of accounts of the city of New York and the commission ap-

pointed by the mayor of the city to investigate this whole subject of taxicab regulation have both reported that such frauds have been commonly committed. The requirement that meters shall be used is not only necessary if the frauds heretofore practiced are to be prevented, but is obviously so just and reasonable a regulation as not to justify further discussion." *Yellow Taxicab Co. v. Gaynor*, 82 Misc. 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 N. Y. App. Div. 893.

94. *Yellow Taxicab Co. v. Gaynor*, 82

**Sec. 167. Rate of fare.**

The common law duty is imposed on all carriers of passengers for hire to charge for the service not more than a "reasonable" rate. Within reasonable limitations a municipal corporation generally has the power to fix the rates of fare which shall be charged within its limits for the carriage of passengers for hire in motor vehicles.<sup>95</sup> And when such a regulation is enacted, the common law right of the vehicle owner is abridged so that, while the rate must still not exceed a reasonable limit, it must also not exceed the specified rate. It may be that a regulation which made the rate so low that it was impossible to operate motor vehicles under them at a profit would be unreasonable and ineffective, but the burden is upon the person attacking the ordinance to show the unreasonableness of the rate permitted.<sup>96</sup> It is not necessarily objectionable for an ordinance to fix a lower rate of fare for passengers in motor-driven vehicles than for those in horse-drawn carriages.<sup>97</sup>

Misc. 94, 143 N. Y. Suppl. 279, wherein it was said: "The purpose of a taximeter is to enable the occupant of the cab to determine the distance traveled and the rates of fare therefor. It is a matter of common knowledge that the distance traveled is more easily ascertainable in the case of horse-drawn than in the case of motor-driven vehicles. The fact that motor-driven vehicles designed to carry not more than four persons are required to have taximeters, while the same requirement is not made as to motor-driven vehicles of greater carrying capacity, cannot be said to be unreasonably discriminatory. The smaller cabs designed to carry a few persons are more generally engaged in transit business, while touring cars and sight-seeing vehicles designed to carry a larger number of persons are more generally employed to travel a fixed route between known points or are employed for a definite time at an agreed rate. In determining whether or not

a provision of an ordinance is discriminatory, it is always to be borne in mind that regulations which are designed to promote public convenience are not to be condemned, and whether or not such regulations are adapted to this end rests largely within the discretion of the governing body of the city."

95. *Commonwealth v. Slocum*, 230 Mass. 180, 119 N. E. 687; *Fonsler v. Atlantic City*, 70 N. J. Law, 125, 56 Atl. 119; *Yellow Taxicab Co. v. Gaynor*, 82 Misc. (N. Y.) 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 App. Div. 893; *Ex parte Diekey*, 76 W. Va. 576, 85 S. E. 781.

96. *Yellow Taxicab Co. v. Gaynor*, 82 Misc. (N. Y.) 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 App. Div. 893.

97. *Yellow Taxicab Co. v. Gaynor*, 82 Misc. (N. Y.) 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 App. Div. 893.

**Sec. 168. Miscellaneous regulatory matters.**

Various regulations not specifically discussed in the foregoing paragraphs have been imposed on the operation of jitneys and other vehicles used for hire and have been sustained by the courts. Thus, it is proper to require a licensed vehicle to carry all persons applying for passage and tendering the legal fare.<sup>98</sup> A tax of five per cent. of the gross receipts may be imposed on jitney owners in some jurisdictions.<sup>99</sup> And a regulation which provides for a convenient notification to intending passengers whether the vehicle is in use, is not unreasonable.<sup>1</sup> So, too, it may be unlawful for the operator to allow any one to ride on the same seat with him.<sup>2</sup> Or passengers may be prohibited from riding on the doors of motor buses.<sup>3</sup> And a jitney operator may be forbidden to carry passengers beyond the seating capacity of the machine, and to maintain a light in the tonneau during the hours of darkness.<sup>4</sup> The proprietor of a jitney route may be required to submit his machines once each week for the inspection of a municipal official.<sup>5</sup> The use of trailers,<sup>6</sup> dangerous speed,<sup>7</sup> or the passage of a railway crossing without stopping,<sup>8</sup> may be forbidden. The jitney owner may be required to display his license, a number plate issued by the municipality, or a sign with information concerning its route, schedules, and other matters.<sup>9</sup> He may be required to execute a power of

98. *Fonsler v. Atlantic City*, 70 N. J. Law, 125, 56 Atl. 119; *West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190.

99. *West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190.

1. *Fonsler v. Atlantic City*, 70 N. J. Law, 125, 56 Atl. 119.

2. *Yellow Taxicab Co. v. Gaynor*, 82 Misc. (N. Y.) 94, 143 N. Y. Suppl. 279, affirmed on opinion below, 159 N. Y. App. Div. 893.

3. *City of Dallas v. Gill* (Tex. Civ. App.), 199 S. W. 1144.

4. *Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883; *Commonwealth v. Slocum*, 230 Mass. 180, 119 N. E. 687; *West v. Asbury Park* (N. J.), 99 Atl.

190; *Booth v. Dallas* (Tex. Civ. App.), 179 S. W. 301; *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18.

5. *Booth v. Dallas* (Tex. Civ. App.), 179 S. W. 301.

6. *Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883.

7. *West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190.

8. *Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883.

9. *Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883; *Commonwealth v. Slocum*, 230 Mass. 180, 119 N. E. 687; *West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190; *Allen v. City of Bellingham*, 95 Wash. 12, 163 Pac. 18.

attorney authorizing one to acknowledge service of process in actions against him.<sup>10</sup> A municipality may impose a penalty on the jitney owner for a violation of the regulations.<sup>11</sup>

### Sec. 169. Liability for injury to passenger — in general.

Common carriers of passengers, among which are to be classed jitneys, taxicabs, and other motor vehicles carrying passengers for hire, are bound to exercise a high degree of care for the safety of their passengers.<sup>12</sup> In this respect, their legal situation may be different from that of other vehicular travelers, who are required to exercise merely ordinary care under the circumstances.<sup>13</sup> If, by reason of their failure to

10. *West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190. See also *Gillard v. Manufacturer's Casualty Ins. Co.*, 93 N. J. L. 215, 107 Atl. 446.

11. *Hutson v. Des Moines*, 176 Iowa, 455, 156 N. W. 883.

12. *Todd v. Chicago City Ry. Co.*, 197 Ill. App. 544; *Boland v. Gay*, 201 Ill. App. 359; *McKellar v. Yellow Cab Co.* (Minn.), 181 N. W. 348; *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174, 4 A. L. R. 1480; *Singer v. Martin*, 96 Wash. 231, 164 Pac. 1105; *McDorman v. Dunn*, 101 Wash. 120, 172 Pac. 244, 4 A. L. R. 1500. "Appellant Martin as a common carrier owed to respondent as his passenger the duty of exercising the highest degree of care compatible with the practical operation of the car. That duty would not be met as a matter of law by a mere observance of the law of the road. His negligence, if any, as between him and his passenger, is to be measured by his duty as a common carrier, not by his duty to other users of the highway." *Singer v. Martin*, 96 Wash. 231, 164 Pac. 1105.

**Instructions.**—In an action for personal injuries sustained by a passenger riding in a taxicab, an instruction that "common carriers of persons for hire are required to do all that human care,

vigilance and foresight can reasonably do, consistent with the character and mode of conveyance adopted and the practical prosecution of the business, to prevent accidents to passengers while being carried by them," held to state the correct rule as to the liability of a carrier of passengers by taxicab. *Boland v. Gay*, 201 Ill. App. 359.

**Sightseeing automobiles** are regarded as common carriers and owe to the public the same degree of care to transport them in safety as other common carriers of passengers owe. *McFadden v. Metropolitan St. Ry. Co.*, 161 Mo. App. 552, 144 S. W. 168.

**Between chauffeur and railroad company.**—While, as between the chauffeur of a taxicab and a passenger therein, the chauffeur is required to exercise a high degree of care, no such degree of care is required as between the chauffeur and a railroad company in an action for injuries received by the chauffeur at a grade crossing. *Southern Ry. Co. v. Vaughn's Adm'r*, 118 Va. 692, 88 S. E. 305, L. R. A. 1916 E. 1222.

**Extending arm out of window of jitney**, not necessarily contributory negligence. *Thibodeau v. Hamley* (N. J.), 112 Atl. 320.

13. Section 277.

perform this duty, a passenger receives an injury, the carrier may be liable.<sup>14</sup> Where a collision occurs by reason of the concurring negligence of the operator and the driver of another vehicle on the highway, a passenger who is thereby injured may maintain an action against both drivers jointly.<sup>15</sup> And this is true although the high degree of care required of the carrier of passengers is different from that required of the one driving the other vehicle.<sup>16</sup> So, in the case of a collision between a street car and a taxicab, a passenger in the taxicab may join as defendants both the operator of the taxicab and the street railway company; and if he shows negligence on the part both of the motorman and the taxi driver, he may recover against both.<sup>17</sup> One traveling in an autobus used for carrying passengers is, in the absence of countervailing circumstances, presumed to be a passenger for hire.<sup>18</sup>

14. *California*.—*Baker v. Western Auto Stage Co.* (Cal. App.), 192 Pac. 73.

*Colorado*.—*Seeing Denver Co. v. Morgan* (Colo.), 185 Pac. 339.

*Illinois*.—*Johnson v. Coey*, 237 Ill. 88, 86 N. E. 678; *Swancutt v. Trout Auto Livery Co.*, 176 Ill. App. 606; *Todd v. Chicago City Ry. Co.*, 197 Ill. App. 544; *Dunne v. Boland*, 199 Ill. App. 308.

*Kansas*.—*Bean-Hogan v. Kloehr*, 103 Kans. 731, 175 Pac. 976.

*Kentucky*.—See *Denker Transfer Co. v. Pugh*, 162 Ky. 818, 173 S. W. 139.

*New York*.—*Piper v. New York State Rys.*, 185 N. Y. App. Div. 184, 172 N. Y. Suppl. 838.

*Pennsylvania*.—*Muncey v. Pullman Taxi Service Co.*, 112 Atl. 30.

*Texas*.—*Routledge v. Rambler Auto Co.* (Civ. App.), 95 S. W. 749.

*Vermont*.—See *Desmarchier v. Frost*, 91 Vt. 138, 99 Atl. 782.

*Virginia*.—*Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174, 4 A. L. R. 1480.

*Washington*.—*Bogdan v. Pappas*, 95 Wash. 579, 164 Pac. 208.

*Wisconsin*.—*Hannon v. Van Dyke*

*Co.*, 154 Wis. 454, 143 N. W. 150.

*Canada*.—*Hughes v. Exchange Taxicab*, 11 D. L. R. 314.

*Route*.—A taxicab driver may be guilty of negligence in taking a dangerous route to go to the passenger's destination instead of following a safer course. *Hathaway v. Coleman*, 35 Cal. App. 107, 169 Pac. 414.

15. *Cairns v. Pittsburgh, etc., Ry. Co.*, 66 Pitts. Leg. Journ. (Pa.) 817; *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174; *McDorman v. Dunn*, 101 Wash. 120, 4 A. L. R. 1500. "We are of opinion that the plaintiffs in error were jointly and severally liable; that their negligence concurred and produced a single indivisible result, and they were properly joined as defendants, although there was no common duty, common design, or concert of action between them." *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174.

16. *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174, 4 A. L. R. 1480.

17. *Shields v. F. Johnson & Son Co.*, 132 La. 773, 61 So. 787.

18. *Meier v. Golden State Auto Tour Corp.* (Cal. App.), 195 Pac. 290.



**Sec. 170. Liability for injury to passenger — assault on passenger.**

A taxicab passenger is entitled to proper and decorous treatment from the carrier and his servants during the course of transportation, and this involves an assurance that the servant in charge of the conveyance will neither assault nor insult him.<sup>19</sup>

**Sec. 171. Liability for conduct of driver.**

One who rides in a jitney or taxicab as a passenger is not generally liable for the negligent acts of the chauffeur causing injury to a third person.<sup>20</sup> The chauffeur is the servant of the proprietor of the machine, not of the passenger, and the general rule is that the proprietor alone is responsible for his carelessness.<sup>21</sup> One who hires a public hack and gives the driver instructions where to go, but exercises no other control over the conduct of the driver, is not responsible for the driver's negligence.<sup>22</sup> There may be exceptions to the general rule, as when the passenger interferes with the operation of the machine. Thus, if the chauffeur exceeds the speed limit at the request of the passenger, the latter may be liable for criminal prosecution.<sup>23</sup> And a passenger may be liable

19. *Fornoff v. Columbia Taxicab Co.*, 179 Mo. App. 620, 162 S. W. 699, wherein the court said: "When the relation of passenger and carrier is established, the passenger surrenders himself into the care and custody of the carrier. This implies an obligation on the part of the carrier, not only to transport the passenger to destination, if he properly deports himself, but to discharge him on arrival free from assault on the part of its servants; that is, in the proper manner. The mere stepping of the passenger from the vehicle into the street at the end of his journey is not enough to acquit this obligation, for the passenger is to be discharged and protected from assault by the servants while being discharged by the carrier. Even though the jour-

ney was ended, plaintiff was not discharged by the carrier at the time the assault was made upon him."

20. *Little v. Hackett*, 116 U. S. 366, 29 L. Ed. 652, 6 Sup. Ct. 391; *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922; *Donnelly v. Philadelphia & Reading Co.*, 53 Pa. Super. Ct. 78; *Cairns v. Pittsburgh, etc., Ry. Co.*, 66 Pitts. Leg. Journ. (Pa.) 817; *Hannon v. Van Dyeke Co.*, 154 Wis. 454, 143 N. W. 150; *Donovan v. Syndicate*, L. R. (1893), 1 Q. B. (Eng.) 629.

21. *Nell v. Godstrey* (N. J.), 101 Atl. 50. And see sections 628, 643, 645.

22. *Little v. Hackett*, 116 U. S. 366, 29 L. Ed. 652, 6 Sup. Ct. 391.

23. *Commonwealth v. Sherman*, 191 Mass. 439, 78 N. E. 98. And see section 726.

where he participates in or sanctions the negligence of the driver; but such a situation is not shown merely by evidence that the passenger at one time told the chauffeur to "be careful."<sup>24</sup> Responsibility is charged against the proprietor of a jitney route or taxicab, although the driver receives for his compensation a share of the proceeds earned by the vehicle.<sup>25</sup> And the fact that the driver hires the car at a prescribed rate per diem, does not relieve the owner from responsibility for the acts of the driver.<sup>26</sup> Public policy forbids the jitney proprietor to make a contract with his drivers so as to relieve him from responsibility for their negligent conduct. But, when a jitney driver is directed to adhere to a certain route but he deviates therefrom to a street where the license does not authorize the operation of the jitney, he is not acting within the scope of his employment and his employer is not liable for his negligent acts while he is so deviating.<sup>27</sup> But, when he is returning, he may be thought to be within the scope of his employment.<sup>28</sup>

### **Sec. 172. Imputation of negligence of driver to passenger.**

The general rule that a passenger in a public hack is not chargeable with the negligence of the driver, applies when an injury is caused to the passenger by the negligence of a third person, such as a railroad or street railway company or person using another vehicle, who seeks to escape liability by charging the contributory negligence of the driver to the passenger.<sup>29</sup> As a general proposition, the negligence of the driver is not to be imputed to the passenger, and the latter's freedom from contributory negligence is to be determined

24. *Hannon v. Van Dyeke Co.*, 154 Wis. 454, 143 N. W. 150.

25. *Edwards v. Yarbrough* (Mo. App.), 201 S. W. 972; *Fitzgerald v. Cardwell* (Mo. App.), 226 S. W. 971; *King v. Breham Auto Co.* (Tex. Civ. App.), 145 S. W. 278.

26. *McDonald v. Lawrence*, 170 Wash. 576, 170 Pac. 576.

27. *Youngquist v. L. J. Droese Co.*, 167 Wis. 458, 167 N. W. 736.

28. *Smith v. Yellow Cab Co.* (Wis.), 180 N. W. 125. And see section 633.

29. *Thompson v. Los Angeles, etc.*, R. Co., 165 Cal. 748, 134 Pac. 709; *Eckels v. Mitschall*, 230 Ill. 462, 82 N. E. 872; *Zalotuchin v. Metropolitan St. Ry. Co.*, 127 Mo. App. 577, 106 S. W. 548; *Wolf v. Sweeney* (Pa.), 112 Atl. 869; *Cairns v. Pittsburgh, etc., Ry. Co.*, 66 Pitts. Leg. Jour. 817; *Zucht v. Brooks* (Tex. Civ. App.), 216 S. W. 684.

solely from his own acts and omissions.<sup>30</sup> The question is quite similar to that involved when a guest riding in a pleasure car receives an injury from the joint negligence of the owner and of the driver of another vehicle; in that class of cases, the negligence of the owner or driver is not imputed, as a general rule, to a guest in a machine.<sup>31</sup>

### Sec. 173. Rights of proprietor of vehicle.

The proprietor of a motor vehicle used for the carriage of passengers for hire is entitled to recover the legal fare from the passenger.<sup>32</sup> This obligation is so clear that there has been little occasion for court decisions. The proprietor of a public hack also has a right of recovery against other travelers whose negligence has occasioned injury to the machine. And, when the proprietor is riding in the carriage at the time of a collision with another motor vehicle and thereby receives personal injuries, he may have a cause of action against the operator of the other conveyance.<sup>33</sup> The fact that the owner

30. *Thompson v. Los Angeles, etc.*, R. Co., 165 Cal. 748, 134 Pac. 709; *Broussard v. Louisiana Western R. Co.*, 140 La. 517, 73 So. 606; *Rush v. Metropolitan St. Ry. Co.*, 157 Mo. App. 504, 137 S. W. 1029; *Cairns v. Pittsburgh, etc., Ry. Co.*, 66 Pitts. Leg. Jour. 817; *Chicago, etc., R. Co. v. Wentzel* (Tex. Civ. App.), 214 S. W. 710; *Dallas Ry. Co. v. Eaton* (Tex. Civ. App.), 222 S. W. 318; *Wentworth v. Waterbury*, 90 Vt. 60, 96 Atl. 334; *Bancroft v. Cote*, 90 Vt. 358, 98 Atl. 915. See also *United States v. Manabat*, 28 Philippine, 560.

31. Section 679.

32. **Liability to pay fare.**—It should be understood that the liability of a passenger to pay the rate named on the taximeter or otherwise posted, arises out of contract. When one engages a taxicab he impliedly agrees to abide by the posted rates provided they do not exceed the legal limit.

33. *Moore v. Hart*, 171 Ky. 725, 188

S. W. 861; *McClung v. Pennsylvania Taximeter Cab Co.*, 252 Pa. 478, 97 Atl. 694.

34. *Moore v. Hart*, 171 Ky. 725, 188 S. W. 861, wherein the court said: "It is urgently insisted upon us that the fact of plaintiff riding upon the steps is not only contributory negligence, but such as to prevent recovery herein, and to have authorized a peremptory instruction for the defendant. The rule as to causal connection between the act complained of and the effect produced, to which we have hereinbefore averted, has peculiar application here. It is perfectly manifest that the place where plaintiff was riding was altogether safe, and no injury would have happened to him if his car had not been overturned. His position is entirely unlike that of a passenger protruding his arm or some parts of his body, out from the car, and thereby sustaining injuries. In such a case it is the universal rule that such acts on the part of the passenger

was standing on a step at the rear,<sup>34</sup> or was sitting on the floor,<sup>35</sup> at the time of the collision, does not bar his remedy.

constitute such contributory negligence as to prevent a recovery in a suit between him and the railroad company, there being no negligent act of the defendant shown; but it could hardly be contended that if the passenger thus offending is injured through a negligent collision, or because of a defective track whereby a wreck was precipitated, he would be deprived of recovering from the defendant because of his negligence, as stated above. It will at once be seen that his negligence, of the character stated, was no part of the proximate cause of the injury which he might sustain in the collision or the derailment of the car. But the case of a passenger becoming injured while wrongfully exposing himself to danger has no analogy to the instant case. The one deals with contractual relations between passenger and carrier, while the other sounds altogether in tort. The analogy would be more marked if a third party, while the passenger was occupying a dangerous or careless position on the train, should negligently injure him. Surely it could not be contended that because the passenger was negligent as between himself and carrier such negligence would prevent his recovering damages for such injuries from the one committing the tort. In the instant case the position of plain-

tiff on his automobile truck is an incident which afforded an opportunity for the negligence of the defendant to have the more easily produced the injury, but this is the only effect that can be given to it. It, in no view of the case, justified the collision, or furnished a defense to a suit to recover damages for the injuries."

35. *McClung v. Pennsylvania Taximeter Cab Co.*, 252 Pa. 478, 97 Atl. 694, wherein it was said: "Plaintiff was the owner and in charge of his car, and it is not clear that his position thereon was one of danger, or that he was more liable to injury there than elsewhere. It bears no analogy to the case of a passenger voluntarily standing on the bumpers or footboard of a car, or riding with his feet between a car and the engine. The cause of the accident was the violent collision, resulting as the jury found from defendant's negligence, and not because of the place plaintiff occupied on his car. His being there was merely a condition, not the cause of the accident. A person injured by the negligence of another is not deprived of all remedy merely because at the time he was occupying an unusual position in a conveyance, unless he thereby co-operated in causing his injury."

**CHAPTER X.**

## PRIVATE HIRE OF AUTOMOBILES.

- SECTION** 174. Scope of chapter.  
175. Nature of contract.  
176. Liability for injury from operation of machine—liability of owner for operation by hirer.  
177. Liability for injury from operation of machine—liability for acts of driver furnished by owner.  
178. Liability for injury from operation of machine—liability for acts of driver furnished by hirer.  
179. Liability for injury from operation of machine—injury to passenger.  
180. Injury to machine—care to be exercised by hirer.  
181. Injury to machine—loss of machine.  
182. Injury to machine—conversion of machine by hirer.  
183. Injury to machine—deviation from agreed route.  
184. Injury to machine—right of action by hirer for injury.  
185. Duties and liabilities of parties—possession of machine.  
186. Duties and liabilities of parties—duty to carry to destination.  
187. Duties and liabilities of parties—termination of hiring.  
188. Duties and liabilities of parties—surrender of machine.  
189. Duties and liabilities of parties—compensation for hire.

**Sec. 174. Scope of chapter.**

This chapter is intended to cover the nature of the contract between the owner of a motor vehicle and one to whom he hires the same for a consideration, and the legal results which follow such relationship. In another chapter is discussed the public carriage of passengers for hire, such as jitneys, taxicabs, omnibuses, etc.<sup>1</sup> This chapter relates to the private use of another's machine and not to the public use. The proprietor of the hired machine is described in this chapter as the "owner," and the one procuring the use thereof as the "hirer."

**Sec. 175. Nature of contract.**

The hiring of an automobile from the owner creates in law a form of bailment known as *locatio rei*. Where the owner of personal property lets it to another party, who is to pay

1. Chapter IX.

for the use of it, the contract is for their mutual benefit, which fact is important in determining the rights and liabilities of the parties.<sup>2</sup>

**Sec. 176. Liability for injury from operation of machine.—  
liability of owner for operation by hirer.**

The owner of an automobile who has let it to another is not generally responsible for any negligence of the latter in the operation of the machine.<sup>3</sup> The fact that the hirer may be unskilled is held not to change the rule in this respect; except it might appear that the latter is an immature child, or clearly lacking in mental capacity or intoxicated, or the like.<sup>4</sup>

2. Parsons on Contracts, Vol. II (9th Ed.), 134.

According to the foreign and Roman law, the letter, in virtue of the contract, impliedly engages to allow to the hirer the full use and enjoyment of the thing hired, and to fulfill all his own engagements and trusts in respect to it, according to the original intention of the parties: "*Proestroe frui licere, uti licere.*" This implies an obligation to deliver the thing to the hirer; to refrain from every obstruction to the use of it by the hirer during the period of the bailment; to do no act which shall deprive the hirer of the thing; to warrant the title and right of possession to the hirer, in order to enable him to use the thing, or to perform the service; to keep the thing in suitable order and repair for the purposes of the bailment; and, finally, to warrant the thing free from any fault, inconsistent with the proper use or enjoyment of it. These are the main obligations deduced by Pothier from the nature of contract; and they seem generally founded in unexceptionable reasoning. Story on Bailments, p. 317.

3. Neubrand v. Kraft, 169 Iowa, 444, 151 N. W. 455, L. R. A. 1915 D. 691; Atkins v. Points, 148 La. —, 88 So. 231. Sections 642, 643, 666.

4. Neubrand v. Kraft, 169 Iowa, 444,

151 N. W. 455, L. R. A. 1915 D. 691, wherein the court said: "In an argument for appellant counsel contends that one who lets an automobile for hire is responsible for the proper skill and care of the person to whom he intrusts it. In support of this position we are cited to certain English cases where the owner of a cab is held liable for injuries resulting from the negligence of the driver. But such cases are parallel neither in fact nor in principle with the one now before us. The proprietor of a car or hack stand lets his carriages supplied with drivers of his own selection and in his own employment. While to a certain extent the driver under such circumstances becomes the servant of the hirer, he does not cease to be the servant and representative of the cab-owner so far as the immediate care and management of the carriage and its motive power is concerned, and if by his careless or reckless driving a collision occurs upon the street, and a third person is thereby injured without fault on his own part, the owner is very reasonably and properly held to respond in damages. But the owner of a livery stable or garage making a business of letting teams or carriages or motor cars to customers who propose and expect to do their own driving has never been held to any such

Where the owner of an automobile delivered it to another under an agreement that the latter was to use it for hire and to pay the purchase price out of the money derived from its use, and the former owner never had the control of the machine after it left his possession and never rode in it, and such hirer was not in his employ or under his control or direction, the negligence of the hirer is not chargeable to such owner.<sup>5</sup>

**Sec. 177. Liability for injury from operation of machine — liability for acts of driver furnished by owner.**

When an automobile is hired and a chauffeur is also furnished by the owner, in whose employ he is and by whom he is paid, and the hirer has no authority over him except to direct him where he wishes to go, the chauffeur is considered the servant of the owner; and the owner, not the hirer, is responsible for his acts of negligence.<sup>6</sup> The principle involved

rule of responsibility by any court so far as the precedents have been called to our attention, and we think there is no general rule or principle necessitating such conclusion. Cases may be imagined, perhaps, where an owner recklessly lets his spirited team or his automobile to an immature child, or to a person who is intoxicated or otherwise manifestly incompetent to manage or control it, with the natural result of a collision upon the public street and consequent injury to others. It may well be that under such circumstances the owner would be held liable in damages not because the hirer is his servant or because as owner he is required to vouch to the public for the competency of all persons to whom he may let his teams or his cars for hire, but because he knew the incompetency of this particular driver and the imminent peril to which he thereby exposed others who were in the lawful use of the streets, and as a person of ordinary prudence should have refrained from so doing. Nothing of this manifest want of pru-

dence is shown in this case now under consideration."

5. *Braverman v. Hart*, 105 N. Y. Suppl. 107.

6. *United States*.—*Little v. Hackett*, 116 U. S. 366, 29 L. Ed. 652, 6 Sup. Ct. 391.

*Arkansas*.—*Forbes v. Reinman*, 112 Ark. 417, 166 S. W. 563, 51 L. R. A. (N. S.) 1164.

*Illinois*.—*Dunne v. Boland*, 199 Ill. App. 308. See also *Johnson v. Coey*, 237 Ill. 88, 86 N. E. 678, 21 L. R. A. (N. S.) 81.

*Louisiana*.—*Wilkinson v. Myatt-Dicks Motor Co.*, 136 La. 977, 68 So. 96; *Broussard v. Louisiana Western R. Co.*, 140 La. 517, 73 So. 606.

*Massachusetts*.—*Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922; *Shepard v. Jacobs*, 204 Mass. 110, 90 N. E. 392, 26 L. R. A. (N. S.) 442; *Tornroos v. R. H. White Co.*, 220 Mass. 336, 107 N. E. 1015.

*Minnesota*.—*Myers v. Tri-State Automobile Co.*, 121 Minn. 68, 140 N. W. 184, 44 L. R. A. (N. S.) 113. "Both

is the same as if the owner of the machine were letting a horse and carriage together with his driver for the hire of another.<sup>7</sup> The hirer, however, and not the owner, may become chargeable if the hirer assumes the management of the vehicle, so that the driver becomes his servant.<sup>8</sup> One who lets an automobile and furnishes a chauffeur for the purpose of conveying the hirer and his guests enters into a contract of hire for

on principle and authority we decline to follow the rule that the defendant is liable only for the exercise of care in the selection of the driver. We apply the ordinary rule of *respondet superior* to this case, and hold that where a dealer in automobiles and owner of a garage lets a car for hire and furnishes a driver, and the hirer exercises no control or supervision over the driver except to direct him where to go and what route to take, and to caution him against improper driving, the owner is responsible for the negligence of the driver, and the hirer may recover from the owner in damages for an injury caused by the driver's negligence. The fact that the defendant only occasionally let automobiles for hire does not appeal to us as important. The rule does not depend on the frequency with which such an act is done." *Myers v. Tri-State Auto Co.*, 121 Minn. 68, 140 N. W. 184.

*New Jersey*.—*Rodenburg v. Clinton Auto & Garage Co.*, 85 N. J. L. 729, 91 Atl. 1070.

*New York*.—*Waldman v. Picker Bros.*, 140 N. Y. Suppl. 1019.

*North Carolina*.—*Cates v. Hall*, 171 N. Car. 360, 88 S. E. 524.

*Pennsylvania*.—*Wallace v. Keystone Automobile*, 239 Pa. 110, 86 Atl. 699; *Neumiller v. Aeme Motor Car Co.*, 49 Pa. Super. Ct. 183.

*Texas*.—*Routledge v. Rambler Auto Co.* (Civ. App.), 95 S. W. 749.

*Wisconsin*.—*Gerretson v. Rambler Garage Co.*, 149 Wis. 528, 136 N. W. 182, 40 L. R. A. (N. S.) 457.

*England*.—*Donovan v. Syndicate, L.*

*R.* (1893), 1 Q. B. 629.

See also section 643.

7. *Shepard v. Jacobs*, 204 Mass. 110, 90 N. E. 392, 26 L. R. A. (N. S.) 442, wherein the court said: "If the defendants had furnished horses, a carriage and a driver under a similar contract, instead of an automobile and a driver, there would be no doubt of their liability for the negligence of the driver in the management of the team. The question is whether the same result should be reached upon the facts of this case. The analogy between the two kinds of contract is very close. The management of an automobile properly can be trusted only to a skilled expert. The law will not permit such a vehicle to be run in the streets except by a licensed chauffeur of approved competency. The danger of great loss of property by the owner, as well as injury to the chauffeur, his servant, is such as to make it of the highest importance that care should be exercised in his interest, and that the control and management of the machine should not be given up to the hirer. The reasons for applying this rule in a case like the present are fully as strong as when a carriage and horses are let with a driver."

8. *Burns v. Southern Pac. Co.* (Cal. App.), 185 Pac. 875; *Sargent Paint Co. v. Petrovitsky*, (Ind. App.), 124 N. E. 881; *Myers v. Tri-State Auto Co.*, 121 Minn. 68, 140 N. W. 184; *Diamond v. Sternberg, etc., Co.*, 87 Misc. (N. Y.) 305, 149 N. Y. Suppl. 1000. See also *Carr v. Burke*, 183 N. Y. App. Div. 361, 169 N. Y. Suppl. 981.



the benefit of the guests as well as the hirer, and owes the same duty to each, without regard to the fact that he does not know the names or number of the guests.<sup>9</sup>

**Sec. 178. Liability for injury from operation of machine — liability for acts of driver furnished by hirer.**

While the owner of the machine is generally liable for the negligence of the driver in his general employ,<sup>10</sup> the situation is entirely different when the owner furnishes only the machine, and the chauffeur is furnished by the hirer. When one rents an automobile to another and the latter furnishes the driver thereof, such driver is not deemed to be the servant of the owner of the machine but of the hirer, and the hirer alone is liable for his negligence.<sup>11</sup> In such a case, it is possible for the owner to ride as a guest of the hirer, and nevertheless escape liability.<sup>12</sup>

**Sec. 179. Liability for injury from operation of machine — injury to passenger.**

Where a dealer in automobiles and owner of a garage lets a car for hire and furnishes a driver, and the hirer exercises no control or supervision over the driver, except to direct him where to go, and what route to take and to caution him against improper driving, the owner is responsible for the negligence of the driver, and the hirer may recover from the owner in damages for an injury caused by the driver's negligence.<sup>13</sup> In such a case the negligence of the driver is imputed to the owner and not to the hirer of the vehicle.<sup>14</sup> But

9. *Greenberg & Bond Co. v. Yarrow* (Ga. App.), 106 S. E. 624; *Dunne v. Boland*, 199 Ill. App. 308.

10. Section 628.

11. *Pease v. Gardner*, 113 Me. 264, 93 Atl. 550; *Hornstein v. Southern Boulevard R. Co.*, 79 Misc. (N. Y.) 34, 138 N. Y. Suppl. 1080.

12. *Pease v. Montgomery*, 111 Me. 582, 88 Atl. 973. See also sections 642-644.

13. *Johnson v. Coey*, 237 Ill. 88, 86 N. E. 678, 21 L. R. A. (N. S.) 81;

*Meyers v. Tri-State Auto Co.*, 121 Minn. 68, 140 N. W. 184; *Cates v. Hall*, 171 N. C. 360, 88 S. E. 524. See also, *Buckingham v. Eagle Warehouse & Storage Co.*, 189 N. Y. App. Div. 760, 179 N. Y. Suppl. 218.

**Burden of proof.**—In an action by the hirer against the owner for personal injuries, the burden is upon the plaintiff to show the negligence of the defendant. *Wallace v. Keystone Automobile Co.*, 239 Pa. St. 110, 86 Atl. 699.

14. *Broussard v. Louisiana Western*

if the carriage of passengers by a chauffeur is an individual enterprise of the driver without the knowledge of the owner, the latter is not liable.<sup>15</sup> But, although the negligence of the driver is not to be imputed to the passenger in such cases, nevertheless the duty is on him of using reasonable care for his own safety; and, if he fails in this respect, he cannot recover of the owner for his injuries.<sup>16</sup> But, though riding beside the driver, he is not guilty of contributory negligence because he fails to warn, advise or direct the driver in cases of emergency or because he fails to control the acts of the driver in passing other cars.<sup>17</sup> The owner impliedly warrants that the machine is in proper condition for the purpose contemplated, and he must exercise reasonable care to see that the machine is in proper repair.<sup>18</sup>

#### **Sec. 180. Injury to machine — care to be exercised by hirer.**

A party who hires an automobile from another is bound to take only ordinary care of the machine, and he is not responsible for damage inflicted to the automobile, if ordinary prudence has been exercised while the machine was in his custody as a bailee.<sup>19</sup> The degree of care, of course, which the hirer of an automobile should exercise depends upon all the facts and circumstances of the case, but still it is only ordinary care as the law defines this term. The hirer is bound to render such care in the case as the owner has a right to expect that a man of ordinary capacity and caution would take of the automobile, if it were his own under the same circumstances.<sup>20</sup> As a general rule, if the machine is injured or destroyed through the alleged negligence of the hirer, it is a question for the jury to determine whether negligence has been established.<sup>21</sup>

R. Co., 140 La. 517, 73 So. 606; Meyers v. Tri-State Auto Co., 121 Minn. 68, 140 N. W. 184; Bancroft v. Cote, 90 Vt. 358, 98 Atl. 915. See section 679, *et seq.*, as to imputation of driver's negligence to passenger.

15. Nicholson v. Houston Elec. Co. (Tex. Civ. App.), 220 S. W. 632.

16. Sections 688-695.

17. Wilson v. Puget Sound Elec. Ry., 52 Wash. 522, 101 Pac. 50.

18. Collette v. Page (R. I.) 114 Atl. 136.

19. Parsons on Contracts, vol. II (9th Ed.), 134, 135.

20. Parsons on Contracts, vol. II (9th Ed.), 134, 135.

21. Brown v. Freeman, 84 N. J. L. 360. 86 Atl. 384.

**Sec. 181. Injury to machine — loss of machine.**

If an automobile is lost through theft, or is injured as a result of violence, the hirer is only answerable when imprudence or negligence caused or facilitated the injurious act.<sup>22</sup> However, where a hired automobile is lost or injured, the hirer is bound to account for such loss or injury. When this is done, the proof of negligence or want of due care is thrown upon the bailor, and the hirer is not bound to prove affirmatively that he used reasonable care.<sup>23</sup> If the employee of the hirer uses the machine for an unauthorized purpose, and while it is so used, it is stolen through the negligence of such employee, the hirer may be liable.<sup>24</sup>

**Sec. 182. Injury to machine — conversion of machine by hirer.**

If the hirer of an automobile should sell it without authority to a third party, the owner or bailor may institute an action of trover against even a *bona fide* purchaser, one who purchases the machine innocently believing that the hirer had the title and power to sell.<sup>25</sup>

**Sec. 183. Injury to machine — deviation from agreed route.**

There is an implied obligation on the part of the hirer of a motor vehicle to use the machine only for the purpose and in the manner for which it was hired. If the automobile is used in a different way, or for a longer time, the hirer may be responsible for a loss then accruing, although by inevitable casualty.<sup>26</sup>

**Sec. 184. Injury to machine — right of action by hirer for injury.**

Upon the assumption that the hirer of an automobile is under the obligation to return it to the bailor in as good condi-

22. Parsons on Contracts, vol. II (N. J.), 110 Atl. 690. (9th Ed.), 138.

23. Parsons on Contracts, vol. II (9th Ed.), 138.

24. Donaldson v. Ludlow & Squier, (9th Ed.), 141, 142.

25. Parsons on Contracts, vol. II (9th Ed.), 138.

26. Parsons on Contracts, vol. II

tion as at the commencement of the bailment, reasonable wear and tear excepted, it has been decided that in case of an injury to an automobile by the negligence of a third party, the hirer may recover therefor.<sup>27</sup> If the owner brings the action against the third party, the negligence of the hirer is not imputed to such owner.<sup>28</sup>

### **Sec. 185. Duties and liabilities of parties — possession of machine.**

The owner of the automobile, or the party letting it out, is obliged to deliver the automobile hired in a condition to be used as contemplated by the parties; and the owner may not interfere with the hirer's use of the automobile while the hirer's interest continues. Even if the hirer abuses the automobile, although the owner may then, as it is said, repossess himself of his property if he can do so peaceably, he may not do so forcibly, but must bring an action. If such misuse of the automobile terminates the original contract of bailment the owner may demand the automobile, and, on refusal, bring trover; or, in some cases, he may bring the action of trover, without demand.<sup>29</sup> By the contract of hire, the hirer of the automobile acquires a qualified property in it which he may maintain against all persons except the owner, and against him as far as the terms and conditions of the contract, express or implied, may warrant. During the time for which the hirer is entitled to the use of the automobile, the owner is not only bound not to disturb him in that use, but if the hirer returns it to the owner for a temporary purpose, he is bound to return it to the hirer.<sup>30</sup>

### **Sec. 186. Duties and liabilities of parties — duty to carry to destination.**

Where a person enters into a contract of hiring with the owner of an automobile by which the latter undertakes to

<sup>27</sup> *Manion v. Loomis Sanitarium*, Suppl. 313.

162 N. Y. App. Div. 421, 147 N. Y. Suppl. 761.

<sup>28</sup> *Fischer v. International Ry. Co.*, 112 Misc. (N. Y.) 212, 182 N. Y.

<sup>29</sup> *Parsons on Contracts*, vol. II (9th Ed.), 139, 140.

<sup>30</sup> *Parsons on Contracts*, vol. II (9th Ed.), 142.

convey the former to a certain destination, and, while on the way, in the performance of such agreement, the automobile breaks down, if the mechanism cannot be properly adjusted at the time and the owner is able to furnish another machine so as to complete his contract of carriage, it is his duty to do so.<sup>31</sup>

### **Sec. 187. Duties and liabilities of parties — termination of hiring.**

The contract for the hire of an automobile may be terminated by the expiration of the time for which the vehicle was hired, or by the act of either party within a reasonable time, if no time is fixed by the contract, as by the agreement of both parties at any time; or by operation of law if, for instance, the hirer becomes the owner of the automobile, or by the destruction of the automobile. If it is destroyed without the fault of either party, before any use of it by the hirer, he has nothing to pay; if after some use, it may be doubted how far the aversion of the law of apportionment would prevent the owner from recovering *pro tanto*; probably, however, where the nature of the case admitted a distinct and just apportionment, it would be applied. Either party being in fault would, of course, be amenable to the other. The contract might wisely provide for such a contingency as the destruction of the automobile in such manner.<sup>32</sup>

### **Sec. 188. Duties and liabilities of parties — surrender of machine.**

The hirer of an automobile must surrender the machine at the appointed time, and if no time is specified in the contract, then whenever called upon after a reasonable time. What constitutes a reasonable time is to be determined from all of the facts and circumstances of each particular case.<sup>33</sup>

31. *Taxicab Co. v. Grant*, 3 Ala. (9th Ed.), 143.  
App. 393, 57 So. 141.

33. *Parsons on Contracts*, vol. II

32. *Parsons on Contracts*, vol. II (9th Ed.), 142.

### Sec. 189. Duties and liabilities of parties — compensation for hire.

The owner of a motor vehicle is, of course, entitled to compensation for the use of the machine, unless it is intended that the use shall be gratuitous.<sup>34</sup> If a definite sum is not stated in the contract between the parties, there arises an implied undertaking that the hirer shall pay a reasonable amount.<sup>35</sup> One who uses another's automobile without consent or knowledge of the owner, may be liable to pay a reasonable hire therefor.<sup>36</sup> In case the hirer is a corporation, there may arise the question whether the agent of the company making the contract, has authority to bind the company.<sup>37</sup> Where a ma-

34. O'Brien v. L. E. White Lumber Co. (Cal. App.), 185 Pac. 514.

35. Kentucky Glycerine Co. v. Clouse, 187 Ky. 484, 219 S. W. 788. And see Parsons on Contracts, vol. II (9th Ed.), 143.

36. Bush v. Fourcher, 3 Ga. App. 43, 59 S. E. 459.

37. Lake County Agr. Soc. v. Verplank (Ind. App.), 124 N. E. 494; Merrill v. Caro Ins. Co., 70 Wash. 482, 127 Pac. 122.

38. Jones v. Belle Isle, 13 Ga. App. 437, 79 S. E. 357, wherein it was said: "The court will not enforce a contract made on Sunday in furtherance of one's ordinary business. . . . Generally if a contract founded upon an illegal consideration is executed, it will be left to stand. If it be executory, neither party can enforce it. . . . As letting automobiles for pleasure rides was a work neither of charity nor of necessity, the contract as to the automobile hired on Sunday was void *ab initio*. . . . If one's ordinary calling is lawful, a contract made in furtherance thereof is neither illegal nor immoral: If made on Sunday, it is unenforceable solely because the State, in the exercise of its police power has prohibited the citizen from pursuing his usual business or calling on the Sabbath day. A con-

tract founded upon a consideration which is neither illegal nor immoral may be subsequently ratified, even though it is unenforceable *ab initio* because made on a day on which the law prohibits it from being executed. Hence, if a contract of sale be made on Sunday and the property delivered to the purchaser, his retention of it after the expiration of Sunday would amount to a ratification and render him liable for the purchase price. And where a contract is made on Sunday, and the parties proceed to carry it out on a subsequent day, both will be bound. . . . The owner of the automobile knew it was illegal to let his machine on Sunday. With this knowledge he took the risk of voluntary payment by the defendant. The contract was wholly executed on Sunday; nothing remained to be done but to pay for the use of the machine. The new promise to pay was founded upon no new consideration, and there was no such obligation to pay as would support the new promise. The hirer of the automobile was engaged in an illegal act, one which is denounced by our law as a crime. The original promise to pay was made in furtherance of a crime. Therefore it could not furnish a consideration for a new promise made

chine is hired for "joy riding" on Sunday, it has been held that the contract is illegal and the hirer cannot recover for the use of the automobile.<sup>38</sup>

on a secular day. *Catlett v. M. E. Church*, 62 Ind. 365, 30 Am. Rep. 197. There is no reason why the courts should be solicitous to aid one who violates the Sunday law to reap the fruits from his illegal act. It is the declared policy of this State that no one shall pursue the work of his ordi-

nary calling on Sunday. To allow the plaintiff to recover in this case would encourage the violation of the Sunday law. The purpose of the law is to discourage and, as far as possible, prohibit work on the Sabbath day save that which is done of necessity or for charity."

## CHAPTER XI.

### GARAGES AND GARAGE KEEPERS.

- SECTION 190. Scope of chapter.
- 191. Garage defined.
  - 192. Status of garage keeper.
  - 193. Garage as a nuisance.
  - 194. Restrictive covenant forbidding garage.
  - 195. Regulatory power over garages—in general.
  - 196. Regulatory power over garages—licensing.
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  - 198. Regulatory power over garages—manner of construction.
  - 199. Regulatory power over garages—storage of gasoline.
  - 200. Regulatory power over garages—keeping register of repairs.
  - 201. Rights of garage keeper.
  - 202. Liability of garage keeper—in general.
  - 203. Liability of garage keeper—gratuitous bailee.
  - 204. Liability of garage keeper—injury by fire.
  - 205. Liability of garage keeper—property stolen from garage.
  - 206. Liability of garage keeper—use of machine without owner's consent.
  - 207. Liability of garage keeper—damages to machine while driven by bailee.
  - 208. Liability of garage keeper—conversion of customer's automobile.
  - 209. Liability of garage keeper—delay in making repairs.
  - 210. Liability of garage keeper—improper performance of work on machine.
  - 211. Liability of garage keeper—sale of inferior supplies.
  - 212. Liability of garage keeper—burden of proof.
  - 213. Liability of garage keeper—acts of driver injuring third person.
  - 214. Liability of garage keeper—acts of servant towing disabled machine.
  - 215. Liability of garage keeper—defective premises.

#### Sec. 190. Scope of chapter.

This chapter is designed to include certain matters relating peculiarly to garages and garage keepers, such as the regulations which the State or municipal divisions may make with reference to the construction and management of garages, and the powers and liabilities of garage keepers. In another chapter are treated the questions which arise out of the carriage of passengers for hire by garage keepers.<sup>1</sup> And refer-

1. Chapters IX and X.



ence is also to be made to another part of this work for a discussion of the liens of garage keepers for storage, repairs and supplies.<sup>2</sup>

### Sec. 191. Garage defined.

The garage has been said to be the modern substitute for the ancient livery stable.<sup>3</sup> The term was appropriated from the French language, there meaning "keeping under cover," or a "place for keeping." As used in this country the term means a place where a motor vehicle is housed and cared for.<sup>4</sup> The term "public garage," as used in a tax law, has been construed as including an automobile repair shop.<sup>5</sup> A building constructed by a tenant and used for a garage and repair shop, though connected with an existing building by a shed, is a trade fixture which may be removed by the tenant after the expiration of the tenancy.<sup>6</sup>

### Sec. 192. Status of garage keeper.

A garageman who receives the motor vehicle of another for the purpose of repairing or taking care of it, the owner to pay a compensation for such service, is a bailee for hire.<sup>7</sup> The relation between the parties is that of bailor and bailee, and

2. Sections 875-881.

3. *Smith v. O'Brien*, 46 Misc. R. (N. Y.) 325, 94 N. Y. Suppl. 673, affirmed 103 App. Div. 596, 92 N. Y. Suppl. 1146.

4. *White v. Home Mut. Ins. Assoc.* (Iowa), 179 N. W. 315, wherein it was said: "The word 'garage' was recently appropriated from the French language, there meaning keeping under cover, or a place for keeping, and, as employed in English, is accurately defined by Webster's dictionary, substantially like that of the Century dictionary, as 'a place where a motor vehicle is housed and cared for.' To be such, the place need not be apart from other buildings, though that may be the more common and appropriate way. If the 'place' be in a 'lean-to' attached to

another building, as a barn or cornerib constructed for the purpose, or having been erected, is set apart for the housing of the automobile, it is none the less a 'garage,' within the meaning of that word in either language. In French the word has reference to the place of keeping wagons and other vehicles of transportation, as well as automobiles; but in English it appears to have been restricted to motor vehicles."

5. *Laurence v. Middleton*, 103 Miss. 173, 60 So. 130.

6. *Ray v. Young*, 160 Iowa, 613, 142 N. W. 393, Ann. Cas. 1915 D. 258.

7. *Woods v. Bowman*, 200 Ill. App. 612; *Warren v. Finn*, 84 N. J. L. 206, 86 Atl. 530; *Perry v. Fox*, 93 Misc. (N. Y.) 89, 156 N. Y. Suppl. 369.

Garage keeper as a "wheelright."—

their rights and liabilities are to be determined according to such relation.<sup>8</sup> The relation of landlord and tenant does not exist.<sup>9</sup> The status of bailee enables the garageman to maintain an action of replevin to recover the property from the possession of any one except the bailor.<sup>10</sup> But, nevertheless, such custody does not constitute ownership for the purpose of the allegation of ownership in a prosecution for theft of a part of the machine.<sup>11</sup> So long as the relation between the owner and the garage keeper is that of bailor and bailee, the owner is not ordinarily responsible for the negligence of the garageman or his servants in the care or operation of the vehicle.<sup>12</sup> One who undertakes to repair an automobile for another is regarded as an independent contractor where there is no right on the part of the owner to control the work.<sup>13</sup>

### Sec. 193. Garage as a nuisance.

A public garage is not a nuisance *per se*.<sup>14</sup> And it has been said that the business of a garage keeper "appears perfectly lawful and legitimate."<sup>15</sup> Even the storage of gasoline in suitable tanks set well down in the earth is not a nuisance *per se*.<sup>16</sup> But, although the business of the garage keeper is

It has been held that a garage man who makes a business of repairing motor vehicles, is a "wheelright." Shelton v. Little Rock Auto Co., 103 Ark. 142, 146 S. W. 129.

8. Woods v. Bowman, 200 Ill. App. 612.

9. White v. Lokey, 7 Boyces (30 Del.) 598, 110 Atl. 560.

10. Warren v. Finn, 84 N. J. L. 206, 86 Atl. 530.

11. Staha v. State, 69 Tex. Crim. 356, 151 S. W. 543.

12. Woods v. Bowman, 200 Ill. App. 612; Neff v. Brandeis, 91 Neb. 11, 135 N. W. 232, 39 L. R. A. (N. S.) 933; Perry v. Fox, 93 Misc. (N. Y.) 89, 156 N. Y. Suppl. 369. And see also section 646.

13. Woodcock v. Sartle, 84 Misc. R. 488, 146 N. Y. Suppl. 540.

14. Radney v. Town of Ashland, 199

Ala. 635, 75 So. 25; People *ex rel.* Busching v. Ericson, 263 Ill. 368, 105 N. E. 315; Wolfeschlager v. Applebaum (Mich.), 182 N. W. 47; Diocese of Trenton v. Toman, 74 N. J. Eq. 702, 70 Atl. 606; Ronan v. Barr, 82 N. J. Eq. 583, 89 Atl. 282; Stein v. Lyon, 91 N. Y. App. Div. 593, 87 N. Y. Suppl. 125; Hanes v. Caroline Cadillac Co., 176 N. Car. 350, 97 S. E. 162; Sherman v. Livingston, 128 N. Y. Suppl. 581; Phillips v. Donaldson (Pa.), 112 Atl. 236; Lewis v. Berney (Tex. Civ. App.), 230 S. W. 246.

15. Stein v. Lyon, 91 N. Y. App. Div. 593, 87 N. Y. Suppl. 125.

16. See Hanes v. Caroline Cadillac Co., 176 N. Car. 350, 97 S. E. 162.

Painting and upholstering automobiles is a legitimate business.—Wolfeschlager v. Applebaum (Mich.), 182 N. W. 47.

not necessarily a nuisance, it may become so when conducted in certain localities, such as a strictly residential section, or when it is conducted in an improper manner.<sup>17</sup> Thus, the operation of a public garage may be enjoined in a purely residential section within a short distance of large churches, a parochial school, and modern houses.<sup>18</sup> But a garage is not necessarily a nuisance because it is a wooden construction, more or less old and dilapidated; or because of the storage of gasoline and inflammable oils, neighboring buildings are exposed to a fire hazard.<sup>19</sup>

### Sec. 194. Restrictive covenant forbidding garage.

Whether a restrictive covenant in a deed will preclude the construction of a public or private garage on certain premises, depends, of course, upon the language of the covenant. As a garage is not a nuisance *per se*,<sup>20</sup> it is held that a deed forbidding the maintenance of a "nuisance," will not bar a

17. *People ex rel. Busching v. Ericson*, 263 Ill. 368, 105 N. E. 315; *Wright v. Lyons*, 224 Mass. 167, 112 N. E. 876; *Diocese of Trenton v. Toman*, 74 N. J. Eq. 702, 70 Atl. 606; *Prendergast v. Walls*, 257 Pa. 547, 101 Atl. 826; *Phillips v. Donaldson (Pa.)*, 112 Atl. 236; *Lewis v. Berney (Tex. Civ. App.)*, 230 S. W. 246. "These garages occupy with relation to automobiles the same place that stables do with regard to horses, and stables have not been held to be nuisances." *Diocese of Trenton v. Toman*, 74 N. J. Eq. 702, 70 Atl. 606.

**Injunction against garage keeper.**—The owner of an automobile garage, licensed to store one barrel of gasoline in the building, which is a frame building and adjacent to other frame buildings, will be enjoined from introducing gasoline into tanks of the automobile inside the building, and restrained from storing automobiles with gasoline in the tanks inside the building.

*O'Hara v. Nelson*, 71 N. J. Eq. 161, 63 Atl. 836.

**Lease of a building for garage held equivalent to an ejection of lessee of adjoining property used for lodging house.** *Blaustein v. Pincus*, 47 Mont. 202, 131 Pac. 1064.

**A lease providing that premises are to be used only as a store, to handle and sell automobile accessories and as a showroom for new automobiles, but no repairs of any kind will be allowed on the premises, cannot be construed as meaning that the premises demised should be used as a garage.** *Winograd v. Olson*, 207 Ill. App. 343.

18. *Prendergast v. Walls*, 257 Pa. 547, 101 Atl. 826.

19. *Radney v. Town of Ashland*, 199 Ala. 635, 75 So. 25.

20. Section 193.

**By whom enforced.**—The assignee or heir of the original grantor in some cases cannot enforce the covenant. *Ringgold v. Denhardt (Md.)*, 110 Atl. 321.

garage.<sup>21</sup> Nor is a garage a "stable" within the meaning of a covenant providing that, if a stable should be built on certain premises, it would be on a certain corner of the premises.<sup>22</sup> But the maintenance of a public garage may be prescribed by a covenant which forbids any "offensive" business.<sup>23</sup> Coven-

21. *Diocese of Trenton v. Toman*, 74 N. J. Eq. 702, 70 Atl. 606; *Ronan v. Barr*, 82 N. J. Eq. 583, 89 Atl. 282; *Goldstein v. Hirsch*, 108 Misc. (N. Y.) 294, 178 N. Y. Suppl. 325, affirmed 191 App. Div. 492, 181 N. Y. Suppl. 559. "The second paragraph of the covenant prescribes the use of the lots for purposes therein specifically mentioned 'or any other nuisance whatsoever. The erection of a public garage *eo nomine* is not prohibited, but it is insisted that to permit one to be erected and operated would create a nuisance. To read this into the clause inhibiting nuisances necessarily requires a finding that a public garage is a nuisance *per se*. This it surely is not. It is a place for the housing of automobiles. The business is a lawful one and the presumption is that it will be lawfully carried on. In such circumstances a court of equity will not interfere. If, in the prosecution of the business, a nuisance is created, it may interpose." *Ronan v. Barr*, 82 N. J. Eq. 583, 89 Atl. 282.

22. *Asbury v. Carroll*, 54 Pa. Super. Ct. 97.

23. *Hohl v. Modell*, 264 Pa. St. 516, 107 Atl. 885; *Phillips v. Donaldson* (Pa.), 112 Atl. 236.

Restriction in a deed construed.—Where the erection of "any tavern, drinking saloon, slaughterhouse, skin-dressing establishment, or any other building for offensive purpose or occupation" is forbidden by the terms of a deed it is decided that a public garage is within the meaning of the restriction. *Hibberd v. Edwards*, 235 Pa. 454, 84 Atl. 437. A garage is not a "stable," neither is it a dangerous,

noxious, unwholesome or offensive establishment, trade, calling or business offensive to the neighborhood within the meaning of a restrictive covenant which provides that there shall not be erected or carried on or upon the premises any "omnibus, livery or cow stable . . . or other dangerous, noxious, unwholesome or offensive establishment, trade, calling or business whatsoever offensive to the neighborhood." It is inconceivable that when said covenant was made in 1850 and repeated in subsequent deeds in 1852 and 1853 and referred to in deeds down to 1896, the parties interested had in contemplation a garage. *Goldstein v. Hirsch*, 108 Misc. (N. Y.) 294, 178 N. Y. Suppl. 325, affirmed 191 App. Div. 492, 181 N. Y. Suppl. 559.

Business of garage is offensive.—An owner of land divided it into building lots, and in each deed inserted a restriction that the property should not be used for any business "offensive to the neighborhood for dwelling houses." In a suit by one of the grantees to restrain the erection of an automobile garage, it appeared that the building was designed to accommodate about 125 large automobiles, a part of one story being designed for a repair shop, and it being intended to place in the building a portable forge; that demonstration cars were to be kept, with demonstrators to run them, and that about seventy-five or a hundred customers were expected to store automobiles there, such machines to go in and out on an average of once a day. The Supreme Judicial Court of Massachusetts held that the maintenance of such a building would constitute a violation

ants made since the popularity of automobiles sometimes expressly forbid a "garage." When such is the case, the question involved is whether a particular structure is a "garage."<sup>24</sup> It has been held that it is not a violation of a restrictive covenant limiting the use of property to residential purposes and prohibiting public or private stables for horses or other animals, or nuisances of any kind, description or nature, for an owner to erect a small building connected with his dwelling to be used as a private garage.<sup>25</sup> And, although a restrictive covenant running with the land forbids the grantee from erecting a "garage," an adjoining landowner, for whose benefit the covenant exists, cannot enjoin the erection of a "lean-to" against the side of a dwelling for the purpose of protecting an automobile, used only for private purposes, where the restrictive covenant taken as a whole shows merely an intention to prohibit offensive trades or any business which would detract from the residential character of the neighborhood.<sup>26</sup> But a portable sheet metal garage placed

of the restriction against carrying on offensive business. See *Evans v. Foss*, 194 Mass. 513, 80 N. E. 587, 9 L. R. A. (N. S.) 1039, 11 Ann. Cas. 171.

24. A *porte-cochere*, although the front and rear openings are fitted with doors, and the enclosure is used for the housing of an automobile, may still be considered a *porte-cochere*. *Conrad v. Boogher*, 201 Mo. App. 644, 214 S. W. 211.

25. *Beekwith v. Piring*, 134 N. Y. App. Div. 608, 119 N. Y. Suppl. 444, wherein it was said: "Is either the spirit and intent or the letter of the covenant violated by the erection of a garage such as this one is intended to be? There is no allegation that it is to be a public character. Its dimensions would hardly make that possible. If after its erection an attempt should be made to use it for such a purpose, and to thus carry on the business of storing automobiles for hire, a different question would be presented. We think that this structure is incidental to the

reasonable use of property for residential purposes. If one having a fondness for flowers should attach to his residence a small extension for the purpose of conservatory or greenhouse, or a lover of music, should attach a similar extension to be used as a private music room, or being a patron of art, should in like manner construct a building to be used as an art gallery, we think it could hardly be claimed that this was a violation of the covenant. However much we may differ upon a question of taste, it seems to us that if one has a fondness for automobiles, and desires to build an addition to his dwelling house for the storing of his own automobiles, it cannot be claimed that he is destroying the character of the property as residential property, or devoting any portion of it to a use which is not fairly incidental thereto."

26. *Sullivan v. Sprung*, 170 App. Div. 237, 156 N. Y. Suppl. 332, wherein the court said: "While the courts carry out and enforce such covenants restrict-

on a lot has been held to be contrary to a covenant providing, "No stable or garage shall be built unless appurtenant to a house on a plot not less than 100 feet in width by 150 feet in depth."<sup>27</sup> And a covenant forbidding the construction of an "outbuilding" is broad enough to include a garage.<sup>28</sup>

### Sec. 195. Regulatory power over garages — in general.

The odors, the noise, and the fire hazard, which are occasioned by the construction and management of a garage,

ing the enjoyment of land such restrictions are not to be enlarged or extended by judicial construction. (11 Cyc. 1078.) The present structure, painted to conform to the house to which it is attached, is simply an addition to the dwelling. While used to house a motor car it might serve as a storeroom or for other needs of a private dwelling. . . . It is a familiar principle that separate terms in the enumeration of things and uses prohibited or limited by such restrictions are to be taken subject to the general qualifying words expressive of the scope and purpose of the covenant as a whole. . . . This entire covenant is directed against offensive trades and further toward quasi-public uses, such as trade or business, which would detract from the private residential character of the occupation. Under the *ejusdem generis* rule the latter portion of the covenant against buildings or structures 'for any hospital, cemetery, asylum, manufactory, trade shop, store, hotel, clubhouse, boarding house, stable or garage,' does not apply to this structure attached to defendant's residence, in which is kept her private motor car." And see *White v. Home Mut. Ins. Assoc.* (Iowa), 179 N. W. 315, holding that an automobile kept in a "lean-to" connected with a barn was kept in a "garage" within the meaning of an insurance application.

<sup>27</sup> *Seibert v. Ware*, 158 N. Y. Suppl. 229, wherein it was said: "Here the

garage was a separate, complete and entire building, with its own walls and roof, and built so as not to be incorporated in the dwelling. It was a portable building, placed on the defendant's lot and intended for use as a garage, and for no other purpose. . . . The defendant's breach of the covenant seems to have been deliberate. She evidently thought or was advised that by adopting the plan of using a portable building, instead of one permanently affixed to the freehold, she could disregard an agreement which had become irksome. It is none the less an unlawful act, in that she has put in place on the property a so-called portable building, constructed elsewhere, instead of causing a building to be erected thereon in accordance with her first design. Portability does not necessarily imply transiency, and a violation does not need to be permanent before equity can intervene. The end sought to be accomplished by the restriction was to prevent the building of any garage upon plots of less than a certain size. The motive may have been to avoid fire hazard or noise from the operation of cars in close proximity to houses on adjoining lots. Whatever the motive, the covenant is plain, and a temporary violation, while it lasts, is within its purview just as much as a more permanent one."

<sup>28</sup> *Ringgold v. Denhardt* (Md.), 110 Atl. 321.

create a situation which justifies public regulation.<sup>29</sup> As was said in one case,<sup>30</sup> "Conceding, as the parties do, that the business of conducting a public garage does not constitute a nuisance *per se*, it is a matter of common knowledge that the automobile propelled by the use of gasoline is a large and sometimes noisy machine, which frequently, when in operation, emits an offensive odor. Automobiles go in and out of public garages at all hours of the day and night, producing noises which must necessarily interfere with the comfort and welfare of those in the immediate vicinity. In the starting of these machines and in the testing and repair of their engines a considerable noise is unavoidable. Gasoline and oil are used in places of this kind, and it is necessary to keep a considerable quantity of gasoline constantly on hand, which is transferred to the tanks of automobiles propelled by this means. In making this transfer a portion of it necessarily becomes vapor, thus creating a menace both because of the odor of the fumes and their inflammable character. The power of the Legislature to regulate such a business is in no way dependent upon the question whether it is a nuisance *per se*. It is of such a character that it becomes a nuisance when conducted in particular localities and under certain conditions, and it is clearly within the province of the Legislature, in the exercise of the police power, to authorize the municipalities of the State to direct the location of public garages." Thus, a city may pass an ordinance forbidding the construction of a garage except on the authorization of the board of aldermen.<sup>31</sup> If one attempts to erect a garage without a proper permit or attempts to construct one in violation of the permit, an injunction may be granted upon the prayer of an adjoining owner.<sup>32</sup> Municipal ordinances for the regulation of garages must be reasonable, but they are presumed to be valid, and it is incumbent on the party complaining to show

29. Ninth St. Improvement Co. v. Ocean City, 90 N. J. L., 106, 100 Atl. 568.

30. People *ex rel.* Busching v. Erieson, 263 Ill. 368, 105 N. E. 315.

31. Storer v. Downey, 215 Mass. 273, 102 N. E. 321.

32. Trauernicht v. Richter, 141 Minn. 496, 169 N. W. 701; Page v. Brooks (N. H.), 104 Atl. 786.

their invalidity.<sup>33</sup> A municipal regulation may be invalid if it discriminates between different garage keepers similarly situated.<sup>34</sup>

### Sec. 196. Regulatory power over garages — licensing.

Municipal corporations in some States may require the licensing of garages and impose a license fee of their owners.<sup>35</sup> A license fee of a specified sum for each tank or filling apparatus may be imposed.<sup>36</sup> So, too, under certain circumstances, licenses for the storage of gasoline or inflammable oils may be granted or withheld from garages.<sup>37</sup> A motor club organized as a corporation not for profit, to own, run and maintain a club house and garage to be enjoyed by members of the club, has been held to be maintaining a garage within the meaning of a city ordinance requiring a garage license.<sup>38</sup>

### Sec. 197. Regulatory power over garages — location.

On account of the offensive noises and odors which arise from the maintenance of a garage, as well as the danger of fire from gasoline and inflammable oils kept on such premises, the location of a public garage is a matter of municipal regulation.<sup>39</sup> Thus, it is proper to prohibit the maintenance of a public garage within a prescribed distance, which is reasonable, of a church or hospital or school.<sup>40</sup> Filling stations may not be excluded from certain streets, if there is no adequate reason for the discrimination.<sup>41</sup> It is held that a municipality

33. *Dangel v. Williams*, 11 Del. Ch. 213, 99 Atl. 84; *People ex rel. Busching v. Ericsson*, 263 Ill. 368, 105 N. E. 315; *People v. Oak Park*, 266 Ill. 365, 107 N. E. 636.

34. *Kenney v. Village of Dorchester*, 101 Neb. 425, 163 N. W. 762.

35. *Louisville Lozier Co. v. City of Louisville*, 159 Ky. 178, 166 S. W. 767.

36. *Lewis v. City of Savannah (Ga.)*, 107 S. E. 588.

37. Section 199.

38. *City of Chicago v. Logan Square Motor Club*, 189 Ill. App. 142.

39. *People ex rel. Busching v. Ericsson*, 263 Ill. 368, 105 N. E. 315. See also *State v. Harper*, 166 Wis. 303, 165 N. W. 281.

Zoning ordinance held invalid. *Village of S. Orange v. Hellen (N. J. Eq.)*, 113 Atl. 697.

40. *People ex rel. Busching v. Ericsson*, 263 Ill. 368, 105 N. E. 315; *People v. Thompson*, 209 Ill. App. 570; *People ex rel. Sondern v. Walsh*, 108 Misc. (N. Y.) 193, 178 N. Y. Supp. 192.

41. *Standard Oil Co. v. City of Kearney (Neb.)*, 184 N. W. 109.



may pass an ordinance forbidding the construction of a garage in a residential part of the municipality without the consent of the adjoining owners or of a certain proportion of the residents within a given distance.<sup>42</sup> An ordinance which makes it unlawful to "build, construct or maintain" a public garage in a residence district without obtaining frontage consents applies to such garages as are already being maintained as well as to those proposed to be constructed in the future, and is therefore not void as discriminating between persons already engaged in the business and those intending to engage.<sup>43</sup> In determining whether consent of the requisite number of nearby owners has been given, the following holdings have been made: The ruins left by a building destroyed by fire are not to be counted at all; a structure divided by frame partitions into three small shops is to be counted as one business building; a structure having two street numbers may be counted as one residence building; a building at a corner having shops on the street level with their entrances on another street, but its main entrance on the street in question, may be counted as a flat building on the street in question; and, where a court extending from the street to a front yard for residents, is used in common for light and air and egress and ingress to the street, two court buildings abutting the street and two buildings at the rear of the court and facing the street are to be counted.<sup>44</sup> In determining the proportion of buildings used exclusively for residence purposes within a given radius of the site of a proposed public garage, barns and private garages used in connection with residences are

42. *Myers v. Fortunato* (Del.), 110 Atl. 847; *United States ex rel. Early v. Richards*, 35 App. D. C. 540; *Weeks v. Heurich*, 40 App. D. C. 46; *People ex rel. Busching v. Erecsson*, 263 Ill. 368, 105 N. E. 315; *People v. Oak Park*, 266 Ill. 365, 107 N. E. 636; *People v. Stroebel*, 156 N. Y. App. Div. 457, 141 N. Y. Suppl. 1014. Compare, *Dangol v. Williams*, 11 Del. Ch. 213, 99 Atl. 84.

**Injunction by nearby owner.**—When one seeks to construct or maintain a garage without the consent of the

nearby owners as required by a local regulation, the owner of premises a few feet away may invoke injunctive relief. *Weeks v. Heurich*, 40 App. D. C. 46.

**Notice to co-tenants of adjoining premises of petition for permit to erect a public garage.** See *Wright v. Lyons*, 224 Mass. 167, 112 N. E. 867.

43. *People v. Oak Park*, 266 Ill. 365, 107 N. E. 636.

44. *Wise v. Chicago*, 183 Ill. App. 215.

not to be counted as buildings not used exclusively for residence purposes.<sup>45</sup> Where a regulation provides that no garage shall be built on a street where a certain per cent. of the buildings on both sides of the block are residences, a "block" is construed not to extend between two streets that completely cross the street in question, but to stop at a street running into it though not across it.<sup>46</sup> The power to regulate the location of public garages within a municipality will not give the right to prohibit them within its territorial bounds.<sup>47</sup> And it has been held that a municipal regulation prohibiting garages and certain other structures without the consent of the real estate owners within 300 feet is invalid.<sup>48</sup>

#### **Sec. 198. Regulatory power over garages — manner of construction.**

The manner of construction of garages is a matter within the regulatory power of the State and generally of municipal divisions. Thus, a municipality may pass an ordinance providing that only fire proof buildings shall be used for garages.<sup>49</sup>

#### **Sec. 199. Regulatory power over garages — storage of gasoline.**

On account of the danger of fire, the storage of gasoline and other inflammable oils and materials in a garage is a

45. *People v. Oak Park*, 266 Ill. 365, 107 N. E. 636.

46. *Wise v. Chicago*, 183 Ill. App. 215.

47. *People ex rel. Busching v. Ericson*, 263 Ill. 368, 105 N. E. 315, wherein it was said: "We do not agree with counsel for appellant that under this statute the city is given the power to prohibit the location of a garage anywhere within its corporate limits. Such legislation by the city authorities would be so unreasonable as to render it invalid. Under this statute the city undoubtedly has the power, if it should see fit, to prohibit the location of a garage in a strictly residential district, and it necessarily follows that an ordi-

nance permitting the location and maintenance of a garage in residential districts under the conditions prescribed by this ordinance cannot be said to be unreasonable. The requirement that the person desiring to construct or maintain a garage in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residences procure the written consent of a majority of the property owners, according to frontage, on both sides of the street, is not unreasonable."

48. *State ex rel. Nehrbass v. Harper*, 162 Wis. 589, 156 N. W. 941.

49. *McNamara v. Rings*, 80 Misc. (N. Y.) 239, 140 N. Y. Suppl. 934.

proper subject of governmental regulation.<sup>50</sup> Thus a city ordinance providing that no garage permit allowing the storage of volatile inflammable oil shall be issued for any building, shed or inclosure which is situated within fifty feet of the nearest wall of a building occupied as a school, has been sustained though it applies to property used as a garage for a number of years prior to the enactment of the ordinance.<sup>51</sup> So, too, a regulation requiring that all lights on motor vehicles except electric lights shall be extinguished before volatile inflammable oil is delivered to fuel tanks, is proper, and places an obligation upon garage keepers to extinguish lights on a machine before delivering gasoline into the tank of a motor vehicle.<sup>52</sup> And regulations adopted by the Commissioner of the District of Columbia prohibiting the storage or keeping for sale of inflammable oils without a license and prescribing the conditions under which licenses shall be granted, have been sustained.<sup>53</sup> And it has been held a part of such regulations requiring every person storing gasoline in the city of Washington to take out a license, which requires every such application to be referred to the inspectors of buildings and the chief engineer of the fire department for examination of the building described in the application, who shall transmit the application with the recommendation to the assessor of

50. *Gulf Refining Co. v. McKernan*, 179 N. Car. 314, 102 S. E. 505.

**Discrimination.**—A municipal regulation requiring one dealer to remove a tank and gasoline pump at the curb in front of his place of business, constitutes an unlawful discrimination where his competitor a short distance away is permitted to maintain a similar apparatus. *Kenney v. Village of Dorchester*, 101 Neb. 425, 163 N. W. 762.

**Licensing of gasoline filling stations.**—*Invader Oil & Refining Co. v. City of Ft. Worth* (Tex. Civ. App.), 229 S. W. 616.

51. *McIntosh v. Johnson*, 211 N. Y. 265, 105 N. E. 416, wherein it was said: "He challenges the regulation quoted as being in violation of his constitu-

tional rights, because it deprives him of his property without due process of law, and denies to him the equal protection of the law. It seems to me that the regulation is not objectionable on the score stated by the relator. The object sought is the preservation of public safety and the welfare of the community. The enactment is not an arbitrary interference with the rights of the individual, but is a fair, reasonable and appropriate exercise of the police power."

52. *Karg v. Seventy-ninth St. Garage Corp.*, 102 Misc. (N. Y.) 114, 168 N. Y. Suppl. 164.

53. *Cabill v. District of Columbia*, 23 Wash. L. Rep. 759.

the district, who shall, if such officials recommend, issue a license unless otherwise ordered by the commissioners, is not void as an unauthorized delegation of the powers conferred upon the commissioners; it not being a delegation of their authority to commit to the expert agents named, a duty to ascertain and report information important to the exercise of their power to issue the license, the propriety of which issue must depend upon the character and surroundings of the building occupied. The word "recommendation" in the regulation is used in the sense of report.<sup>54</sup> An information in the police court against the proprietor of an automobile storage and repair house, charging him with storage and keeping gasoline for sale without a license, is not supported by evidence which shows that the defendant had a license to conduct such a business but had been refused a special license for the storage and sale of gasoline on the premises; that he did not have a permit to store gasoline in an underground tank half a block from his establishment; that from time to time each day as needed he procured gasoline from such tank for the supply of automobiles in his establishment, which remained therein from ten minutes to an hour awaiting the arrival of their owners, who had ordered them made ready for use; there being nothing in such evidence from which the sale of gasoline could be inferred and nothing to show that it was stored upon the premises within the meaning of the regulation.<sup>55</sup>

**Sec. 200. Regulatory power over garages — keeping register of repairs.**

A statute requiring that "every repair shop of whatsoever kind, or garage, within this State, engaged in the repairing, rebuilding or repainting of automobiles of every description; or any repair shop, within the State, engaged in electrical work in connection with automobiles of every description, shall keep a well bound book in which they shall register, in an intelligent manner, each and every material repair or change in or on any automobile or automobiles of every de-

54. District of Columbia v. Weston,  
23 App. D. C. 363, distinguishing  
United States v. Ross, 5 App. D. C. 241.

55. Weston v. District of Columbia,  
23 App. D. C. 367.

scription," applies to the "garage" or "repair shop,"<sup>56</sup> but the persons engaged in operating them are not amenable to prosecution.<sup>56</sup>

### Sec. 201. Rights of garage keeper.

A garage keeper is generally allowed a lien on a motor vehicle for the storage thereof and for repairs made to it.<sup>57</sup> But, even if his lien is ineffective for some reason, he is entitled to recover of the owner the agreed price for storage or for supplies and repairs. Or, in the absence of agreed price for repairs, the garage keeper is entitled to recover of the owner the reasonable value of the services and materials furnished;<sup>58</sup> even though the value of the repairs exceeds the

56. *Fowler v. State*, 81 Tex. Cr. 574, 196 S. W. 951, wherein the court said: "Following these rules, taking the language employed and its meaning, it will be readily seen and observed that by no sort of ordinary language such as is commonly understood can a garage be a person, nor is the individual citizen of Texas to be regarded by the language of this statute as a repair shop or electrical works. He may be the manager or owner, but he is not the shop—he is not the garage. It will be observed further the legislature does not undertake, which perhaps they might have done had they desired, to define a garage with such meaning as would do violence to the ordinary language and understood words. It cannot be held with any degree of accuracy that the word 'garage' is synonymous with 'person' or a 'citizen.' Sometimes where ambiguous language is used by the legislature, looking to the whole act, it may be held that the language conveys or includes things not specifically designated, but this is a stretch of the rule or construction unless the legislature has specially so defined it. Recognizing the fact, however, that perhaps a garage and an individual are different things, or that a repair shop is not a hu-

man being, they did not undertake to make a garage, repair shop, and electrical works synonymous with the term 'citizen' or a 'person.' This law would not justify, from this viewpoint, the complaint and information. We have a law also to the effect, that before a man can be punished in Texas there must be an offense defined by the legislature, and it must affect the individual and include him within its terms. No one looking at this statute would undertake to believe that by the plain import of the language in which it is written a garage would be an individual or a citizen."

57. Sections 875-881.

58. *Helber v. Schaible*, 183 Mich. 379, 150 N. W. 145. See also, *MacIntosh v. Chicago Elec. Motor Car Co.* (Cal.), 186 Pac. 364.

**Time cards** showing the number of hours of labor devoted to the repair of an automobile may be shown to witness to refresh his recollection on the subject. *New York Motor Car Co. v. Greenfield*, 145 N. Y. Suppl. 33, wherein it was said: "In endeavoring to show the number of hours of labor devoted to the repair of the automobile and the materials furnished thereon, plaintiff called its former foreman who had been

original cost of the machine.<sup>59</sup> The circumstances may however, be such that an implied contract to pay for repairs will not be made.<sup>60</sup> When the machine is brought to the garage by a chauffeur, the garage keeper should assure himself of the authority of the chauffeur to order repairs, especially where they are of a permanent nature.<sup>61</sup> If the garageman undertakes to make repairs so as to put the machine in good

in charge of this work. He testified in substance that he could not remember the details without having his memory refreshed. A large number of daily time cards were then shown to him which he recollected that he had made out. These cards, which were signed by the witness, showed the materials furnished and the number of hours of labor which had been put into this repair work. The witness testified repeatedly on his direct and cross-examination that he personally knew what materials had been furnished and what labor done, and that he had constantly superintended the work or was with the workmen when they did it. He also said that before making the entries he would each evening ask each workman the number of hours which he had devoted to the work. Basing his contention upon this last statement alone, which was evidently a statement by the witness of an additional precaution which he took to verify his knowledge, the respondent claims that the entries on the cards were founded on hearsay, and that the cards, therefore, were not rendered admissible. To this view we cannot assent without doing violence to the letter and spirit of the witness' testimony, which showed ample detailed knowledge of both the hours of labor applied and of the materials furnished."

**Evidence in action for repairs.** See *Randle v. Borden* (Tex. Civ. App.), 161 S. W. 1063.

<sup>59.</sup> *Horton v. Phillips* (Mass.), 131 N. E. 324.

<sup>60.</sup> *Helber v. Schaible*, 183 Mich. 379, 150 N. W. 145.

<sup>61.</sup> *Gage v. Callanan*, 57 Misc. (N. Y.) 479, 109 N. Y. Suppl. 844, reversed on other grounds, 128 N. Y. App. Div. 752, 113 N. Y. Suppl. 227. In the lower court, it was said: "Evidently the chauffeur had no implied or apparent authority to order permanent repairs, or any repairs other than such as were necessary to enable him to proceed upon his journey. This was evident to the plaintiff himself, for he placed no reliance upon the word of the chauffeur, writing the owner himself for instructions. The owner ignored his letters. Clearly the plaintiff was in no way deceived as to the chauffeur's authority. Clearly he knew that he had no authority to order the repairs in question. The case, therefore, is precise, as if the chauffeur had not given the orders in question, merely leaving the car in plaintiff's shop for safe keeping. If the plaintiff had then suggested repairs to the defendant, and received no response to his suggestion, he could not then have made repairs except at his own cost and risk. So in this case. The plaintiff is, therefore, not entitled to recover his repair bill. It is otherwise as to his bill for storage. The chauffeur had the right to place the broken down car in the plaintiff's custody for safe keeping. The defendant was informed that he had done so. He did not interfere with the plaintiff's custody of the car, but left it with him for a long period of time. He certainly is liable for the keep of the car."

running condition, though he is not bound to put the machine in perfect mechanical condition, he must at least substantially perform his part of the contract before he can recover from the owner for his services.<sup>62</sup> Under a provision of a Penal Code making it a misdemeanor for one selling

62. A decision by the municipal court of New York city is of interest in this connection and the following opinion is given:

LAUER, J.—This action is brought to recover the sum of \$267.12, representing three items, first, the item of \$160, the agreed price of certain repairs to defendant's electric automobile; secondly, the price of \$78.12, the cost, as per agreement of the parties, of placing in the defendant's automobile a new armature; and thirdly, the item of \$29, representing certain work, labor and services performed by the plaintiff upon the same automobile at the defendant's request.

I find great difficulty in reaching a decision in this case, realizing that if I decide the issues in favor of the defendant the plaintiff must suffer a considerable loss, in view of the fact that it has expended time and money in the repairs which it undertook to make upon this automobile. But, on the other hand, if I decide in plaintiff's favor the defendant would be put to great expense with comparatively little, if any, gain by reason of the work which the plaintiff undertook.

I think it may fairly be said that it was the understanding between the parties that by reason of the repairs which the plaintiff undertook to do the automobile of the defendant was to be put in first class running condition, or at least in good running condition. As I understand it, this does not necessarily mean that it should be put in perfect mechanical condition. The question, is, however, can it fairly be said that this automobile was by reason of

the repairs which the plaintiff made put in running condition? Admittedly, while the automobile was in the possession of the plaintiff, the only test of its running qualities was made about the garage floor. Besides this the automobile was operated only from the garage to the pier in New York and from the pier to the garage in Huntington, a distance of but a few miles, over good roads, and after that the car could not be and was not, operated satisfactorily. It is undisputed that when the attempt was made to recharge the batteries, which had in part been exhausted by the trip to Huntington, it was found that there was an interrupted circuit in the shape of the breaking of certain metal straps connecting the cells of the batteries. While this in itself may not have been a matter of very great importance, and a repair which could be made, it indicates to my mind that the work was not done in that workmanlike manner which the defendant had a right to expect. I take it that a car is not put in first class or in good running condition merely because it happens to run a few miles. There must be at least some reasonable period of time when, with fair and reasonable usage, under ordinary conditions, the car should continue to be capable of operation. In this instance such was not the case. I do not mean to decide that the party undertaking repairs of an automobile guarantees the duration of those repairs, but where, as here, without any hard usage, and with only a few miles of operation, the car is found unfit for further operation, I do not think it can be said that the

goods to an employee or servant acting for another or who renders service or labor to give a commission, discount or bonus to such employee, where a plaintiff sued for supplies and work in repairing defendant's automobile and the giving to the chauffeur of a discount on such materials and work was proved, it was held that the contract was void and that the plaintiff could not recover.<sup>63</sup>

## Sec. 202. Liability of garage keeper — in general.

A garage keeper storing the car of another for compensation is classed as a bailee for hire,<sup>64</sup> and as such, he is bound to furnish reasonably safe accommodations and to exercise reasonable care and prudence to keep the machine in a safe manner.<sup>65</sup> If guilty of negligence resulting in loss or injury to the machine, he may be charged with the damage.<sup>66</sup> The

plaintiff has reasonably complied with its contract to put the car in first class or even in good running condition. So far, therefore, as the item of \$160, the contract work, is concerned, I have concluded that the plaintiff must fail in its recovery. In regard to the items representing the labor of the plaintiff's employees in attempting to make the repairs in Huntington I do not think the plaintiff is entitled to recover, for they were mere attempts to remedy the defective condition of the car. So far as the price of the armature is concerned I believe that it is but fair to permit the plaintiff to recover for the cost thereof, as this armature was purchased by the plaintiff for the defendant, at the defendant's request, and was put into the defendant's car, and the defendant undoubtedly received the benefit thereof.

If follows from these expressions of my opinion that judgment must be for the plaintiff in the sum of \$78.12. See *New York Law Journal*, Dec. 4, 1908.

63. *General Fire Repair Co. v. Price*, 115 N. Y. Suppl. 171.

64. Section 192.

65. *Morgan Millwork Co. v. Dover Garage Co.* 7 Boyce's (30 Del.) 383, 108 Atl. 62; *Stevens v. Stewart-Warner Speedometer Corp.*, 223 Mass. 44, 111 N. E. 771; *Hayes v. Maykel Automobile Co.*, 234 Mass. 198, 125 N. E. 165.

**Temperature.**—Garageman may be liable if the temperature of the garage is permitted to fall so that the water in the cooling system freezes and bursts the water jacket or other parts. *Smith v. Economical Garage, Inc.*, 107 Misc. 430, 176 N. Y. Supp. 479; *Simms v. Sullivan (Oreg.)*, 198 Pac. 240.

66. *Illinois*.—*Ford Motor Co. v. Osburn*, 140 Ill. App. 633.

*Kansas*.—*Roberts v. Kinley*, 80 Kans. 885, 132 Pac. 1180, 45 L. R. A. (N. S.) 938.

*Massachusetts*.—*Stevens v. Stewart-Warner Speedometer Corp.*, 223 Mass. 44, 111 N. E. 771.

*Michigan*.—*Smith v. Bailey*, 195 Mich. 105, 161 N. W. 822.

*New York*.—*Allen v. Fulton Motor Co.*, 71 Misc. 190, 128 N. Y. Suppl. 419.

*North Carolina*.—*Beck v. Wilkins-Ricks Co.*, 179 N. C. 231, 102 S. E. 313.



liability of a garage keeper for hire is not affected by reason of the knowledge of the owner as to the place where the property is kept.<sup>67</sup> Its acceptance by the garageman imposes on him the duty of exercising due care for its safety and protection.<sup>68</sup> In the absence of statute affecting his liability, he is not an insurer of the safety of the machine.<sup>69</sup> Nor is he liable for deterioration in value owing to the inroads of time.<sup>70</sup> Upon the expiration of the bailment, the bailee must return the machine to the bailor,<sup>71</sup> though, if the machine has been stolen, he may return it to the true owner.<sup>72</sup>

### Sec. 203. Liability of garage keeper — gratuitous bailee.

One who cares for the vehicle of another without compensation, may be classed as a "gratuitous" bailee.<sup>73</sup> A gratuitous bailee is sometimes said to be obligated to the bailor only for an exercise of slight care, and is liable only for gross neglect or bad faith.<sup>74</sup> Thus, if a garage keeper permits the owner of a motorcycle to leave the machine in the garage over night without compensation, the garage keeper is a gratuitous bailee and liable only for gross negligence.<sup>75</sup>

*Oregon.*—*Simms v. Sullivan*, 198 Pac. 240.

*West Virginia.*—*McLain v. West Virginia Automobile Co.*, 72 W. Va. 728, 79 S. E. 731.

*Washington.*—*Tacoma Auto Livery Co. v. Union Motor Car Co.*, 87 Wash. 102, 151 Pac. 243.

**Negligent operation of elevator carrying car from one floor to another.** *Einhorn v. West 67th St. Garage*, 191 N. Y. App. Div. 1, 177 N. Y. Suppl. 887.

**67.** *Stevens v. Stewart-Warner Speedometer Corp.*, 223 Mass. 44, 111 N. E. 771; *Simms v. Sullivan* (Oreg.), 198 Pac. 240.

**68.** *Stevens v. Stewart-Warner Speedometer Corp.*, 223 Mass. 44, 111 N. E. 771.

**69.** *Renfroe v. Fouché* (Ga. App.), 106 S. E. 303; *Ford Motor Co. v. Osburn*, 140 Ill. App. 633; *Roberts v.*

*Kinley*, 80 Kans. 885, 132 Pac. 1180, 45 L. R. A. (N. S.) 938; *Allen v. Fulton Motor Co.*, 71 Misc. (N. Y.) 190, 128 N. Y. Suppl. 419; *Beek v. Wilkins-Ricks Co.* (N. Car.), 102 S. E. 313.

**70.** *Wimpfheimer v. Demarent & Co.*, 78 Misc. (N. Y.) 171, 137 N. Y. Suppl. 908.

**71.** *Morgan Millwork Co. v. Dover Garage Co.*, 7 Boyce's (30 Del.) 383, 108 Atl. 62; *Drew v. King*, 76 N. H. 184, 80, Atl. 642.

**72.** *Hancock v. Anchors* (Ga. App.), 105 S. E. 631.

**73.** *Glende v. Spraner*, 198 Ill. App. 584.

**74.** *Thomas v. Hackney*, 192 Ala. 27, 68 So. 296; *Renfroe v. Fouché* (Ga. App.), 106 S. E. 303; *Glende v. Spraner*, 198 Ill. App. 584.

**75.** *Glende v. Spraner*, 198 Ill. App. 584.

### Sec. 204. Liability of garage keeper — injury by fire.

In the absence of special statute on the subject or special contract between the parties, a garageman is bound to exercise reasonable care, but does not insure a vehicle in his custody against damage from fire in the garage. He is liable for the injury, only when his negligence has contributed thereto.<sup>76</sup> If an employee at a service station is negligent in filling the tank of a car with gasoline, and as a result the gasoline is ignited and the car is damaged, a recovery may be had.<sup>77</sup> The tender to the garageman of the storage charges is not a prerequisite to the suit.<sup>78</sup>

### Sec. 205. Liability of garage keeper — property stolen from garage.

The owner of a garage is bound to exercise reasonable care to protect property stored in his place of business against loss from theft.<sup>79</sup> Thus, the garageman may be liable if he assumes the custody of an automobile and thereafter permits it to remain in an alley without using any precautions to protect it from being stolen.<sup>80</sup> But he is not an insurer and does not, in the absence of peculiar statutory provisions or special circumstances, guarantee the owner that the property will not be stolen.<sup>81</sup> In an action against a garage keeper to recover

**76.** *Parris v. Jaquith* (Colo.), 197 Pac. 750; *Ford Motor Co. v. Osburn*, 140 Ill. App. 633; *Allen v. Fulton Motor Car Co.*, 71 Misc. (N. Y.) 190, 128 N. Y. Suppl. 419; *Beck v. Wilkins*, 179 N. Car. 231, 102 S. E. 313. See also *Hobson v. Silvea* (Cal. App.), 194 Pac. 525; *Roberts v. Kinley*, 80 Kans. 885, 132 Pac. 1180, 45 L. R. A. (N. S.) 938.  
**77.** *Sanders v. Austin*, 180 Cal. 664, 182 Pac. 449. See also, *Pinter v. Wenzel* (Wis.), 180 N. W. 120.  
**78.** *Hobson v. Silvea* (Cal. App.), 194 Pac. 525.

**79.** *Stenson v. Flour City Fuel & Transfer Co.*, 144 Minn. 375, 175 N. W. 681; *Stevens v. Stewart-Warner Speedometer Corp.*, 223 Mass. 44, 111 N. E. 771; *Hoel v. Flour City Fuel &*

*Transfer Co.*, 144 Minn. 280, 175 N. W. 300; *Rubin v. Forwarders Auto Trucking Corp.*, 111 Misc. (N. Y.) 376, 181 N. Y. Suppl. 451; *Farrell v. Universal Garage Co.*, 179 N. C. 389, 102 S. E. 617.

Where a part is stolen while in the custody of the keeper of the garage and he agrees to replace it, its value should be allowed in adjusting the claim of the garage keeper. *University Garage v. Heiser*, 142 N. Y. Suppl. 315.

**80.** *Stevens v. Stewart-Warner Speedometer Corp.*, 223 Mass. 44, 111 N. E. 771.

**81.** *Glende v. Spraner*, 198 Ill. App. 581; *Burge v. Englewood, etc.*, 213 Ill. App. 357.

for the loss of plaintiff's motorcycle, where the evidence shows that plaintiff had left the machine in defendant's garage over night, that he had advertised it for sale and had so informed defendant, also informing the latter that the machine could not be operated until repairs were made, and had left his name and address with defendant and had requested the latter to permit anyone to inspect the machine whom he might send around, defendant is not liable for the theft of the machine by one who presented a written permit from plaintiff to inspect and, under the pretext of inspecting it, stole it, riding it away.<sup>82</sup>

In the absence of any evidence showing or raising a presumption of agency between the owner of a garage and a porter employed there, by which the latter is authorized to receive personal property of one who keeps his automobile in such garage, the garage owner will not be liable for the loss of property which has been left with such porter. Thus, where a salesman who traveled in the automobile of his employer left a case of samples with the porter of the garage where the automobile was kept, saying he would call for it later, but he did not call for it until about three months had elapsed, and in the meantime the garage business had been moved to another place and the porter had quit his position, and the case was lost, in an action to recover for the same, a judgment was rendered in favor of the defendant, the court declaring that there was no evidence showing the porter was acting within the scope of his employment or any knowledge on the part of the defendant or its office force as to the custody or even existence of the sample case until after its loss and complaint was made.<sup>83</sup>

#### **Sec. 206. Liability of garage keeper — use of machine without owner's consent.**

Where a garage owner by the terms of his contract is not to permit an automobile to leave the garage without a written order from the owner, it is the duty of the former to use

<sup>82</sup>. Glende v. Spraner, 198 Ill. App. 584.

<sup>83</sup>. Chesley v. Woods Motor Vehicle Co., 147 Ill. App. 588.

proper diligence in devising and putting into effect some method which will prevent chauffeurs taking out cars improperly.<sup>84</sup> Thus, where a person placed his automobile in the care of a garage owner under a written contract, one of the stipulations of which was that the machine was not to be taken from the garage at night without the former's written order, a verdict finding the garage owner guilty of lack of due care in failing to adopt proper methods to prevent chauffeurs taking out motor cars without due authority, was held to be justified upon evidence that the plaintiff's chauffeur during the height of the evening rush hour was seen by the defendant's watchman in plaintiff's machine to come up quickly behind an outgoing machine; that the watchman held up his hand and shouted to him to stop and produce his order to take out the machine, and that the chauffeur, instead of so doing, put on speed, dashed through the doorway and turning the corner was out of sight almost immediately.<sup>85</sup> Independently, however, of any express agreement in respect to this, it would seem that the garage keeper should be held to the exercise of reasonable care to prevent the car from being used without the owner's consent.<sup>86</sup> And he should use reasonable care in the selection of servants to assist in the management of the garage, and negligence may be based on employment of an incompetent employee or one who is habitually intoxicated.<sup>87</sup> Moreover, outside of the question of negligence, if the machine is taken and damaged by his employee, the garage keeper may be liable on the theory that he has failed to perform his contract with the owner of the machine.<sup>88</sup>

**84.** *Wilson v. Wyckoff, Church & Partridge*, 133 N. Y. App. Div. 92, 117 N. Y. Suppl. 783, affirmed 200 N. Y. 561, 93 N. E. 1135.

**85.** *Wilson v. Wyckoff, Church & Partridge*, 133 N. Y. App. Div. 92, 117 N. Y. Suppl. 783, affirmed 200 N. Y. 561, 93 N. E. 1135.

**86.** *McLain v. West Virginia Automobile Co.*, 72 W. Va. 738, 79 S. E. 731.

**87.** *Corbett v. Smeraldo*, 91 N. J. L. 29, 102 Atl. 889.

**88.** *Corbett v. Smeraldo*, 91 N. J. L. 29, 102 Atl. 889. "The jury could hardly avoid the inference that the automobile was left with the defendant for storage in his garage. Storage involved keeping the automobile there and not permitting it to go out without the plaintiff's authority. If the defendant chose to intrust that duty

### Sec. 207. Liability of garage keeper — damage to machine while driven by bailee.

Where the garage keeper or his servant runs a machine left in his custody for storage or repairs and the driver is guilty of negligence causing an injury to the machine, the garage-man is generally liable for the damages sustained by the owner.<sup>89</sup> Where a machine is damaged through the use of the bailee, the burden is generally upon him of showing that he exercised due care.<sup>90</sup> After the completion of repairs on the machine, if the repairer undertakes to deliver it by one of his employees to the owner, such employee's negligence causing injury will be considered as that of his master.<sup>91</sup> And where such an employee is testing the machine before delivering it to the owner, his employer will be liable for damages resulting from a collision due to his negligent operation of the car.<sup>92</sup> Where, by the terms of the agreement between the garage keeper and the owner the garage keeper is to deliver the automobile to the owner when called upon to do so, the chauffeur being furnished by the former, if, while the automobile is in charge of the chauffeur, it is injured owing to his carelessness or wantonness, he will be considered as acting within the scope of his employment and the garage keeper will be liable therefor.<sup>93</sup> Even if the chauffeur deviates from the customary route and takes considerably longer than is ordinarily taken, the court will not say as a matter of law that the chauffeur is not acting in the scope of his employment.<sup>94</sup>

to his night man, he was liable, not because the night man was negligent, but because the defendant himself had been guilty of a breach of his contract of storage." *Corbett v. Smeraldo*, 91 N. J. L. 29, 102 Atl. 888.

**89.** *Southern Garage Co. v. Brown*, 187 Ala. 484, 65 So. 400; *Gibson v. Dupree*, 26 Colo. App. 324, 144 Pac. 1133; *National Cash Register Co. v. Williams*, 161 Ky. 550, 171 S. W. 162; *Banks v. Strong*, 197 Mich. 544, 164 N. W. 398. See also *Travelers Indemnity Co. v. Fawkes*, 120 Minn. 353, 139 N. W. 703.

**90.** Section 212.

**91.** *Williamson v. National Cash Register Co.*, 157 Ky. 836, 164 S. W. 112.

**92.** *Segler v. Callister*, 167 Cal. 377, 139 Pac. 819.

**93.** *Firemen's Fund Ins. Co. v. Schreiber*, 150 Wis. 42, 135 N. W. 507, 45 L. R. A. (N. S.) 314, *Ann. Cas.* 1913 E. 823.

**94.** *Southern Garage Co. v. Brown*, 187 Ala. 484, 65 So. 400. See also *Lockett v. Reighard*, 248 Pa. 24, 93 Atl. 773, wherein the court said: "While the employee was performing this duty, especially in the absence of the owner, he was manifestly not the

**Sec. 208. Liability of garage keeper — conversion of customer's automobile.**

A garage keeper must so handle the machine of another that he cannot be charged with conversion. He must deliver the machine to the owner upon the expiration of the bailment, and

servant of Schmeltz, but of the defendant, who employed him and paid him for the service. He was under the defendant's control and was subject to his orders and directions. When the machine was being returned to the garage from the Schmeltz residence by the employee on the night of the accident it was as much in the custody of the defendant as when it was stored in the garage. While the employee, therefore, was operating the machine between those two places he was doing so in furtherance of the business of his employer, who was responsible for his acts. . . . When the car left the Schmeltz residence at 9 o'clock that evening it was in charge of and being operated by defendant's servant, who was acting in the line of his employment, and in about one hour later it collided with the plaintiff on one of the public thoroughfares of the city. We think the presumption arises that Carter was still operating the car at the time it struck the plaintiff. His duty required him to return the car to the garage, and in the absence of evidence showing the contrary, we must assume that he was in the performance of that duty and in charge of the car when it was going in the direction of the garage at the time of the accident. There is no question that Carter was an employee of the defendant, engaged at the garage, and that he had frequently taken the car to the Schmeltz home and returned it to the garage. We think, therefore, the jury under the evidence was justified in finding that the automobile which injured the plaintiff was in charge of and being operated by the defendant's employee

at the time of the accident. The defendant further contends that if his employee was in charge of the car which struck the plaintiff, he was not at that time acting within the scope of his employment. The defendant supports this contention by pointing to the testimony, which shows that it only required fifteen minutes over the direct route to take the machine from the Schmeltz residence to the garage, and that the accident did not occur until more than an hour after the chauffeur started to make the return, and, further, that the machine at the time of the accident was coming from the direction of the city, and not from the direction of the Schmeltz home. Conceding the truth of this testimony, we do not think it sufficient to warrant the court in saying as a matter of law that the chauffeur was not acting in the scope of his employment when he was running the machine on Center avenue and it struck the plaintiff. There is nothing outside of this evidence which would warrant an inference that the chauffeur had gone on an errand of his own or was operating the car for his own pleasure at the time of the collision with the plaintiff. The facts shown by the testimony just referred to are not necessarily inconsistent with the contention of the plaintiff that the chauffeur was taking the car to the garage, as his duty required him to do, when he struck the plaintiff. The deviation from the direct route by the chauffeur or the time elapsing between his departure for the garage and the accident was not so great as to necessarily warrant the conclusion that he was acting outside

if he fails to make any delivery or if he makes a delivery to an unauthorized person, he may be liable for the conversion of the machine.<sup>95</sup> If one having the custody of an automobile belonging to another, intrusts it to a third person without the knowledge or consent of the owner, and as a result thereof the machine is destroyed, the bailee may be held guilty of conversion.<sup>96</sup> If by his contract he is to keep the machine in a certain place and he removes it to another without the owner's consent, where it is damaged, and the injury would not have occurred if it had been kept in the place agreed upon, he will be liable therefor.<sup>97</sup> The owner's right of action for such conversion, is not lost because a chattel mortgage on the machine is subsequently foreclosed, nor does it pass to the purchaser on the foreclosure sale.<sup>98</sup> But where a motor car company reduces its claim of loss for repairs to an automobile and the owner makes no tender of said amount, but offers a lesser amount, the insistence of the company on receiving the amount of its reduced claim of lien does not constitute a conversion.<sup>99</sup> Where a plaintiff having a lien upon an automobile chassis for money loaned, allowed his debtor to deliver it to the defendant for the purpose of having a body placed on the machine on the condition that the debtor should obtain a receipt

the scope of his employment. He might have been detained by an accident to his car, or by stopping to assist a fellow chauffeur in trouble, as is quite customary, or the direct route might have been obstructed by the condition of some of the streets which required him to go a circuitous route. These and other reasons will at once suggest themselves why the chauffeur might be in the discharge of his duty in returning the car to the garage at the time the accident occurred." And see also section 632.

**95.** *Morgan Millwork Co. v. Dover Garage Co.*, 7 Boyce's (30 Del.) 383, 108 Atl. 62; *Doyle v. Peerless Motor Car Co.*, 226 Mass. 561, 116 N. E. 257.

**Liability of unauthorized person.**—The one taking the machine may be liable to the garage keeper, in case the

latter is required to recompense the owner on the theory that the taking constitutes a conversion. *Beacon Motor-car Co. v. Shadman*, 226 Mass. 570, 116 N. E. 559.

**Conversion of tools and parts.**—See *J. C. Killgore v. Whitaker* (Tex. Civ. App.), 217 S. W. 445.

**96.** *Doyle v. Peerless Motor Car Co.*, 226 Mass. 561, 116 N. E. 257; *Geren v. Hallenbeck*, 66 Oreg. 104, 132 Pac. 1164.

**97.** *Pilson v. Tip-Top Auto Co.*, 67 Oreg. 528, 136 Pac. 642.

**98.** *Geren v. Hallenbeck*, 66 Oreg. 104, 132 Pac. 1164.

**99.** *Macumber v. Detroit Cadillac Motor Car Co.*, 173 App. Div. 724, 159 N. Y. Suppl. 890. See also *Knauff v. Yarbray*, 21 Ga. App. 94, 94 S. E. 75. See also chapter XXXI, as to liens.

from the defendant and deliver it to the plaintiff, and the defendant gave the debtor the receipt, stating that the chassis was to be delivered only on return of the receipt properly indorsed, and the debtor in his turn indorsed the receipt, "Deliver to the order of" the plaintiff, and subsequently the defendant returned the machine to the debtor equipped with a body without requiring a surrender of the receipt, it was held in an action by the plaintiff for the conversion of the machine, he having failed to collect his claim of the debtor, that the defendant was not liable, it having been shown that the defendant had no knowledge of the transactions between the plaintiff and the debtor or that the plaintiff had a claim on the chassis.<sup>1</sup>

#### **Sec. 209. Liability of garage keeper — delay in making repairs.**

If one agreeing to make repairs to a motor vehicle unreasonably delays the completion of the work, he may be liable to the owner for damages sustained by reason of the delay. Thus, in an action for the work and labor on the machine, the owner may set-off for the delay in making the repairs.<sup>2</sup> But one injured by the delay in making the repairs must make a reasonable effort to reduce or minimize the loss, and he cannot recover the rental value of another machine during the delay, where he had another machine of his own which, instead of using in place of the machine receiving repairs, he sold and delivered to another person.<sup>3</sup>

#### **Sec. 210. Liability of garage keeper — improper performance of work on machine.**

Where one undertaking to repair a motor vehicle fails to do the work properly, the owner may maintain an action for the recovery of his damages or may off-set such damages against the claim of the repairman,<sup>4</sup> whether the work is

1. *Manny v. Wilson*, 137 N. Y. App. Div. 140, 122 N. Y. Suppl. 16.

2. *Bertschy Motor Co. v. Brady*, 168 Iowa, 609, 149 N. W. 42.

3. *Woodward v. Pierce Co.*, 147 Ill. App. 339.

4. *Holcomb Co. v. Clark*, 86 Conn. 319, 85 Atl. 376; *Russell's Express v. Bray's Garage* (Conn.), 109 Atl. 722.



done by the repairman or by special employee.<sup>5</sup> Where one for a stated sum agreed to build a body on the chassis of an automobile furnished by the plaintiff, but the work was not properly done, it has been held the plaintiff is not entitled to recover the difference between the value of the whole machine if the work had been properly done and the value of the machine as delivered to the defendant, but that the true measure of damage is the cost reasonably necessary to make the work and materials conform to the contract.<sup>6</sup> Expert evidence may be received as to the cost of repainting the machine and renewing certain woodwork and trimming, which work was claimed to be necessary by reason of the repairman's negligent treatment of it.<sup>7</sup>

### **Sec. 211. Liability of garage keeper — sale of inferior supplies.**

In an action by the owner of an automobile for damages alleged to have been caused by the use in his machine of lubricating oil furnished by the defendant, the evidence was examined and it was held that the plaintiff had failed to show that the oil was defective, the only evidence of a defect in the oil being the presence in the cylinders and crank case of a carbon deposit which might have been occasioned by an overflow of the oil in the combustion chambers, due to wear in the

5. *Russell's Express v. Bray's Garage* (Conn.), 109 Atl. 722.

6. *Anthony v. Moore & Munger Co.*, 135 N. Y. App. Div. 203, 120 N. Y. Suppl. 402, wherein it was said: "The court charged, in submitting the case to the jury (to which the defendant excepted): 'If, however, you believe that the work which the defendant had agreed to do was not workmanlike or that the materials furnished were not as agreed, or both, in some or all of the matters claimed by the plaintiff, he would be entitled to your verdict in an amount which would fairly and reasonably represent the difference between the value of the automobile as it was when the defendant delivered it to the

plaintiff at the end of December, 1906, and what its value would have been if the agreed work had been properly done.' Such testimony was improperly admitted and the instructions were erroneous. Had the defendant contracted to build an automobile, this would have been the proper measure of damage, but that was not the contract. What the defendant agreed to do was to build a body and place it upon a chassis furnished by the plaintiff and also to furnish other materials and make certain repairs upon the machine."

7. *Holcomb Co. v. Clark*, 86 Conn. 219, 85 Atl. 376.

cylinders, and there being no evidence that the wear was occasioned by the oil in question rather than by the ordinary use of the machine.<sup>8</sup>

### Sec. 212. Liability of garage keeper — burden of proof.

A serious question is presented as to whether, in case of injury to a vehicle which is the subject of a bailment, the burden of proof is on the owner to show that the injury was the result of the bailee's negligence, or whether the burden is on the bailee to show his freedom from negligence. Where, upon return of the vehicle of the owner, it appears that unusual injury has resulted to it, the burden is generally placed on the bailee to show that such injury was not the result of his negligence.<sup>9</sup> But, when the cause of action is not based on an injury to the machine but upon the failure of the bailee to redeliver the property, if the bailee shows that it was lost or stolen or was destroyed by fire, then the burden is generally placed upon the owner to show that the loss was due to the negligence of the bailee.<sup>10</sup> The burden of proof in such cases has occasioned a divergence of opinion, and decisions

8. *Knight v. Willard*, 26 N. Dak. 140, 143 N. W. 346.

9. *Alabama*.—*Southern Garage Co v Brown*, 187 Ala. 484, 65 So. 400; *Thomas v. Hackney*, 192 Ala. 27, 68 So. 296. "The evidence, however, having established the injury to the car while in the custody of the plaintiff, the burden of proof was upon him to show at least that degree of care on his part that the law required of him when the car was injured. He simply proved a collision and, from aught that appears, it may have resulted solely from his fault and while not in the exercise of even slight care. He had the custody of the car and was in the same when it was injured, and should have shown enough facts connected with the collision as would have acquitted him of the failure to exercise that degree of care owing to the

defendant." *Thomas v. Hackney*, 192 Ala. 27, 68 So. 296.

*Colorado*.—*Gibson v. Dupree*, 26 Colo. App. 324, 144 Pac. 1133.

*Kentucky*.—*National Cash Register Co. v. Williams*, 161 Ky. 550, 171 S. W. 162.

*Michigan*.—*Smith v. Bailey*, 195 Mich. 105, 161 N. W. 822.

*Minnesota*.—See *Travelers Indemnity Co. v. Fawkes*, 120 Minn. 353, 139 N. W. 703.

*New York*.—*Wimpfheimer v. Demarcant & Co.*, 78 Misc. (N. Y.) 171, 137 N. Y. Suppl. 908.

*South Dakota*.—*Gilbert v. Hardimon*, 40 S. Dak. 482, 168 N. W. 25.

10. *Glende v. Spraner*, 198 Ill. App. 584; *Allen v. Fulton Motor Car Co.*, 71 Misc. (N. Y.) 190, 128 N. Y. Suppl. 419.

may be found placing the burden on the garageman of showing that his negligence did not contribute to the loss.<sup>11</sup>

**Sec. 213. Liability of garage keeper — acts of driver injuring third person.**

Where a garage keeper has control of the motor vehicle of another so that the relation of bailor and bailee exists between the parties, the garageman, not the owner, is the person responsible for the chauffeur's negligence which results in an injury to a third person.<sup>12</sup> Of course, if the driver of the car was acting without the scope of his authority and was using the car for his personal purposes, neither the garage keeper nor the owner would be liable for his negligence.<sup>13</sup> Where the owner of an automobile stored it at a garage under an agreement by which the garage keeper, for an agreed compensation, was to furnish a chauffeur from time to time as requested to drive the car (it being left to the garage keeper to select the driver and pay him his compensation and to hire and discharge him at pleasure), the relation of master and servant existed between the garage keeper and the driver, and the garage keeper was liable for negligence of the driver while operating the car at a time when the owner was an occupant thereof, if such owner did not assume to direct or control the method or manner of driving, further than to tell the driver where he desired to go.<sup>14</sup> But, where an owner of an automobile took it to an automobile company to have a

11. *Morgan Millwork Co. v. Dover Garage Co.*, 7 Boyce (30 Del.) 383. 108 Atl. 62; *Hight Accessory Place v. Lam* (Ga. App.), 105 S. E. 872; *Renfroe v. Fouché* (Ga. App.), 106 S. E. 303; *Hoel v. Flour City Fuel & Transfer Co.*, 144 Minn. 280, 175 N. W. 300; *Steenenson v. Flour City Fuel & Transfer Co.*, 144 Minn. 375, 175 N. W. 681; *Beck v. Wilkins-Ricks Co.* (N. Car.), 102 S. E. 313.

12. *Roach v. Hincheliff*, 214 Mass. 267, 101 N. E. 383; *Geiss v. Twin City Taxicab Co.*, 120 Minn. 368, 139 N. W. 611; *Dalrymple v. Covey, etc. Co.*,

66 Oreg. 533, 135 Pac. 91, 48 L. R. A. (N. S.) 424; *Ouellette v. Superior Motor & M. Works*, 157 Wis. 531, 147 N. W. 1014. And see section 646.

13. *Luckett v. Reighard*, 248 Pa. 24, 93 Atl. 773. See also *Spradlin v. Wright Motorear Co.*, 178 Ky. 772, 190 S. W. 1087. And see section 627, *et seq.*

14. *Neff v. Brandeis*, 91 Neb. 11, 135 N. W. 232, 39 L. R. A. (N. S.) 933; *Dalrymple v. Covey, etc. Co.*, 66 Oreg. 533, 135 Pac. 91, 48 L. R. A. (N. S.) 424; *Ouellette v. Superior Motor & M. Works*, 157 Wis. 531, 147 N. W. 1014.

“rattle” in the car located, and an employee of the company got in the car and rode with the owner and later, at the suggestion of the owner, the employee drove the machine until it collided with a street car and the owner was injured, it was held that the negligence of the employee, if any, in driving the car could not be imputed to the automobile company so as to make it liable to the owner for his injuries, it appearing that the owner was directing the employee where to drive the machine, that the company had no authority to control the employee in driving it and that the company had not assumed the service of driving or operating it.<sup>15</sup>

**Sec. 214. Liability of garage keeper — acts of servant towing disabled machine.**

Where a part of the business of a garage is to tow for hire automobiles requiring that service, if the real or apparent authority of an agent who is requested to send a machine for such purpose is limited to the selection of only the necessary number of men and he selects more, it is held that the surplus men cannot be regarded as the servants of the garage owner. If, however, such agent is empowered to send as many men as he thinks necessary and acting under such authority he sends such men as he thinks necessary, but more than in fact are necessary, or if he is empowered to send as many men as he pleases, and he sends more than are necessary, then it is held that the men so sent are the servants of the garage owner, whether or not they are in fact needed.<sup>16</sup> Where two persons were taking a drive together in an automobile owned by one of them, having agreed to share equally the expenses of the trip, and the automobile, which was kept at defendant's garage became disabled, and the owner sent to the defendant garage for a tow, and a person was sent with a machine to which the disabled car was hitched, and while proceeding at a rate of speed alleged to be high, the car being towed was thrown against a telephone pole, causing both personal injuries and injuries to the automobile for which it was claimed

15. *Bastien v. Ford Motor Car Co.*, 189 Ill. App. 367.

16. *Beaucage v. Mercer*, 206 Mass. 492, 92 N. E. 774.

the defendant was liable, both on the ground of a negligent hitching of the cars together and that there was negligence in the towing, and it appeared that the owner of the automobile had protested against the manner in which the hitching was done, an instruction was held to be erroneous, which stated that, if he had so protested with a full appreciation and knowledge of the dangers involved in riding in the machine, under those circumstances, neither of the plaintiffs would be entitled to recover since the effect of the instruction was to authorize the jury to find for the defendant, even if the accident was due not to the defective hitching, but solely to the manner in which the towing car was managed.<sup>17</sup>

### **Sec. 215. Liability of garage keeper — defective premises.**

The owner of a garage is bound to furnish a reasonably safe working place for his servants, and in case of a failure in this respect, he is liable, even under the common law system, for the injuries resulting from his failure. Thus, one of his employees may recover for injuries sustained in falling down an unguarded elevator shaft.<sup>18</sup> The owner of a garage must also use reasonable care in providing its workmen with safe and suitable appliances for use in their work.<sup>19</sup> The lia-

17. *Beauceage v. Mercer*, 206 Mass. 492, 92 N. E. 774.

18. *Kinsey v. Locomobile Co.*, 235 Pa. St. 95, 83 Atl. 682, wherein it was said: "The principle of law which controls this case is that one who maintains a building for the purpose of trade or doing business with other persons, no matter what the business is, is bound to use reasonable care in keeping the premises safe."

19. *Bowers v. Columbia Garage Co.*, 93 Misc. (N. Y.) 49, 156 N. Y. Suppl. 286.

**Turn-table.**—While plaintiff, after washing an automobile in defendant's garage where he was employed, was skidding the car around on the washstand so as to get it back in its place, when he slipped on some kerosene oil, which by order of defendant's super-

intendent was poured under the rear wheels of the car to make it skid, and was injured, and his testimony that in other garages where he had worked there was either a turn-table or skids used to turn the cars around was corroborated, it was held that a dismissal of the complaint on the ground that plaintiff had failed to prove a cause of action was reversible error. It was the duty of the defendant to use reasonable care in providing its workmen with safe and suitable appliances in their work, and it being inferred that, if skids or a turn-table had been provided, the superintendent would not have ordered kerosene oil to be thrown under the wheels of the automobile, and if the oil used because of the absence of appliances created a dangerous condition in the prosecution of the

bility in case of defective premises may extend so as to create a cause of action in favor of a person, not an employee of the garage keeper, but entering the premises to do business with the owner or for some other lawful purpose. Thus, one struck by a motor vehicle as he is entering a garage may have a cause of action against the garageman or the driver of the vehicle.<sup>20</sup> Where a prospective purchaser of an automobile while inspecting the machine in the owner's garage is injured by its sudden and unexpected motion against him while it is being manipulated and operated by the owner, the doctrine of *res ipsa loquitor* applies, and the burden is placed on the owner of explaining the accident.<sup>21</sup>

work, the defendant was chargeable with negligence. *Bowers v. Columbia Garage Co.*, 93 Misc. (N. Y.) 49, 156 N. Y. Suppl. 286. 154 N. W. 877; *Jewison v. Dieudonne*, 127 Minn. 163, 149 N. W. 20.

20. *Stodgel v. Elder*, 172 Iowa, 739,

21. *Barnes v. Kirk Bros. Auto Co.*, 32 Ohio Circuit Rep. 233.

## CHAPTER XII.

## CHAUFFEURS.

## SECTION. 216. Scope of chapter.

- 217. Chauffeur defined.
- 218. Origin of term "chauffeur."
- 219. Status of chauffeur.
- 220. Regulation of chauffeurs—in general.
- 221. Regulation of chauffeurs—powers of municipalities.
- 222. Regulation of chauffeurs—age limit.
- 223. Licensing of chauffeurs—in general.
- 224. Licensing of chauffeurs—discrimination between paid chauffeurs and other operators.
- 225. Licensing of chauffeurs—unlicensed chauffeur receiving instruction.
- 226. Licensing of chauffeurs—effect of failure of chauffeur to have license.
- 227. Rights of chauffeur.
- 228. Liability of master for injury to chauffeur.
- 229. Liability of chauffeur to owner.

## Sec. 216. Scope of chapter.

The discussion in this chapter covers a few topics which relate peculiarly to the drivers of motor vehicles, as distinguished from their owners. Thus, at this place are treated such subjects as the regulation and licensing of chauffeurs, and the liability of the owner for injuries to his chauffeur. The general power of the State and of municipal corporations to regulate the operation of motor vehicles, is included in other chapters.<sup>1</sup> And the liability of the owner for injuries to third persons caused by the negligent operation of the machine, is treated in another chapter.<sup>2</sup> A distinction is to be drawn between the licensing of motor vehicles and the licensing of the operators of such machines. Statutes in most States require that both the machine and the chauffeur be licensed. In other States statutes have been enacted which contemplate the licensing of the owners or operators of machines rather than the machines.<sup>3</sup>

1. See chapters V and VI.

2. Chapter XXIII.

3. Commonwealth v. Templeton, 22

Montg. Co. J. Rep. (Pa.) 203. See also *In re Automobile Acts*, 15 Pa. Dist. Rep. 83.

## Sec. 217. Chauffeur defined.

The term chauffeur means one who manages the running of an automobile. The term in legal significance may be said to mean any person operating or driving a motor vehicle, as an employee, or for hire. This is the definition of the term contained in the motor vehicle laws of some States.<sup>4</sup>

The Pennsylvania Automobile Act of April 19, 1905, P. L. 217, applies to the operator of an automobile and not to the owner. *Commonwealth v. David*, 33 Pa. Co. Ct. 12.

**Carrying license.**—Where an automobile is owned by two partners, both of whom are licensed, and the machine carries the number of one of the licensed partners, and both partners are occupants of the machine, the operation of the machine by the partner whose license is not carried, is not a violation of the act of April 19, 1905, P. L. 217. *Yeager v. Winton Motor Carriage Co.*, 53 Pa. Super. Ct. 202.

4. "By a 'chauffeur' is meant one who operates an automobile for hire." *Staaek v. General Baking Co. (Mo.)*, 223 S. W. 89. Probably the best definition of the term chauffeur is that the word designates a person who habitually and as an occupation drives a motor vehicle commonly called an automobile, for hire generally, or for a master or employer who engages the services of the employee at regular wages. A person who owns an automobile and carries on a hacking business personally operating the machine, although he drives "for hire" and may be said to be a chauffeur, nevertheless, is not a "chauffeur" within the meaning of many automobile enactments and does not come within the commonly accepted understanding of the word. In an automobile law of the Province of Quebec the word "chauffeur" has been defined as meaning a person skilled in operating motor vehicles who habitually drives such vehicles as a means of livelihood. See section 1, subdivision

2, of the Motor Vehicle Law of Quebec 1906.

In New York, as is the case in several of the States, the term has been expressly defined by the Motor Vehicle Law as meaning any person operating or driving a motor vehicle as an employee, or for hire. See ch. 374. N. Y. Laws. 1910, § 281, p. 674.

A salesman for an oil company who uses the company's truck for the sale and delivery of oil, is not a "chauffeur" within the meaning of the Texas statute relating to the licensing of chauffeurs. *Matthews v. State*, 85 Tex. Cr. 469, 214 S. W. 339.

The chauffeur is engaged in manual labor.—*Smith v. Associated Omnibus Co.*, Div. Ct. 916.

**Legal result of definition of term.**—All persons coming within the definitions of the term "chauffeur," as provided in the various automobile enactments, are subject to the regulations intended to govern chauffeurs. Conversely, all persons who do not come within the definition are exempt from those provisions of law intended to govern that class of individuals. The importance of the term including every person intended and who should be regulated as a chauffeur, and excluding every individual who should not be so regulated, is apparent. Take, for example, the New York Motor Vehicle Law of 1904, which has been copied extensively by automobile legislation throughout the United States. Three classes of persons were required to register with the Secretary of State; namely, owners, chauffeurs, manufacturers, and dealers. If a person



### Sec. 218. Origin of term "chauffeur."

A "chauffeur" was a member of the bands of outlaws, during the reign of terror in France, who roamed over the north-eastern part of the country under the lead of John the Skinner, or Schinderhaunes. They garroted men and women, and roasted their feet to compel them to disclose hidden treasure. In 1803 rigorous measures were taken which resulted in their suppression. With the increasing use of the automobile as a means of recreation and transportation, the term chauffeur was applied to the driver who operated the carriage and the mechanic who was carried to look after the machinery and fuel. The origin of this use of the term is found in France, where automobiling first found favor as a sport, the word chauffeur being there employed to designate a fireman or stoker.<sup>5</sup>

### Sec. 219. Status of chauffeur.

The legal status, duties, and responsibilities of the chauffeur or operator of a motor car are of vital interest, not only to the motorist, but to others. Those who employ chauffeurs have interests at stake. Those who are employed as chauffeurs not only have serious responsibilities of a personal nature, but are, to a great extent, the guardians of their employer's interests. The chauffeur or operator of an automobile occupies towards his employer and the public a serious position, one which compares favorably in the necessity for prudence, diligence, and intelligence with that of the railroad

does not belong to either one of these classes of individuals, he is not subject to the regulations. A person may be neither an owner nor a chauffeur under the 1904 New York law, in which case he is at liberty to drive a hired or borrowed automobile without a license. This is a defect in laws similar to the one mentioned and should be remedied. The true purpose of regulations controlling the chauffeur is to regulate all automobile drivers who are not otherwise permitted by license to drive an automobile. Some of the State laws

compel owners to obtain a driver's license before they can operate a motor vehicle which has been registered. Other State laws permit the owner to drive his automobile upon registration of the machine with the proper office. It will be seen that the term "chauffeur" should be as comprehensive in its meaning as is intended by the law. All chauffeurs are necessarily automobile drivers, but all automobile drivers are not chauffeurs.

5. The New International Encyclopedia, vol. IV, p. 427.

engineer or master of a ship. As between the owner of a motor vehicle and a paid chauffeur, the relation is that of master and servant, and the liability of the parties to each other, as well as to third persons, is determined according to the principles of that relation.<sup>6</sup>

### Sec. 220. Regulation of chauffeurs — in general.

The occupation of a chauffeur for hire is one which, under the police power inhering in legislative bodies, may properly be a subject for government regulation.<sup>7</sup> When a calling or profession or business is attended with danger and requires a certain amount of scientific knowledge upon which others must rely, then legislation properly steps in and imposes conditions upon its exercise.<sup>7a</sup> That the occupation of a chauffeur is of this character may not be questioned and has been decided.<sup>8</sup> As was said in one case,<sup>9</sup> "If any subject can be conceived of which requires the exercise of the powers assumed by this ordinance for the safety of the public it is the ascertainment of the qualifications and fitness of operators of automobiles and other motor vehicles driven through the streets of a city like Chicago. These ponderous vehicles, driven by powerful engines, are a menace to the public safety unless managed and driven by persons who are competent and qualified to operate them. Those used for transporting heavy merchandise are practically engine-driven freight cars. The owners of such vehicles are not different from other persons—no better, no worse. They include not only the prudent and those considerate of the rights of others, but also the incompetent, the careless, reckless and lawless. The great majority are prudent and careful, but it is only human nature that arbitrary power should beget arbitrary act, and the symptoms and conduct before and after ownership are frequently well

6. See sections 627-654. as to liability to third persons.

7. *Matter of Stork*, 167 Cal. 294, 139 Pac. 684; *Ruggles v. State*, 120 Md. 553, 87 Atl. 1080.

7a. *Minneapolis, etc. Railroad Co. v. Beckwith*, 129 U. S. 29, 32 L. Ed. 585, 9 Sup. Ct. Rep. 207.

8. *Christy v. Elliott*, 216 Ill. 31, 108 Am. St. Rep. 196, 3 Ann. Cas. 487, 1 L. R. A. (N. S.) 215, 74 N. E. 1035; *State v. Swagerty*, 203 Mo. 517, 102 S. W. 483.

9. *Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917.

marked. Careless and incompetent operators endanger the public safety, and with another class the tooting of the horn is a warning to get off the highway or street, directed to the citizen for whose use it was originally laid out. Naturally enough, there has been a great loss of life on the public streets because of these vehicles, and very frequently in the darkness and excitement or tumult the operator has escaped. Everyone knows the dangers of the operation of these machines on the public streets, and especially in a metropolitan city, when the streets and crossings are thronged with citizens."

Among provisions which are considered a valid exercise of the police power are those forbidding the carrying of a person on a motor vehicle in front of the operator.<sup>10</sup> Or a chauffeur may be compelled to wear his badge in sight, but in an action for injuries to an automobile occasioned through a collision at a railroad crossing, it is no defense that the badge of the chauffeur was not in sight.<sup>11</sup>

### **Sec. 221. Regulation of chauffeurs—powers of municipalities.**

Municipalities are generally invested with power to regulate the operation of motor vehicles within their territorial limits.<sup>12</sup> Under its power to regulate the use of streets and pass and enforce all necessary police regulations, a city may require the drivers of automobiles used in transporting persons or property for hire to be examined and licensed by the city, notwithstanding such drivers have licenses under the State law, where a proviso to the State law or the State constitution reserves such power to the city.<sup>13</sup> A tax imposed by the State on the vehicle does not necessarily abridge the power of a municipality to charge a license fee on chauffeurs.<sup>14</sup> But where the State statute expressly provides that local authorities shall have no power to pass ordinances requiring licenses from chauffeurs, a local regulation to that effect is not en-

10. *In re Wickstrum*, 92 Neb. 523. 138 N. W. 733.

11. *Latham v. Cleveland, Cincinnati C. & St. L. R. Co.*, 164 Ill. App. 559.

12. Chapter VI.

13. *City of Montgomery v. Orpheum*

*Taxi Co. (Ala.)*, 82 So. 117; *City of Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917.

14. *Wasson v. City of Greenville (Miss.)*, 86 So. 450.

forceable.<sup>15</sup> And it has been held, applying the general rule that municipal corporations have only such power as may be granted by the Legislature unless otherwise provided in the constitution, that a city having only authority "to license, tax, and regulate hackmen, draymen, omnibus drivers and drivers of baggage wagons," has no power to provide that it shall be unlawful for any person under the age of sixteen years to operate any automobile or motor vehicle upon the streets of the city, as the power conferred by such a statute is one of regulation, not of prohibition.<sup>16</sup> Moreover, it has been held that, as a prerequisite to one operating his automobile for pleasure on the public ways, the city of Chicago has no power to require a party who uses his automobile for his private business and pleasure only, to submit to an examination and to take out a license, for such is imposing a burden upon one class of citizens in the use of the streets, which is not imposed upon others, and such an ordinance is beyond the power of the city council and is therefore, void.<sup>17</sup>

### Sec. 222. Regulation of chauffeurs — age limit.

Statutes have been passed in many States forbidding the operation of motor vehicles by minors under a prescribed age.<sup>18</sup> Regulations of this character are proper, and are designed for the protection of other travelers on the highway.<sup>19</sup> A statute of this character constitutes a legislative declaration that persons below the limited age are incompetent to operate a motor vehicle upon the public highways.<sup>20</sup> If,

15. *Barrett v. City of New York*, 189 Fed. 268.

16. *Ex parte Epperson*, 61 Tex. Cr. App. 237, 134 S. W. 685.

17. *Chicago v. Banker*, 112 Ill. App. 94.

18. *Mannheimer Bros. v. Kansas Casualty & Surety Co. (Minn.)*, 180 N. W. 229.

19. *Schultz v. Morrison*, 91 Misc. R. 248, 154 N. Y. Suppl. 257, wherein it was said: "The object and purpose of the statute is to promote the safety of those traveling the public highways. While a motor vehicle is not, in and

of itself, to be deemed a dangerous machine, nevertheless it becomes such in the hands of a careless and inexperienced person. The statute has, in effect, so declared when it forbids its operation by persons under the age of eighteen. It, in substance, declares that such persons do not possess the requisite care and judgment to run motor vehicles on the public highways without endangering the lives and limbs of others."

20. *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351.

therefore, the owner of such a vehicle permits an infant under the given age to drive the machine, and an injury is thereby occasioned to a third person, the violation of the statute by the owner may be a ground for holding him liable for the injuries.<sup>21</sup> Although the driving of a motor vehicle by an infant under the prescribed age may be negligence *per se*, there may be a question for the jury as to whether the violation of the law is the proximate cause of injuries in a particular case.<sup>22</sup> A municipal regulation prohibiting any person under eighteen years of age from operating a motor vehicle within the city limits may be held unreasonable where the regulation is apparently designed to include property other than streets and alleys.<sup>23</sup>

### Sec. 223. Licensing of chauffeurs — in general.

Under its police power of regulating the public highways, the State may, directly by means of a statute, or indirectly by authorizing a municipal corporation to pass ordinances on the subject, require that chauffeurs shall be licensed and pay a reasonable license fee.<sup>24</sup> If the State constitution preserves the right of municipal corporations to regulate chauffeurs in certain cases, the legislative body may be without power to interfere.<sup>25</sup> Under a statute defining a "chauffeur" as any person operating or driving a motor vehicle as an employee or for hire, an employee of an electric company who uses in the discharge of his duties an automobile furnished by his employer, must procure a license,<sup>26</sup> but a salesman of an oil company using its truck for the sale and delivery of oil is not

21. *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Schultz v. Morrison*, 91 Misc. (N. Y.) 248, 154 N. Y. Suppl. 257; *Allen v. Bland* (Tex. Civ. App.), 168 S. W. 35. "When the defendant permitted one of his own family, whose acts he had the right and authority to control, to operate his car, he became a party to the violation of the statute, and should be held responsible for the consequence which followed." *Schultz v. Morrison*, 91 Misc. 248, 154 N. Y. Suppl. 257. And see

section 662.

22. *Taylor v. Stewart*, 175 N. Car. 199, 95 S. E. 167.

23. *Royal Indemnity Co. v. Schwartz* (Tex. Civ. App.), 172 S. W. 581.

24. *Matter of Stork*, 167 Cal. 294, 139 Pac. 684; *Cleary v. Johnston*, 79 N. J. L. 49, 74 Atl. 538.

25. *City of Montgomery v. Orpheum Taxi Co.* (Ala.), 82 So. 117.

26. *People v. Fulten*, 96 Misc. (N. Y.) 663, 162 N. Y. Suppl. 125.

necessarily a "chauffeur."<sup>27</sup> Laws regulating chauffeurs should prohibit the issuance of licenses to minors under a prescribed age.<sup>28</sup> The failure of an applicant for a chauffeur's license to disclose physical disabilities does not render the license void, nor make him a trespasser in operating the machine on the highway, but the license is valid until it is revoked by the proper authority.<sup>29</sup> The license fees for the drivers of motor vehicles may be graduated according to the horse power of the machines. Thus, a statute fixing an annual fee of three dollars for registering an automobile of less than thirty horse power and a fee of five dollars for each automobile of thirty horse power or more, and fixing a fee of one dollar for a license to the driver of the first class and of two dollars for one to a driver of the second class, has been held to be constitutional as being a legitimate exercise of the police power of the State, notwithstanding the clause in the statute that requires all fees, fines and penalties arising under the act to be paid to the treasurer of the State and to be apportioned by the State road commissioner for the repair of improved roads.<sup>30</sup>

#### **Sec. 224. Licensing of chauffeurs — discrimination between paid chauffeurs and other operators.**

A distinction may properly be drawn between the professional chauffeur who operates the machine of his employer for hire, and other operators such as those who run their own cars. Hence, a regulation relative to chauffeur's licenses is not an unlawful discrimination because it charges a license fee on professional chauffeurs of five dollars annually, while other operators are required to pay only two dollars for a license which does not need to be renewed annually.<sup>31</sup> Moreover, a statute may be enacted imposing a reasonable license

27. *Matthews v. State*, 85 Tex. Cr. 469, 214 S. W. 339.

28. Section 222.

29. *O'Hare v. Gloag*, 221 Mass. 24, 108 N. E. 566.

30. *Cleary v. Johnston*, 79 N. J. L. 49, 74 Atl. 538. And see sections 109-115.

31. *Ruggles v. State*, 120 Md. 553, 87 Atl. 1080.

fee against the professional chauffeur and exempting the other classes of operators from any charge of that nature.<sup>32</sup>

**Sec. 225. Licensing of chauffeurs — unlicensed chauffeur receiving instruction.**

Statutes which regulate the licensing of chauffeurs contemplate that an applicant for a license shall have received training in that work. This would present an inconvenient situation were it not for provisions in such laws permitting an unlicensed person to operate a vehicle without a license when he is accompanied by a licensed chauffeur. Such a provision is designed to afford an opportunity for persons to become proficient under the supervision of an experienced driver.<sup>33</sup> Under a statute permitting an unlicensed person over a designated age to operate a motor vehicle when "accompanied by a licensed operator," the latter must, in order to comply with statute, be in such proximity to the former as to

32. *Matter of Stork*, 167 Cal. 294, 139 Pac. 684, wherein the court said: "There are unquestionable elements of similarity, even of identity, between the driving of an automobile by a professional chauffeur and the driving of a like vehicle by a private owner, designated in this act as an 'operator.' Thus it may not be gainsaid that the ignorance of the one is as likely to result in accident as the same ignorance upon the part of the other. The recklessness of the one is as likely to result in injury as the recklessness of the other. It is equally dangerous to other occupants and users of the highway whether the unskilled or reckless driver be a chauffeur or 'operator.' All these matters may be conceded, and yet there are others of equal significance where the differences between the two classes of drivers are radical. Of first importance in this is the fact that the chauffeur offers his services to the public and is frequently a carrier of the general public. These circumstances put professional chauffeurs in a class

by themselves and entitle the public to receive the protection which the legislature may accord in making provision for the competency and carefulness of such drivers. The chauffeur, generally speaking, is not driving his own car. He is intrusted with the property of others. In the nature of things a different amount of care will ordinarily be exercised by such a driver than will be exercised by the man driving his own car and risking his own property. Many other considerations of like nature will readily present themselves, but enough has been said to show that there are sound, just, and valid reasons for the classification adopted. The argument of the peril attending the public at the hands of the unlicensed operator driving his own car is not without force, but it can only successfully be presented to the legislative department and not to the courts."

33. *Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404, 35 L. R. A. (N. S.) 701.

be able to furnish with reasonable promptness, necessary advice and assistance for the safe operation of the car, the closeness of the proximity varying according to the circumstances of the particular case, having reference to the experience of the unlicensed operator and the mechanism and equipment of the car.<sup>34</sup>

**Sec. 226. Licensing of chauffeurs.— effect of failure of chauffeur to have license.**

When an automobile is not registered and licensed according to the regulations on the subject, as is said in another place in this work,<sup>35</sup> there is a conflict of authority as to whether the non-registration will bar an action for injuries to the machine or an occupant, where such injuries are the result of the negligence of a third person. The general rule is that the non-registration is not a proximate cause of the injury and does not affect the right of recovery, but a contrary rule is adopted in Massachusetts and a few other States. The situation with reference to an unlicensed chauffeur is analogous, and it is to be expected that the courts will hold that the failure to procure a license will not preclude a re-

34. *Hughes v. New Haven Taxicab Co.*, 87 Conn. 416, 419, 87 Atl. 42. Judge Wheeler said in this case: "The legislature . . . knew that, unless it provided a method by which beginners could learn to operate an automobile, there would be no opportunity for them to acquire skill by practice so that they might qualify as licensed operators. To accomplish this end it provided this necessary exception to the general rule and at the same time endeavored to maintain the public safety by providing for the operation of an automobile by an unlicensed person, if accompanied by a licensed operator, who should be personally liable for any violation of the automobile act. The language 'accompanied by' means that the licensed operator shall be in such proximity to the unlicensed operator of the car as to be

able to furnish with reasonable promptness such advice and assistance as may be necessary for the safe operation of the car. The degree of experience of the unlicensed operator would determine the necessity for the advice and assistance and have much to do with settling the closeness of proximity required. So, too, the mechanism and equipment of the car might determine in a given case that the licensed operator should be by the side of the unlicensed operator, while in another case such proximity might not be required. In short, ordinarily each case must be decided upon its own facts by the application to those facts of the construction we accord the words 'accompanied by.' Ordinarily, as in this case, the ultimate decision is one of fact for the jury and not of law for the court."

35. See sections 125-127.



covery for injuries sustained while driving a motor vehicle. The courts so hold, so far as the statutes are similar.<sup>36</sup> Nor does the fact that the operator has no license forbid a recovery by the owner for damages to the machine.<sup>37</sup> Nor can the absence of a license be charged as a ground of liability in case the machine injures another traveler, unless the lack of the license has a bearing upon the accident by reason of the unskillfulness of the chauffeur.<sup>38</sup> Even in Massachusetts, where the courts take the contrary view on the licensing of machines, the general rule is followed in cases involving the absence of a chauffeur's license.<sup>39</sup> The statutes in some

**36.** *Crossen v. Chicago, etc. Co.*, 158 Ill. App. 42; *Stack v. General Baking Co. (Mo.)*, 223 S. W. 89; *Zageir v. Southern Express Co.*, 171 N. Car. 692, 89 S. E. 43; *Marquis v. Messier*, 39 R. I. 563, 99 Atl. 527. "It is true that the plaintiff, at the time of the accident, was negligent in not procuring a license from the city of Asheville to operate her automobile upon the streets of the city, but she is not placed outside all protection of the law, nor does she forfeit all her civil rights merely because she violated such ordinance. The plaintiff's violation of the law, in order to bar her recovery, must, like any other act, be a proximate cause in the same sense in which defendant's negligence must have been a proximate cause to give a right of action. A collateral unlawful act not contributing to the injury will not bar a recovery. . . . The right of a person to maintain an action for a wrong committed on him is not taken away because at the time of the injury he was disobeying a statute, which act on his part in no way contributed to his injury." *Zageir v. Southern Express Co.*, 171 N. Car. 692, 89 S. E. 43.

**Failure to carry license.**—Though a statute may forbid a recovery by an "unlicensed" operator, one who has received a license but fails to carry it at the time of an accident is not barred

from recovery. *Kiely v. Ragali (Conn.)*, 106 Atl. 502.

**37.** *Crossen v. Chicago, etc. Co.*, 158 Ill. App. 42; *Moyer v. Shaw Livery Co.*, 205 Ill. App. 273; *Moore v. Hart*, 171 Ky. 725, 188 S. W. 861; *McIlbenny v. Baker*, 63 Pa. Super. Ct. 385.

**38.** *Brown v. Green & Flinn, Inc.*, 6 Del. (Boyce) 449, 100 Atl. 475; *Wolcott v. Renault Selling Branch*, 175 N. Y. App. Div. 858, 162 N. Y. Suppl. 496; *Dervin v. Frenier*, 91 Vt. 398, 100 Atl. 760. See also *O'Hare v. Gloag*, 221 Mass. 24, 108 N. E. 566. "Pigeon had been for several years licensed to operate an automobile, but at the time of the accident his license had expired and had not been renewed. This was some evidence of his negligence in operating the car, but it was not conclusive and did not warrant the ordering of a verdict." *Pigeon v. Massachusetts, etc. St. Ry. Co.*, 230 Mass. 392, 119 N. E. 762. "The failure to employ a licensed chauffeur is some evidence of negligence which may be overcome by subsequent evidence showing that, notwithstanding the fact that the chauffeur was not licensed, he was thoroughly competent and was not responsible for the collision. It is not an immaterial question like the failure to have a car license which can have no possible bearing upon the operation of the car. The violation of the

states, however, condemn the travel, so that the unlicensed driver is not permitted to recover for his injuries.<sup>40</sup> The criminal liability for a failure to obey regulations in respect to the licensing of chauffeurs, is discussed in another chapter.<sup>41</sup>

### Sec. 227. Rights of chauffeur.

Ordinarily where the chauffeur's contract for service is for a certain time, if the employer discharges the chauffeur before the expiration of the term of employment, the employer is still liable for the chauffeur's pay unless the latter has given cause by showing himself unable or unwilling to do what he has undertaken to do.<sup>42</sup> But if the contract is for a time certain, and the chauffeur leaves without cause before the time expires, it is held that a servant in such a case has no claim for services already rendered. However, if prevented from performing his duties by sickness, or similar inability, the chauffeur may recover pay for what he has done on a *quantum meruit*.<sup>43</sup> It must not be forgotten that the contract between the chauffeur and his employer is mutual. The employer has a claim against the chauffeur for neglect of duty, and the employer does not waive this claim by paying the chauffeur and continuing him in his service.<sup>44</sup>

ordinance, therefore, is *prima facie* evidence of negligence to be submitted to the jury in connection with the other facts in the case to determine the ultimate liability." *Austin v. Rochester Folding Box Co.*, 111 Misc. (N. Y.) 292, 181 N. Y. Suppl. 275.

39. *Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404, 35 L. R. A. (N. S.) 701, distinguishing prior cases holding the operator of an unregistered automobile a trespasser, by reason of a difference in the provisions of the statute, it being held that the provisions under which the earlier cases were decided made the operation of an unregistered automobile upon the highway unlawful in every respect while in this case the operation of the automobile itself was not objectionable, the illegal element in the act being the failure to

have a license. This decision was followed in *Conroy v. Mather*, 217 Mass. 91, 104 N. E. 487, 52 L. R. A. (N. S.) 801; *Holden v. McGillicuddy*, 215 Mass. 563, 102 N. E. 923; *Holland v. City of Boston*, 213 Mass. 560, 100 N. E. 1009. See also *Rolli v. Converse*, 227 Mass. 162, 116 N. E. 507; *Polmatier v. Newbury*, 231 Mass. 307, 120 N. E. 850; *Griffin v. Hustis* (Mass.), 125 N. E. 387.

40. *Blanchard v. City of Portland* (Me.). 113 Atl. 18.

41. Section 725.

42. *Parsons on Contracts*, vol. II (9th Ed.), 34.

43. *Parsons on Contracts*, vol. II (9th Ed.), 36-40.

44. *Parsons on Contracts*, vol. II (9th Ed.), 48.

**Sec. 228. Liability of master for injury to chauffeur.**

The circumstances may be such that a chauffeur receiving injuries from the care or operation of a motor vehicle may recover damages from his employer. But, except in the cases covered by Workmen's Compensation Laws, the basis of the servant's action is the negligence of the master.<sup>45</sup> Where the engine "kicks back" while he is cranking the car, and it is shown that the act of the owner in moving the spark lever contributed to that result, a recovery may be had. But, if no negligence on the part of the owner is connected with the "kick back" of the engine, there can be no recovery under the common law system.<sup>46</sup> When an injury is received while running a motor vehicle and the cause of the injury is a defective brake, a chauffeur having knowledge of the defect should not be permitted to recover.<sup>47</sup> But, if the owner has knowledge of the defective brake and gives the chauffeur no information in respect thereto, the owner may be liable for injuries received by the servant on account of the defect.<sup>48</sup> But the owner is under no obligation to warn his chauffeur of dangers which are obvious, nor to instruct him in matters which he may fairly be supposed to understand.<sup>49</sup> Where the servant was riding in the machine at the request of the owner who was driving the same, the servant may be permitted to recover if the owner negligently runs the machine, and the questions of the servant's assumption of risk and contribu-

45. *Anderson v. Van Riper*, 128 N. Y. Suppl. 66.

Negligence of chauffeur causing injury to employee riding in machine. See *Burke v. Curtis Aeroplane Motor Co. (Ala.)*, 85 So. 703.

46. *Morris v. Allen*, 217 Mass. 572, 105 N. E. 364; *Godley v. Gowen*, 89 Wash. 124, 154 Pac. 141; *Keller v. Blurton (Mo. App.)*, 183 S. W. 710; *Card v. Turner Center Dairying Assoc.*, 224 Mass. 525, 113 N. E. 187.

47. *Marks v. Stoltz*, 165 N. Y. App. Div. 462, 150 N. Y. Suppl. 952, where-in it was said: "In a populous city like New York, where thousands of peo-

ple are in the streets at all hours of the day and night, an experienced chauffeur, unless it be under exceptional circumstances, who runs an automobile in the street knowing that the brake is defective, ought to be estopped as matter of law from recovering damages against his employer for injuries occasioned by such defect." See also *Pierce v. Morrill Bros. Co.*, 116 Me. 517, 102 Atl. 230.

48. *Granini v. Cerini*, 273 Wash. 687, 171 Pac. 1007.

49. *Plasikowski v. Arbus*, 92 Conn. 556, 103 Atl. 612.

tory negligence are for the jury.<sup>50</sup> And where a chauffeur receives injury in consequence of a defect in the iron retaining ring so that a tire blows out when it is being pumped, the question of the assumption of risk is for the jury when the evidence is conflicting as to whether the owner had knowledge of the defect and had promised to correct it.<sup>51</sup> And, when injuries are received by the servant on account of defective tools furnished by the master, the liability may be a question for the jury.<sup>52</sup>

*Workmen's Compensation Laws*, which have been generally enacted since the collapse of the common law rules as to personal injuries received by employees, have revolutionized the old system.<sup>53</sup> A chauffeur who is injured, however, because he is exceeding the speed limit fixed by statute, is guilty of

50. *Patterson v. Adan*, 119 Minn. 283, 137 N. W. 1112, wherein the court said: "Whether plaintiff directly contributed to his injury or assumed the risk were, on the evidence presented, questions of fact and properly submitted to the jury. It is claimed by defendant that he was intoxicated at the time, a fact known to plaintiff, and that plaintiff took the chances of a safe passage to Minneapolis, and cannot now complain. It may be conceded for the purposes of the case that defendant was somewhat under the influence of liquor, and that plaintiff knew it. But from that it does not necessarily follow as a matter of law, that plaintiff was guilty of contributory negligence or that he assumed the risk of injury by complying with defendant's order and direction to accompany him in the automobile to Minneapolis. The relation of master and servant existed between the parties. Plaintiff was the servant, and, unless defendant was so badly intoxicated as to be incapable of properly running the car, plaintiff's duty, as such servant, was to obey the order of the master. The defendant, the master, is in no very favorable situation to resist liability under such circumstances, or

to be heard to complain that the servant obeyed his orders. There is no claim that defendant was not competent to drive the car; the only point made is with reference to his intoxicated condition which, it is claimed, incapacitated him for the time being properly to operate the car."

51. *Richardson v. Flower*, 248 Pa. St. 35, 93 Atl. 777.

52. *Ridley v. Portland Taxicab Co.*, 90 Oreg. 529, 177 Pac. 429.

53. *California*.—*George Eastman Co. v. Industrial Acc. Com.*, 200 Pac. 17.

*Illinois*.—See *F. W. Hochspeier, Inc. v. Industrial Board of Illinois*, 278 Ill. 523, 116 N. E. 121.

*Iowa*.—*Herbig v. Walton Auto Co.*, 182 Pac. 204.

*Louisiana*.—*Haddad v. Commercial Motor Truck Co.*, 146 La. —, 84 So. 197.

*Michigan*.—*Schanning v. Standard Castings Co.*, 203 Mich. 612, 169 N. W. 879.

*Minnesota*.—*Hansen v. Northwestern Fuel Co.*, 174 N. W. 726.

*New Jersey*.—*Newcomb v. Albertson*, 85 N. J. Law, 435, 89 Atl. 928.

*Pennsylvania*.—*Siglin v. Armour & Co.*, 261 Pa. 30, 103 Atl. 991.

“wilful misconduct” which may bar a recovery under compensation statutes.<sup>54</sup> And the fact that it was the custom of chauffeurs to run their machines at such speed, does not change the rule.<sup>55</sup> A policeman may be a public officer, not an employee, of a municipality and may thus be without the protection of a compensation statute.<sup>56</sup> So, too, a teacher in the automobile department of a city vocational school may not be such an employee of the city as would be entitled to receive compensation.<sup>57</sup> To receive compensation it must appear that the relation of master and servant existed between the parties,<sup>58</sup> and there may arise a question whether the particular injury which was received by the chauffeur arose out of his employment.<sup>59</sup> The statutes of some States justify a distinc-

54. *Fidelity & Deposit Co. v. Industrial Acc. Com.*, 171 Cal. 728, 154 Pac. 834. See also *U. S. Fidelity & Guaranty Co. v. Industrial Accident Com.*, 183 Pac. 540.

55. *Fidelity & Deposit Co. v. Industrial Acc. Com.*, 171 Cal. 728, 154 Pac. 834.

56. *Blynn v. Pontiac*, 185 Mich. 35, 151 N. W. 681.

57. *Lesner v. City of Lowell*, 227 Mass. 44, 116 N. E. 483.

58. *Eng. v. Skell Co. v. Industrial Acc. Com.* (Cal. App.), 186 Pac. 163.

59. *California*.—*Burton Auto Transfer Co. v. Industrial Accident Commission*, 37 Cal. App. 541, 174 Pac. 72; *Employers' Liability Assur. Corp. v. Industrial Accident Com.* (Cal. App.), 177 Pac. 171; *Maryland Casualty Co. v. Industrial Accident Com.* (Cal. App.), 178 Pac. 542; *Employers' Liability, etc. Corp. v. Industrial Acc. Com.*, 187 Pac. 42.

*Illinois*.—*Central Garage of La Salle v. Industrial Com.*, 286 Ill. 291, 121 N. E. 587; *E. E. Walsh Teaming Co. v. Industrial Com.*, 125 N. E. 331; *Morris & Co. v. Industrial Com.*, 128 N. E. 727.

*Maryland*.—*Thistle Mills v. Sparks*, 111 Atl. 769.

*Minnesota*.—*Gibbs v. Almstrom*, 176 N. W. 173.

*New York*.—*Schweitzer v. Thompson & Norris Co.*, 229 N. Y. 97, 127 N. E. 904; *Stillwagon v. Callan Bros., Inc.*, 183 N. Y. App. Div. 141, 170 N. Y. Suppl. 677; *Sztore v. Stansbury*, 189 N. Y. App. Div. 388, 179 N. Y. Suppl. 586; *Roth v. Adirondak Co.*, 193 N. Y. App. Div. 303, 183 N. Y. Suppl. 717; *Lansing v. Hayes*, 196 App. Div. 671.

*Texas*.—*Hartford Accident Co. v. Durham* (Tex. Civ. App.), 222 S. W. 295.

*Wisconsin*.—*Flint Motorcar Co. v. Industrial Com. of Wis.*, 168 Wis. 436, 170 N. W. 285.

**Explosion of percussion cap.**—A person employed as a chauffeur in a garage, who was injured by an explosion of a percussion cap which a fellow-servant brought upon the premises and with which he was experimenting, is not entitled to an award under the Workmen's Compensation Law, for the injury did not arise out of the employment. *Laurino v. Donovan*, 183 N. Y. App. Div. 168, 170 N. Y. Suppl. 340.

**Going from work.**—Where an employer is under no obligation to furnish transportation to his employee, the latter is not acting in the cause of his employer when he is boarding a truck to ride homeward. *Diaz v. Warren Bros. Co.* (Conn.), 111 Atl. 206.

tion between a chauffeur engaged in domestic service for the owner, such as caring for the machine, and a chauffeur engaged in running a truck as a matter of his employer's business. The Workmen's Compensation Acts in some States do not cover injuries received by servants engaged in domestic service.<sup>60</sup>

### Sec. 229. Liability of chauffeur to owner.

If the owner of a motor vehicle is injured, physically or financially, by reason of the wrongful or negligent conduct of his chauffeur, he may have a remedy against such chauffeur.<sup>61</sup> Thus, if one injured by the negligence of the chauffeur recovers a judgment against the owner, the latter will have a right of action against the chauffeur to recover the amount of the judgment.<sup>62</sup> But, where the chauffeur's wife wrongfully takes the machine and it was thereby damaged, the husband and community property are not generally liable.<sup>63</sup>

**Pitman during automobile race.**—See *Frint Motor Car Co. v. General Accident, etc. Corp.* (Wis.), 180 N. W. 121.

**Servant driving own car.**—A person employed at a factory to drive an automobile truck during the week and to guard the premises on Sundays who used an automobile of his own on Sunday to go and get spark plugs which were necessary for the operation of his master's truck and who while cranking his own motor was injured by a back-fire, was at the time engaged in

his master's business and was working to the master's advantage, and, hence, is entitled to an award under the Workmen's Compensation Law. *Martin v. Card & Co.* 193 N. Y. App. Div. 7.

<sup>60</sup> *Wincheski v. Morris*, 179 N. Y. App. Div. 600, 166 N. Y. Suppl. 873.

<sup>61</sup> *King v. Cline* (Cal. App.), 194 Pac. 290.

<sup>62</sup> *Huey v. Dykes* (Ala.), 82 So. 481.

<sup>63</sup> *Killingsworth v. Keen*, 89 Wash. 597, 154 Pac. 1096.

# CHAPTER XIII.

## MISCELLANEOUS SUBJECTS OF REGULATION.

### SECTION 230. Speed.

231. Exclusion from highways.
232. Restriction to certain streets.
233. Identification of machines.
234. Obstruction of streets.
235. Advertising on public vehicles.
236. Law of road.
237. Smoke and odors.
238. Liability for injuries.
239. Taxation.
240. Service of process on automobilist.

### Sec. 230. Speed.

The speed with which motor vehicles may be operated along the public highways is certainly a proper subject of regulation.<sup>1</sup> The Legislature, so long as it acts within constitutional limitations, may fix such rate of speed as seems wise.<sup>2</sup> And municipal corporations, unless restricted by statutory or constitutional provisions, may pass regulations forbidding unreasonable rates of speed.<sup>3</sup> But, in some jurisdictions, the

1. See also, as to speed regulations, 303-325, 728-743.

2. *Ex parte Daniels* (Cal.), 192 Pac. 442; *Ex parte Smith*, 26 Cal. App. 116, 146 Pac. 82; *Christy v. Elliott*, 216 Ill. 31, 1 L. R. A. (N. S.) 215, 74 N. E. 1035, 3 Ann. Cas. 487, 108 Am. St. Rep. 196; *Hartze v. Moxley*, 235 Ill. 164, 85 N. E. 216; *People v. Beak* (Ill.), 126 N. E. 201; *Schaar v. Comforth*, 128 Minn. 460, 151 N. W. 275. And see chapter V, as to regulation in general.

3. *Alabama*.—*Adler v. Martin*, 179 Ala. App. 97, 59 So. 597; *Hood & Wheeler Furniture Co. v. Royal*, 200 Ala. 607, 76 So. 965.

*Georgia*.—*Columbus R. Co. v. Walker*, 12 Ga. App. 674, 78 S. E. 52.

*Illinois*.—*Chicago v. Shaw Livery Co.*, 258 Ill. 409, 101 N. W. 588.

*Iowa*.—*Pilgrim v. Brown*, 168 Iowa, 177, 150 N. W. 1.

*Massachusetts*.—*Commonwealth v. Crowninshield*, 187 Mass. 221, 72 N. E. 963; *Commonwealth v. Tyler*, 199 Mass. 490, 85 N. E. 569.

*Michigan*.—*Brennan v. Connolly* (Mich.), 173 N. W. 511.

*Missouri*.—*Roper v. Greenspon*, 273 Mo. 288, 198 S. W. 1107; *L. R. A.* 1918 D. 126; *City of St. Louis v. Hammond* (Mo.), 199 S. W. 411; *City of Windsor v. Bast* (Mo. App.), 199 S. W. 723.

*Nebraska*.—*Christensen v. Tate*, 87 Neb. 848, 128 N. W. 632.

*New York*.—*People v. Dwyer*, 136 N. Y. Suppl. 148; *People v. Bell*, 148 N. Y. Suppl. 753.

*Oregon*.—*Everart v. Fischer*, 75 Greg. 316, 145 Pac. 33.

And see chapter VI, as to municipal regulation in general.

"Riding" or "driving."—One who is controlling the motive power of an au-

State has reserved to itself the full power of legislating with reference to the speed of automobiles, and in such jurisdictions local regulations may be ineffective.<sup>4</sup> On the other hand, constitutional provisions in some States may lodge the power of regulating the speed of motor vehicles with local municipalities and forbid the enactment by the Legislature of a rule with reference to the speed within municipal corporations.<sup>5</sup> An ordinance is not unreasonable because it restricts the speed to six or seven,<sup>6</sup> or even three<sup>7</sup> miles an hour under given circumstances. Or the driver of an automobile may be required to bring his machine to a stop when he is passing a street which is receiving or discharging passengers.<sup>8</sup> A statute providing that no person shall operate a motor vehicle at a rate of speed greater than is reasonable, or so as to endanger property or the life or limb of any person, provided, that in passing from a side street into a main thoroughfare where persons or vehicles are not plainly discernible, a person operating such vehicle shall have it under perfect control, and the rate of speed shall not exceed a mile in eight minutes, or on any street or highway exceed twenty-five miles per hour, is proper.<sup>9</sup> And a regulation is not invalid because it

tomobile may be said to be driving it within the meaning of a rule by a board of park commissioners, that no person shall "ride" or "drive" in a certain parkway at a rate of speed exceeding eight miles an hour. *Commonwealth v. Crowninshield*, 187 Mass. 221, 72 N. E. 963, 68 L. R. A. 245.

**Speed at crossing.**—In a city ordinance limiting the speed of automobiles on "streets" of city and at "crossings," the word "crossings" refers to street crossings. *Eichman v. Buchheit*, 128 Wis. 385, 107 N. W. 325.

**In Pennsylvania** a township of the first class has the power, under the Act of April 18, 1899, P. L. 104, to pass an ordinance fixing the maximum speed of motor cars at ten miles an hour, and the power is not suspended by Act of April 23, 1903, P. L. 268, which allows motor cars a maximum

speed of twenty miles an hour outside of cities and boroughs. *Radnor Tp. v. Bell*, 27 Pa. Super. Ct. 1.

4. *City of Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917; *City of Seattle v. Rothweiler*, 101 Wash. 680, 172 Pac. 825; *Peck v. O'Gilvie*, 13 R. L. N. S. (Canada) 54, 31 Pueb. S. C. 227.

5. *Kalich v. Knapp*, 73 Oreg. 558, 142 Pac. 594, 145 Pac. 22.

6. *Chittenden v. Columbus*, 26 Ohio Cir. Rep. 531; *Eichman v. Buchheit*, 128 Wis. 385, 107 N. W. 325. 3 Ann. Cas. 435.

7. *Columbus R. Co. v. Waller*, 12 Ga. App. 674, 78 S. E. 52.

8. *Schell v. DuBois*, 94 Ohio St. 93, 113 N. E. 664. And see sections 423-428.

9. *State v. Waterman*, 112 Minn. 157, 130 N. W. 972. Compare *Carter v. State*, 12 Ga. App. 430, 78 S. E.



applies merely to motor vehicles or permits other conveyances to go at a faster rate,<sup>10</sup> nor because it attempts to prescribe what shall be presumptive evidence in the courts.<sup>11</sup>

### Sec. 231. Exclusion from highways.

Highways are designed for the common use of all travelers, regardless of the means of conveyance which is used, and it is thought to be beyond the power of State or municipal authorities to forbid the use of highways to a certain class of vehicles, such as automobiles.<sup>12</sup> Within the police power of regulation, a municipality may in some cases forbid the use of certain motor vehicles on certain streets,<sup>13</sup> but it cannot make a broad exclusion of all motor vehicles from all streets.<sup>14</sup> Motor vehicles may, however, be excluded from the highways until their owners have complied with regulations relative to the registration and licensing thereof.<sup>15</sup> Or trucks of excessive weight may properly be excluded from the streets.<sup>15a</sup> And it has been held that a county may pass a regulation prohibiting the running of automobiles on any of the highways of the county between the hours of sunset of any day and of the sunrise on the following day.<sup>16</sup> The power of regulation over jitneys and motor vehicles used for hire may be somewhat more extensive than over motor vehicles used for the pleasure or business purposes of the owner.<sup>17</sup>

205; *Hayes v. State*, 11 Ga. App. 371, 75 S. E. 523.

It is a question for the jury what is reasonable under such a statute. *Raybourn v. Phillips*, 160 Mo. App. 534, 140 S. W. 977.

10. *Ex parte Snowden*, 12 Cal. App. 521, 107 Pac. 724; *Chittenden v. Columbus*, 26 Ohio Cir. Rep. 531. And see section 62.

11. *Young v. Dunlap*, 195 Mo. App. 119, 190 S. W. 1041.

12. See *Sumner County v. Interurban Transp. Co.*, 141 Tenn. 493, 213 S. W. 412, 5 A. L. R. 765.

**Statute Prince Edward Island.**—8 Edw. VII. ch. 13, entitled "An Act to prohibit the use of motor vehicles upon

the public highways of this Province held to be within the power of the legislature of Prince Edward Island to enact. *In re Rogers* (Pr. Ed. Island), 7 East. L. R. 212.

13. Section 233.

14. *Ex parte Snowden*, 12 Cal. App. 521, 107 Pac. 724; *Walker v. Commonwealth*, 40 Pa. Super. Ct. 638.

15. Compare *Chicago v. Banker*, 112 Ill. App. 94; *Matter of Automobile Acts*, 15 Pa. Dist. Rep. 83. And see section 104.

15a. *White v. Turner* (Wash.), 195 Pac. 240.

16. *Ex parte Berry*, 147 Cal. 52, 82 Pac. 44.

17. "The right of a citizen to travel

### Sec. 232. Restriction to certain streets.

In the regulation of traffic along municipal highways, ordinances may be passed excluding certain motor vehicles from specified streets. The power of excluding vehicles from certain streets is exercised more particularly with reference to the running of jitneys.<sup>18</sup> But, within reasonable limits, the police power lodged in the State and municipal divisions permits them to close certain streets to the use of business and pleasure automobiles, though they are not used for hire.<sup>19</sup>

upon a highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of the citizen, a common right, a right common to all; while the latter is special, unusual and extraordinary. As to the former, the extent of the legislative power is that of regulation; but, as to the latter, its power is broader. The right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature." *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915 F. 840. And see section 136.

#### 18. Chapter IX.

19. *Ex parte Berry*, 147 Cal. 523, 82 Pac. 44; *State v. Mayo*, 106 Me. 62, 75 Atl. 295, 20 Ann. Cas. 512, 26 L. R. A. (N. S.) 502n; *State v. Phillips*, 107 Me. 249, 78 Atl. 283; *Commonwealth v. Kingsbury*, 199 Mass. 542, 85 N. E. 648, 127 Am. St. Rep. 513; *People ex rel. Cavanaugh v. Waldo*, 72 Misc. (N. Y.) 416, 131 N. Y. Suppl. 307; *Strauss v. Enright*, 105 Misc. 367: "The question presented is this: 'Is the ordinance of the town of Eden, passed under express legislative authority, closing to the use of automobiles certain public streets in said town, constitutional?' The contention of the defendant is that it violates the

Fourteenth Amendment of the Constitution of the *United States*, which declares, among other things, that no State shall 'deny to any person within its jurisdiction, the equal protection of the laws,' and that it also denies him that equality of right guaranteed under section 1, art. 1, of the Constitution of *Maine*, 'of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.' It is the equal right of all to use the public streets for purposes of travel, by proper means, and with due regard for the corresponding rights of others; and it is also too well recognized in judicial decisions to be questioned that an automobile is a legitimate means of conveyance on the public highways. But the right to so use the public streets, as well as all personal and property rights, is not an absolute and unqualified right. It is subject to be limited and controlled by the sovereign authority, the State, wherever necessary to provide for and promote the safety, peace, health, morals and general welfare of the people. To secure these and kindred benefits is the purpose of organized government, and to that end may the power of the State, called its police power, be used. By the exercise of that power, through legislative enactments, individuals may be subjected to restraints, and the enjoyment of personal and property rights may be limited, or even

Thus, in one case,<sup>20</sup> it was said: "It seems too plain for discussion that, with a view to the safety of the public, the Legislature may pass laws regulating the speed of such machines (automobiles) when running upon the highways. The same principle is applicable to a determination by the Legislature that there are some streets and ways on which such machines should not be allowed at all. In some parts of the State where

prevented, if manifestly necessary to develop the resources of the State, improve its industrial conditions, and secure and advance the safety, comfort and prosperity of its people. . . . That reasonable regulations for the safety of the people while using the public streets are clearly within this police power of the State is too plain to admit of discussion. . . . The defendant, however, objects against the validity of the ordinance in question here, that it applies to automobiles only, and not to all other vehicles that use those streets. He contends that it 'operates against a class only' and is therefore special legislation which the Constitution inhibits. That contention cannot prevail. This same objection to the constitutionality of statutes and ordinances regulating the use of automobiles, that they apply only to one particular class of vehicles, has been repeatedly raised in recent cases and as repeatedly decided to be without merit. . . . The ordinance in question is general and not special, for it applies equally to all automobiles without discrimination, wherever or by whomsoever owned. The streets in question are closed to all automobiles without any distinctions. . . . This enactment which authorized the closing to the use of automobiles of the streets in question, we do not find to be repugnant to any constitutional provision. In making it the legislature decided that the regulation was necessary and reasonable in order to secure the public safety and welfare, and it cannot be affirmed that such will not

be its effect. The regulation is clearly within the police power of the legislature to enact, its manifest tendency and effect is to accomplish the purpose for which it was intended and accordingly its reasonableness and expediency cannot be reviewed by the court. The judgment of the legislature in that respect is conclusive." *State v. Mayo*, 106 Me. 62, 75 Atl. 295, 20 Ann. Cas. 512, 26 L. R. A. (N. S.) 502n.

**Parks.**—In *New York* a statute authorizing the commissioner of parks of the borough of Brooklyn and Queens "in his discretion, by rules and regulations, to restrict the use and occupation of the main drive of Ocean boulevard, in the borough of Brooklyn, Twenty-Second avenue to Kings highway, to horses and light carriages and to exclude therefrom vehicles of all other kinds, including bicycles and motor vehicles," has been held to be valid legislation. *People ex rel. Cavanagh v. Waldo*, 72 Misc. R. (N. Y.) 416, 131 N. Y. Suppl. 307.

**Discrimination.**—A regulation permitting pleasure cars but excluding business machines from a certain street, may constitute an illegal discrimination. *Clausen v. De Medina*, 82 N. J. L. 491, 81 Atl. 924.

**Unreasonable.**—An ordinance forbidding certain streets to the use of jitneys may be so unreasonable that it will not be enforced. *Curry v. Osborne*, 79 Fla. 39, 79 So. 293, 6 A. L. R. 103.  
**20.** *Commonwealth v. Kingsbury*, 199 Mass. 542, 85 N. E. 848, 127 Am. St. Rep. 513.

there is but little travel public necessity and convenience have required the construction of ways which are steep and narrow, over which it might be difficult to run an automobile, and where it would be very dangerous for the occupants if automobiles were used upon them. In such places it might be much more dangerous for travelers with horses and with vehicles of other kinds if automobiles were allowed there. No one has a right to use the public streets and public places as he chooses, without regard to the safety of other persons who are rightly there. In choosing his vehicle, everyone must consider whether it is of a kind which will put in peril those using the streets differently in a reasonable way. In parks and cemeteries and private grounds, where narrow roads with precipitous banks are sometimes constructed for carriages drawn by horses, it has been a common practice to exclude automobiles altogether, chiefly because of the danger of their frightening horses. The right of the Legislature, acting under the police power, to prescribe that automobiles shall not pass over certain streets as public ways in a city or town, seems to us well established both upon principle and authority.”

#### **Sec. 233. Identification of machines.**

In the absence of statute restricting the power of municipal corporations, a city would no doubt have the power to require motor vehicles to carry number plates for their identification.<sup>21</sup> But, when the Legislature has enacted a system for the registration and licensing of motor vehicles and has passed an act providing that owners of motor vehicles shall not be required to display any other number than the number of the registration issued by the State authorities, a city cannot require an additional identification plate.<sup>22</sup>

#### **Sec. 234. Obstruction of streets.**

A municipality has the power to make reasonable regulations so as to avoid obstructions in the streets.<sup>23</sup> For example,

<sup>21</sup> *Slade v. City of Chicago*, 1 Ill. Ill. 331, 104 N. E. 662.

<sup>22</sup> *Cir. Ct. Rep.* 520. And see section 124.

<sup>23</sup> *City of Chicago v. Francis*, 262

*City of Duluth v. Easterly*, 115 Minn. 64, 131 N. W. 791; *Beck v. Cox*,

taxicabs and vehicles used for hire may be refused the privilege of leaving their machines at certain places in the streets where their presence would constitute more or less of an obstruction to the free use of the streets by other travelers.<sup>24</sup> And a municipality may properly pass a regulation forbidding the leaving of a vehicle standing on the street elsewhere than on the right-hand side thereof with reference to the direction in which it fronts.<sup>25</sup> And the "parking" of cars on certain streets may be prohibited.<sup>26</sup> Even the right of an owner to keep his machine in front of his own place of business may be limited by municipal regulations.<sup>27</sup> Thus, in one case in-

77 W. Va. 442, 87 S. E. 492. "We have these propositions established so far as the city and the general public are concerned: That the public streets of a city are dedicated to public use, and are a public way from 'side to side and end to end,' and that any private use thereof which in any way detracts from or hinders or prevents its free use as a public way to its full extent, is within the meaning of the law, an obstruction or incumbrance, and any obstruction or incumbrance for private purposes is in law a nuisance; that the city is given the exclusive care and control of the streets, and it is made its duty to keep them open and in repair and free from nuisance; that the primary use or purpose for which streets are established is to afford the general traveling public a way of passage or travel, and the general traveling public are invested with the right to have them in repair and free from nuisance, that this right may be enjoyed." *Pugh v. City of Des Moines*, 176 Iowa, 593, 156 N. W. 892.

24. See sections 160-162.

25. *Beck v. Cox*, 77 W. Va. 442, 87 S. E. 492, wherein it was said: "The projection of high-speed automatic vehicles into the streets of cities and towns, among horses, wagons, carts, carriages, and pedestrians, and an enormous increase of the use of the

highways, particularly of the paved streets, for purposes of pleasure, without further regulations than those prescribed for highways in general, is an obvious source of danger to the persons and property of citizens, falling within the express terms of the power delegated to municipal corporations and not withdrawn by any express terms of the act in question, nor abrogated by implication arising from its terms or general scope and purpose. Municipal power, expressly conferred, to keep the streets free from obstruction amply covers the subject of standing vehicles. It would be absurd and ridiculous to say there is not power under the statute to prevent a citizen from leaving his vehicle standing across the middle of a street, or a number of citizens from completely stopping travel on a street by massing their vehicles over its entire width."

26. *Sanders v. City of Atlanta*, 147 Ga. 819, 95 S. E. 695; *Pugh v. City of Des Moines*, 176 Iowa, 593, 156 N. W. 892. See also, *People v. Harden*, 110 Misc. (N. Y.) 72, 179 N. Y. Suppl. 732.

27. *Discrimination*.—A municipality cannot forbid one person from maintaining a gasoline tank and pump in front of his place of business, while permitting his competitor to do so. *Kennedy v. Village of Dorchester*, 101 Neb. 425, 163 N. W. 762.

volving the prosecution of an owner for obstructing a street in front of his place of business with an automobile, it was said: "No hard and fast rule can be laid down as to what in every case will constitute an obstructing or incumbering of a street by an automobile or other vehicle, within the purview of the ordinance here in question. The time and place of an alleged obstruction and the kind of vehicle must be taken into consideration in each particular case. The stopping temporarily and for a reasonable time of an automobile in a public street for the convenience of the owner is not a violation of the ordinance; but he cannot lawfully use the street as a garage or for a taxicab stand, contrary to reasonable police regulations. The evidence in this case, in view of the time, place, and manner of the obstruction, is ample to sustain conviction of the defendant."<sup>28</sup>

### Sec. 235. Advertising on public vehicles.

The United States Supreme Court has sustained an ordinance of the city of New York prohibiting "advertising trucks, vans or wagons," except the putting of business notices upon ordinary business wagons, so long as such wagons are engaged in the usual business or work of the owner and not used merely or mainly for advertising.<sup>29</sup>

### Sec. 236. Law of road.

It is clear that the State or a municipal division thereof may pass suitable regulations relative to the law of the road.<sup>30</sup> Thus, a city ordinance requiring that drivers of vehicles, when making a turn, shall give a signal with a whip or hand as to the direction in which the turn shall be made, is valid and en-

<sup>28</sup>. *City of Duluth v. Easterly*, 115 Minn. 64, 131 N. W. 791.

<sup>29</sup>. *Fifth Ave. Coach Co. v. New York City*, 221 U. S. 467, 31 S. Ct. 709, affirming 194 N. Y. 19, 86 N. E. 824.

<sup>30</sup>. *Pemberton v. Army* (Cal. App.), 183 Pac. 356, affirmed 182 Pac. 964; *Seager v. Foster*, 185 Iowa, 132, 169 N.

W. 681, 8 A. L. R. 690; *Johnson Oil Refining Co. v. Galesburg, etc.* Power Co., 200 Ill. App. 392; *State v. Larabee*, 104 Minn. 37, 115 N. W. 948; *Kelley v. James*, 37 S. Dak. 272, 157 N. W. 990; *City of Oshkosh v. Campbell*, 151 Wis. 567, 139 N. W. 316; *Sutter v. Milwaukee Board of Underwriters*, 164 Wis. 532, 166 N. W. 57.

forceable.<sup>31</sup> Or a municipality is justified in the case of narrow streets in selecting certain streets as "one-way" streets.<sup>31a</sup> But a regulation cannot be enforced which requires a motor vehicle driver to obey all directions of police officers.<sup>32</sup> The Legislature, except possibly in a few jurisdictions where constitutional provisions prohibit, may reserve to itself full power over the law of the road; but statutes which merely prohibit municipalities from regulating motor vehicles do not have the effect of depriving them of enacting ordinances in relation to the law of the road.<sup>33</sup> And municipalities generally have the power to adopt regulations regulating the conduct of motor drivers under circumstances which are not covered by the State statute,<sup>34</sup> or to make additional regulations in furtherance of the purpose of the general law as may seem fit and appropriate to the necessities of a particular locality.<sup>34a</sup> A statute giving motorcycles the same rights on the streets as are given to other persons, does not abridge the power of the municipality from legislating with reference to the law

See chapter XIV, as to Laws of the Road. "It is the universal custom for cities to prescribe the course which streams of traffic shall take. This ordinance supplanted the ordinary general law of the road, which would govern in the absence of such ordinance and in districts to which the ordinance would not apply. The necessity for such particular provisions has been emphasized, as the use of automobiles in large numbers has become more general. Motorneers of street cars, chauffeurs, drivers of ordinary vehicles and of emergency vehicles, like ambulances, fire engines, and the like, and pedestrians, depend not only for the certainty of their movements, but for their safety, upon the enforcement of such ordinances. The ordinance in question is along the line of the so-called 'gyratory movement of traffic,' which is quite generally regarded as the most intelligent solution of the problem. Of course, the necessity or

propriety of a strict enforcement of such an ordinance must depend largely upon the extent of travel at a particular time and place. It is not, however, for individuals, but for the public authorities, to determine that question. Otherwise confusion and danger would result." *State v. Larrabee*, 104 Minn. 37, 115 N. W. 948.

**31.** *Johnson Oil Refining Co. v. Galesburg, etc. Power Co.*, 200 Ill. App. 392.

**31a.** *Commonwealth v. Nolan* (Ky.), 224 S. W. 506.

**32.** *City of St. Louis v. Allen*, 275 Mo. 501, 204 S. W. 1083.

**33.** *Kolankiewiz v. Burke*, 91 N. J. L. 567, 103 Atl. 249; *Kelley v. James*, 37 S. Dak. 272, 157 N. W. 990. And see sections 72, 77.

**34.** *Bruce v. Ryan*, 138 Minn. 264, 164 N. W. 982; *Freeman v. Green* (Mo. App.), 186 S. W. 1166.

**34a.** *Mann v. Scott* (Cal.), 182 Pac. 281.

of the road so as to preclude an ordinance giving the right of way to a fire patrol.<sup>35</sup>

### Sec. 237. Smoke and odors.

That the emission of offensive smoke from automobiles, especially in cities and inhabited districts, is a nuisance cannot be disputed. The accompanying odor is not pleasant and may possibly be injurious, if it is constantly present, either to health or vegetation in the parks or country. The detrimental effect upon persons and plant life has not as yet been authoritatively determined, although in *France* it has been claimed that the fumes coming from the exhausts of automobiles injured the growth of vegetation along the boulevards. Whether this be true or not, the fact that the smoke is offensively unpleasant warrants legislative regulation of the matter. Nuisances have from time to time immemorial been subject to legal control, and the mere fact that conduct is unpleasant, irrespective of injury to either health or property, has constituted cause for controlling it either by legislation or action of the courts. Thus noise may be controlled and unwholesome stenches may be enjoined. It is a matter of record that the courts have issued as many injunctions against the emission of gases from manufacturing establishments which injured vegetation as against any other kind of nuisance. The smoke nuisance resulting from the improper handling of automobiles is on a par with gas nuisances generally, and legislative action is not only proper but legally warranted.

Thus, an ordinance regulative of this nuisance has been sustained.<sup>36</sup> In *England* the law prohibits the emission of offensive smoke or odors from automobiles, and several automobile drivers have been prosecuted and fined for violating the law,<sup>37</sup>

35. *Sutter v. Milwaukee Board of Underwriters*, 164 Wis. 532, 166 N. W. 57.

36. *Chicago v. Shaw Livery Co.*, 258 Ill. 409, 101 N. E. 588.

37. For an English case concerning prosecutions for the smoke nuisance caused by an automobile. See *Star*

*Omnibus Co., London (Limited), v. Tagg* (Div. Ct.).

In *England* it has been decided that where the emission of smoke from a motor car is due to carelessness that does not prevent the car from coming within the provisions of § 1 of the *Locomotives on Highways Act of 1896*



and in the United States of recent years considerable attention has been given to this subject by local legislative bodies.

### **Sec. 238. Liability for injuries.**

It is beyond the legislative power to enact a statute imposing liability on the owner of a motor vehicle for injuries occasioned from the negligent operation thereof, when the machine is not operated by the owner but by a trespasser obtaining possession thereof.<sup>38</sup> Such legislation is unconstitutional as depriving one of his property without due process of law. But a statute providing that when one has received injuries from the negligent operation of a motor vehicle, his damages shall be a lien on the machine, next in priority to the lien of State and county taxes, and thus prior to a chattel mortgage on the machine, has been sustained.<sup>39</sup>

### **Sec. 239. Taxation.**

The form of taxation which is generally imposed on motor vehicles is that of license fees, and such form of taxation is discussed in another chapter of this work.<sup>40</sup> Taxes or license fees are in a few States also imposed on dealers in motor

providing that, "The enactments mentioned in the schedule to this Act and any other enactments restricting the use of locomotives on highways and contained in any public, general, or local and personal Act in force at the passage of this Act, shall not apply to any vehicle propelled by mechanical power if it is under three tons weight unladen and is not used for the purpose of drawing more than one vehicle, . . . and is so constructed that no smoke or visible vapor is emitted therefrom except from any temporary or accidental cause." *Rex v. Wilham* (K. B. Div.), 96 Law T. R. (N. S.) 712.

38. *Daugherty v. Thomas*, 174 Mich. 371, 140 N. W. 615, 45 L. R. A. (N. S.) 699, Ann. Cas. 1915 A. 1163. And see section 626.

39. *Matter of McFadden* (S. Car.),

99 S. F. 838. And see *Merchants & Planters' Bank v. Brigman*, 106 S. Car. 362, 91 S. E. 332, wherein it was said: "The legislature had the right in the exercise of police power to guard its citizens and the public generally by passing a law in a measure that protects them from negligence, carelessness, and recklessness of persons driving dangerous machines, and the proviso making the machine that inflicted the injury liable for the damages and providing attachment of the same is not taking property without due process of law, but is passed in the best interest of the public. The act of the legislature only gives the right to make the machine liable, and not the owner of the machine unless the owner was in the machine."

40. Chapter VIII.

vehicles or on sales made by them.<sup>41</sup> The fee which may be imposed by a State or municipal corporation for the use of the highways by motor vehicles, is classed as a privilege tax rather than as a property tax.<sup>42</sup> But a tax may also be imposed on the vehicle as property, and the fact that the owner is also compelled to pay a license fee for its use does not afford complaint on the ground of double taxation.<sup>43</sup> But there is generally no constitutional objection to a statute which imposes the license fee and then exempts the owner of the vehicle from other taxation on the machine.<sup>44</sup> "The question as to what classes of property shall be taxed and what shall be exempted, except as restricted by the Constitution, is one which rests within the discretion of the Legislature."<sup>45</sup> And an ordinance relative to a tax on vehicles may cover certain vehicles, and exclude from its operation electric street cars and automobiles.<sup>46</sup> And, so, too, vehicles of non-residents who habitually use the streets may be excluded from the opera-

41. Sections 873, 874.

42. *Hudgens v. State*, 15 Ala. App. 156, 72 So. 605; *Jasnowski v. Board of Assessors of City of Detroit*, 191 Mich. 287, 157 N. W. 891; *Ex parte Phillips* (Okla.), 167 Pac. 221. And see section 94.

43. *Harder's Storage & Van Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245; *State v. Jarvis*, 89 Vt. 239, 95 Atl. 541. "The law is well settled that the owner of vehicles used upon the public streets and highways may be required to pay an *ad valorem* tax upon such vehicles as property and also may be required to pay a tax upon the right or privilege of using such vehicles in his business—that is, an occupation tax. The subject of the *ad valorem* taxation is property. The subject of the other taxation is a right or privilege—an entirely distinct and different thing. Because these things are distinct and different the two taxes do not constitute double taxation." *Harder's Storage & Van Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245.

44. *Jasnowski v. Board of Assessors of City of Detroit*, 191 Mich. 287, 157 N. W. 891; *State ex rel. City of Fargo v. Wetz* (N. Dak.), 168 N. W. 835, 5 A. L. R. 731; *Ex parte Shaw* (Okla.), 157 Pac. 900. "It is within the power of the legislature to exempt from other forms of taxation property which pays a specific tax, and this is true whether the specific tax is levied upon the property itself or upon the right to use the property in a certain way." *Jasnowski v. Board of Assessors of City of Detroit*, 191 Mich. 287, 157 N. W. 891.

45. *Jasnowski v. Board of Assessors of City of Detroit*, 191 Mich. 287, 157 N. W. 891.

**Vehicle of school district.**—Where an automobile is owned by a school district, and such machines are not within the class of exemptions, it may be taxed. *Newark Public Schools v. Wright*, 4 Boyce (Del.) 279, 88 Atl. 462.

46. *Kersey v. City of Terre Haute*, 161 Ind. 471, 68 N. E. 1027.

tion of such an ordinance without impairing its validity.<sup>47</sup> Vehicles in transit from one State to another are exempt from State taxation on account of the interstate commerce nature of the transaction, but this does not forbid State authorities from assessing vehicles stored for an indefinite time in the State pending transportation.<sup>48</sup>

#### **Sec. 240. Service of process on automobilist.**

A statute providing that, in actions for damages against the owners of motor vehicles, service of process may be had in a county other than the one where the injury was occasioned and the suit was brought, is constitutional.<sup>49</sup> So, too, a statute is valid which requires each non-resident owner of an automobile to designate an agent within the State upon whom process may be served in an action against such owner arising out of the operation of the machine.<sup>50</sup> But it has been held that a sec-

47. *Kersey v. City of Terre Haute*, 161 Ind. 471, 68 N. E. 1027.

48. *State v. Maxwell Motor Sales Corp.*, 142 Minn. 226, 171 N. W. 566.

49. *Garrett v. Turner*, 235 Pa. St. 383. 84 Atl. 354, affirming 47 Pa. Super. Ct. 128, wherein it was said: "The Act of April 27th, 1909, established a universal rule which applies to all persons who operate motor vehicles upon any public highway within the commonwealth, and it is a general statute. *Strine v. Foltz*, 113 Pa. 349. The wide extent of country covered by the movement of a motor vehicle renders it more probable that, when negligently operated, an accident may occur and an injury be inflicted in a county other than that in which the operator has his residence. The ease and rapidity with which the operator of a motor vehicle may vanish from the scene where he has inflicted an injury, renders it much more difficult for the party injured to call the wrongdoer to account in the county where the injury was inflicted and where the witnesses, by whom the negligence of the defendant must be established, reside, than is

the case where injury results from the negligent management of a horsedrawn carriage. The operator of a motor vehicle whose negligence has caused an injury on a public highway in a county other than in which he has his place of residence, may not only at the time quickly withdraw from the county where the injury has been inflicted, but the speed at which he is able to move along the roads would permit him to subsequently revisit that county at his pleasure, without any risk of being served with legal process while he was within its boundaries. The negligent operator of an automobile has thus a manifest advantage over the driver of a horse, in avoiding service of process within the county where his negligence has caused an injury, and the party injured is at a corresponding disadvantage in obtaining redress. It is on this difference that the discrimination in the Act of 1909, with regard to the service of process, is founded, and it is a fair and constitutional basis for the legislative discretion."

50. *Cleary v. Johnston*, 79 N. J. L. 49, 74 Atl. 538, wherein it was said:

tion of motor vehicle statute, providing that all actions for injury to person or property caused by the negligence of the owner of an automobile may be brought by the injured party in the county of his residence, is an arbitrary, unjust and unreasonable classification, creates a burden and subjects a class of citizens only, to certain liabilities and requirements to respond to a suit in any county in the State, which is required of no other class, and is a denial to them of the equal protection of the law, and such section is therefore unconstitutional.<sup>51</sup>

"Assuming that the right to use the highways belongs to such non-resident owner, yet it is obviously not an absolute right. The stringent legislative restrictions upon the use of the highways by automobiles—which restrictions have received judicial approval—exhibit the fact that the automobile is regarded as a dangerous machine, if used otherwise than under the control provided for by the legislature. It is apparent that these restrictions upon the manner in which highways shall be used by automobiles can only be made effective by penalties; and the penalties can only be enforced by reaching the owners of such machines. A provision for impounding the machine itself would be valid, but while valid, would be inefficacious, because the speed of the automobile is such that in most instances the machine itself would escape arrest. Resident owners can be reached by service of process within this State, while non-resident owners, of course, unless by voluntary appear-

ance are immune from service. Thus while legal proceedings to enforce the penalties for violating the automobile law can be taken in the courts of this State as against residents, yet as to non-residents, in the absence of a provision like the one in question, such enforcement would mean numerous suits in other States in the Union from *New York to California*, or perhaps in other continents. In view of the present need of a vigorous enforcement of these laws for the protection of all users of the highways, I am of the opinion that the condition imposed, that a man who proposes to use our highways for motoring shall agree to submit himself to the courts of the State into which he comes, so far as concerns matters growing out of such use, is neither unconstitutional nor unreasonable." See also *Kane v. State of New Jersey*, 242 U. S. 160, 37 S. Ct. 30.

51. *Hoblitt v. Gorman*, 8 Ohio N. P. (N. S.) 270.

## CHAPTER XIV.

## LAW OF THE ROAD.

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**Sec. 241. In general.**

A highway is for the use of the public at large; indeed it has been defined to be a road which every citizen has a right to use. This being so, it is necessary that the travel and traffic on the highway shall be governed by certain laws so that the rights of each citizen may be certain of protection. The rules by which travel on highways is governed in English speaking countries are called "The law of the road."<sup>1</sup> These rules were originally established by custom in England;<sup>2</sup> and together with the common law system were brought to this country by the colonists and were adopted in principle as a part of our jurisprudence, though, as a matter of detail, the English rule requires the turn to the left while the American rule is the reverse.<sup>3</sup> Since the advent of automobiles and the greater necessity thereby occasioned for a strict observance of the law of the road, the rules have been enacted in the form of statutes in many States.<sup>4</sup> And, in the larger cities, the old rules have been found insufficient for the safety and smoothness of traffic, and additional regulations have been made by municipal authorities. Municipal corporations have been authorized to pass ordinances, not in conflict with general statutes, for the regulation of traffic along their streets.<sup>5</sup> Thus,

1. **The law of the road.**—Angell, *Highways*, sec. 2.

"The fundamental idea of a highway is not only that it is public for free and unmolested passage thereon by all persons desiring to use it—all the inhabitants of the said township, and of all other good citizens of the commonwealth going, returning, passing and repassing, in, along, and through the highway. The use of a highway is not a privilege, but a right limited by the rights of others and to be exercised in a reasonable manner." *Radnor Tp. v. Bell*, 27 Pa. Super. Ct. 1, 5.

2. Angell, *Highways*, sec. 333.

3. *Tulsa Ice Co. v. Wilks*, 54 Okla. 519, 153 Pac. 1169.

4. "Observance of the rule of the road is becoming more important, with the increasing use of steam, electric,

and motor power vehicles on the public highways." *Morrison v. Clark*, 196 Ala. 670, 72 So. 305.

**Driving wagon without lights on wrong side of highway as a criminal offense.**—Under the Penal Law of New York, it was held that driving a wagon on the wrong side of the highway without lights was not a crime, but merely subjected the wrongdoer to a civil penalty, in addition to the damages sustained through the act. *People v. Martinitis*, 168 N. Y. App. Div. 446, 153 N. Y. Suppl. 791.

A presumption arises that the law of the road of another State is the same as that at common law. *O'Donnell v. Johnson*, 36 R. I. 308, 90 Atl. 165.

5. Sections 70-73.

at some of the congested street intersections, municipal regulations have been adopted giving the right of way to vehicles passing in certain directions.<sup>6</sup> And in the business sections in some of the great cities, "one way" streets are selected. Regulations of this character are additional to the customary rules which were developed in England. With reference to pedestrians<sup>7</sup> and other vehicles,<sup>8</sup> the law of the road is further discussed in other chapters of this work.

### Sec. 242. Object of rules.

Too clearly for dispute, the object of rules of the road is the prevention of collisions and other accidents which would likely occur in the absence of some regulations on the conduct and course of drivers.<sup>9</sup> Moreover, in the absence of custom or regulations as to the conduct of a driver, he would be compelled to use his own judgment as to the best course to pursue to avoid other travelers, and his errors in judgment might result disastrously; to eliminate discretion and errors in discretion, these rules of the road are adopted and should be enforced.<sup>10</sup> The necessity for the rules of the road has been emphasized as the use of motor vehicles in large numbers has become more general. Motormen of street cars, chauffeurs, drivers of ordinary vehicles and of emergency vehicles such as ambulances, fire engines, police patrols, etc., as well as pedestrians, depend upon the enforcement of such rules, not alone for the certainty of their movements, but also for their safety.<sup>11</sup> It has been said that a rule may be disregarded when it fails to serve its purpose.<sup>12</sup>

### Sec. 243. Judicial notice.

Proof of the law of the road is not generally necessary. When founded upon custom or statute, the courts will take

6. Section 262.

7. Section 432, *et seq.*

8. Sections 371-394.

9. *Adams v. Parish* (Ky.), 225 S. W. 467; *Buckey v. White* (Md.), 111 Atl. 777; *Granger v. Farrant*, 179 Mich. 19, 146 N. W. 218.

10. *Hayden v. McColly*, 166 Mo. App. 675, 150 S. W. 1132.

11. *State v. Larrabee*, 104 Minn. 37, 115 N. W. 948.

12. *Adams v. Parrish* (Ky.), 225 S. W. 467.

judicial knowledge thereof.<sup>13</sup> It is only in some cases when the rule is based solely upon a municipal ordinance that it becomes necessary to prove the regulation as a matter of fact, for some courts do not take judicial notice of local ordinances.<sup>14</sup>

**Sec. 244. Application of statutes or ordinances — pedestrians.**

A pedestrian who is about to cross a street may be entitled to rely on the law of the road and that vehicles will approach on the proper side of the street,<sup>15</sup> or, if two vehicles are approaching him, that they will obey the law of the road as to each other.<sup>16</sup> But the law of the road is not generally applicable to travelers walking along a rural highway. When overtaking or meeting such a person, it is the duty of both the pedestrian and the driver of the machine to exercise ordinary care to avoid a collision, but no rule is, as a general proposition definitely prescribed as to which side of the pedestrian the passage shall be made.<sup>17</sup> So, in an action by an old man, almost blind, against the drivers of an automobile for running over him, the evidence showing that he was at the side of the road and that they ran straight toward him, it was held that it was not material on which side of the road they were driving, where they saw him and took no heed.<sup>18</sup>

**Sec. 245. Application of statutes or ordinances — bicycles.**

Statutes providing for the manner of passage of different vehicles on the public highways may, and frequently do, apply to cyclists.<sup>19</sup> A cyclist meeting a truck which is proceeding on the wrong side of the road need not, necessarily give way.<sup>20</sup>

13. *Jacobs v. Richard Carvel Co.*, 156 N. Y. Suppl. 766; *Lee v. Donnelly* (Vt.), 113 Atl. 542; *Gagnon v. Robitaille*, 16 R. L. N. S. (Canada) 235; *Osborne v. Landis*, 34 W. L. R. (Canada) 118.

14. Section 82. But see *Jacobs v. Richard Carvel Co.*, 156 N. Y. Suppl. 766.

15. Sections 247, 248.

16. *Off v. Crump*, 40 Cal. App. 173, 180 Pac. 360.

17. *Randolph v. Hunt* (Cal. App.),

183 Pac. 358; *Brown v. Thayer*, 212 Mass. 392, 99 N. E. 237; *Marton v. Fickrell* (Wash.), 191 Pac. 1101.

18. *Apperson v. Lazro*, 44 Ind. App. 186, 88 N. E. 99.

19. *Dice v. Johnson* (Iowa), 175 N. W. 38; *Clark v. Woop*, 159 N. Y. App. Div. 437, 144 N. Y. Suppl. 595; *Tulsa Ice Co. v. Wilkes*, 54 Okla. 519, 153 Pac. 1169. As to injuries to cyclists, see chapter XIX.

20. *Konig v. Lyon* (Cal. App.), 192 Pac. 875.



### Sec. 246. Application of statutes or ordinances — street railway cars.

Some confusion exists as to the extent to which the law of the road applies to street railway cars and to other travelers meeting and passing such cars. It has been held that the driver of a motor vehicle should turn to the right when meeting a street car.<sup>21</sup> And a regulation providing that the driver of a carriage or other vehicle passing a carriage or other vehicle traveling in the same direction shall drive to the left of the middle of the traveled part of the way, has been held applicable to the driver of a team passing from behind an electric street car which has stopped to let off passengers.<sup>22</sup> But it has been held that the provisions of a statute requiring the driver of a "vehicle" approaching an intersecting street to grant the right of way at such intersection to any vehicle coming from the right, does not impose this duty on the motorman of a street car.<sup>23</sup> This conclusion may well be disputed.<sup>24</sup> And an ordinance requiring the driver of a vehicle to keep on the right-hand side of the street has been held not enacted for the protection of street railway companies, and in an action by the owner of a machine for a collision with a street car, the statute does not make the owner guilty of negligence *per se*.<sup>25</sup> A law of the road cannot apply to a street railway car so as to require such car to turn from its course. It must follow the track or stop.<sup>26</sup>

### Sec. 247. Driving along street — on wrong side of highway.

In some jurisdictions, in the absence of other vehicles with which a collision may be expected, negligence cannot be based

21. *Athens Ry. & Elec. Co. v. McKinney*, 16 Ga. App. 741, 86 S. E. 83. See also *Link v. Skeeles*, 207 Ill. App. 48.

22. *McGourty v. De Marco*, 200 Mass. 57, 85 N. E. 891. Compare *City of Chicago v. Keogh*, 291 Ill. 188, 125 N. E. 881.

23. *Reed v. Public Service Ry. Co.*, 89 N. J. Law, 431, 99 Atl. 100.

24. *Syek v. Duluth St. Ry. Co.*

(Minn.), 177 N. W. 944.

25. *Watts v. Montgomery Traction Co.*, 175 Ala. 102, 57 So. 471.

26. *State to use of Stumpf v. Baltimore, etc. Rys. Co.*, 133 Md. 411, 105 Atl. 532; *Campbell v. Richard L. & Rd. Co.*, 181 N. Y. App. Div. 320, 168 N. Y. Suppl. 813. See also, *Northern Texas Tr. Co. v. Stone* (Tex. Civ. App.), 230 S. W. 754.

on the fact that the driver of a motor vehicle is proceeding along the middle of the road, or even along the left side thereof.<sup>27</sup> But in many cities, it is recognized that such practice will occasion danger to foot travelers, and hence statutes and municipal ordinances have frequently been enacted which require that vehicles shall proceed along the right side of the highway.<sup>28</sup> Thus, negligence is sometimes charged against the driver of a motor vehicle who drove the machine along the wrong side of the highway, and in consequence thereof a pedestrian crossing the street was struck and injured.<sup>29</sup> A

27. *Harris v. Johnson*, 174 Cal. 55, 161 Pac. 1155; *Langford v. San Diego Elec. Ry. Co.*, 174 Cal. 729, 164 Pac. 398; *Baker v. Zimmerman*, 179 Iowa, 272, 161 N. W. 479; *Buzich v. Todman*, 179 Iowa, 1019, 162 N. W. 259; *Flynt v. Fondern* (Miss.), 84 So. 188; *Linstroth v. Peper* (Mo. App.), 188 S. W. 1125; *Cohen v. Goodman & Sons, Inc.*, 189 N. Y. App. Div. 209, 178 N. Y. Supp. 528; *Sims v. Eleazer* (S. Car.), 106 S. E. 854; *Stanton v. Western Macaroni Mfg. Co. (Utah)*, 174 Pac. 821; *Richards v. Palace Laundry Co. (Utah)*, 186 Pac. 439. "One may travel in the middle or on either side of the traveled way where no person is passing or about to pass in the opposite direction. It is only upon meeting another that the law of the road is invoked. *Baker v. Zimmerman* (Iowa), 161 N. W. 479. "Driving a vehicle in the middle of a street is neither negligence in itself nor a fact from which negligence can be inferred, either under the common law or under our statute." *Linstroth v. Peper* (Mo. App.), 188 S. W. 1125.

28. *One way street*.—A regulation requiring drivers to proceed along the right of the center of streets cannot apply to a "one way" street. *Hedges v. Mitchell* (Colo.), 194 Pac. 620. *Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319, wherein it was said: "The legislature intended to make it the duty of persons so using such high-

ways to keep to the right side thereof; in other words, we are of the opinion that, in thus prescribing highway regulations, the legislature thereby intended to require persons so using the public highways to keep to the right of the center of such thoroughfares at all times when possible to do so, regardless of whether they should actually meet or see any other person traveling on such highway in an opposite direction." See also, *Todd v. Orcutt* (Cal. App.), 183 Pac. 963; *Conder v. Griffith*, 61 Ind. App. 218, 111 N. E. 816; *Laudenberger v. Easton Transit Co.*, 261 Pa. 288, 104 Atl. 588; *Smoak v. Martin*, 108 S. Car. 472, 94 S. E. 869.

29. *United States*.—*New York Transp. Co. v. Garside*, 157 Fed. 521, 85 C. C. A. 285.

*California*.—*Harris v. Johnson*, 174 Cal. 55, 161 Pac. 1155; *Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319.

*Connecticut*.—*Lynch v. Shearer*, 83 Conn. 73, 75 Atl. 88.

*Delaware*.—*Grier v. Samuel*, 4 Del. 74, 85 Atl. 759.

*Illinois*.—*Trzetiowski v. Evening American Pub. Co.*, 185 Ill. App. 451; *Devine v. Ward Baking Co.*, 188 Ill. App. 588; *Wortman v. Trott*, 202 Ill. App. 528; *Coonan v. Straka*, 204 Ill. App. 17.

*Indiana*.—*Conder v. Griffith*, 61 Ind. App. 218, 111 N. E. 816.

*Iowa*.—See *Clark v. Van Vleck*, 135 Iowa, 194, 112 N. W. 648.

regulation requiring that travelers shall turn to the right upon meeting, and a regulation requiring that travelers shall proceed along the right-hand side of the highway, are not necessarily inconsistent.<sup>30</sup> And when the driver of a machine makes a sudden swerve to the wrong side of the street where he strikes a pedestrian, his negligence is a question for the jury.<sup>31</sup> But, when the vehicle is overtaking or meeting a pedestrian who is walking along the road, the law of the road has little application.<sup>32</sup> So, too, a regulation of the character under discussion has no application to a car which is backed into a parking space of limited size close to the curb.<sup>33</sup> It is not necessarily wrongful to drive to the left side of the street if the driver intends to stop at a house, but he should turn to the right if another machine is approaching.<sup>34</sup> And an ordinance requiring the drivers of vehicles to keep on the right-hand side of the street has been held to be not enacted for the protection of street railway companies; and, in an action by the owner of a machine for a collision with a street car, the statute does make the owner guilty of negligence.<sup>35</sup>

#### **Sec. 248. Driving along street — distance from curb.**

Another type of regulation which is becoming more frequent with the increase in motor vehicle traffic, is that which requires certain classes of vehicles to run close to the curb or requires other classes to run a certain distance therefrom.<sup>36</sup>

*New Jersey.*—*Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262.

*Washington.*—*Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876; *Mickelson v. Fisher*, 81 Wash. 423, 142 Pac. 1160; *Johnson v. Heitman*, 88 Wash. 595, 153 Pac. 331; *Moy Quon v. M. Furuya Co.*, 89 Wash. 526, 143 Pac. 99.

30. *Suelli v. Jones*, 49 Wash. 582, 96 Pac. 4. "Repeals by implication are not favored in law, and it can be seen at a glance that there is no necessary conflict between the provisions of the two ordinances. A provision requiring a driver to pass another in a given manner is not in conflict with an ad-

ditional requirement that he shall keep on a certain side of the street while going in a given direction." *Suelli v. Jones*, 49 Wash. 582, 96 Pac. 4.

31. *Parmenter v. McDougall*, 172 Cal. 306, 156 Pac. 460.

32. See *Apperson v. Lazro*, 44 Ind. App. 186, 88 N. E. 99. And see section 432.

33. *Sheldon v. James*, 175 Cal. 474, 166 Pac. 8, 2 A. L. R. 1493.

34. *Shaw v. Wilcox* (Mo. App.), 224 S. W. 58.

35. *Watts v. Montgomery Traction Co.*, 175 Ala. 102, 57 So. 471.

36. See *Humphrey v. U. S. Macaroni Co.* (Cal. App.), 193 Pac. 609; *Buzich*

For example, municipal ordinances are very frequently enacted so as to require the slow moving vehicles to keep close to the curb and to allow the faster ones the more central part of the street. Where an automobile was driven twenty-five feet from the right-hand curb, in violation of a traffic ordinance, and the driver twice gave a stop signal but stopped only after the second one, it was held that he was guilty of contributory negligence so as to bar a recovery for damages to the machine sustained by reason of a vehicle running into the rear thereof.<sup>37</sup> Under a statute in *Minnesota* entitled, "An act to license and define the road regulations of motor and other vehicles and appropriating money therefor," and providing in part that "in cities or villages, or any place where traffic is large, or on streets usually congested with traffic of horse-drawn vehicles or street cars, slow moving vehicles must keep near the right curb, allowing those moving more rapidly to keep near the center of the street," it was held that a defendant could be convicted for a violation of the law although he was not blocking any traffic but was merely driving on the part of the street most convenient for him.<sup>38</sup>

### Sec. 249. Meeting and passing other travelers — in general.

In England, when two vehicles meet upon the public highway, they pass to the left of each other.<sup>39</sup> In this country, the colonists followed the Continental custom, which was the reverse of the English, and passed to right of other travelers. The practice of the colonists, now reinforced by statutory enactment and municipal regulation, remains the law of the

v. Todman, 179 Iowa, 1019, 162 N. W. 259; *Stack v. General Baking Co.* (Mo.). 223 S. W. 89; *Kelley v. James*, 37 S. Dak. 272, 157 N. W. 990.

**Intersecting streets.**—It is thought that a regulation requiring the driver of a motor vehicle to keep as close to the right-hand curb as possible, does not apply at intersecting streets. See *Bullis v. Ball*, 98 Wash. 342, 167 Pac. 942.

**Vehicles standing at curb.**—See *Collins v. Marsh*, 176 Cal. 639, 169 Pac.

389. as to an ordinance forbidding standing automobiles more than two feet from the curb.

37. *Russell v. Kemp*, 95 Misc. (N. Y.) 582, 159 N. Y. Suppl. 865.

38. *State v. Bussian*, 111 Minn. 488, 127 N. W. 495, 31 L. R. A. (N. S.) 682. In this case the defendant was driving a furniture van drawn by two horses near the right curb.

39. *Wright v. Fleischman*, 41 Misc. (N. Y.) 533, 85 N. Y. Suppl. 62

road.<sup>40</sup> Statutes enacted before the popular use of motor vehicles, prescribing the turns to be made by "vehicles" or "teams" are construed as applying to automobiles.<sup>41</sup> Speaking in general terms, when two vehicles meet and collide on a public highway which is wide enough for them to pass with safety, the traveler on the wrong side of the road is responsible for the damages sustained by the one traveling on the proper side.<sup>42</sup> But a traveler is not justified in getting his machine on the right-hand side of the road and then proceeding regardless of other travelers; on the contrary, the duty of exercising reasonable care for the avoidance of injuries to others continues and applies to those who may be violating the law of the road.<sup>43</sup>

**40.** *McGee v. Young*, 132 Ga. 606, 64 S. E. 689; *Palmer v. Baker*, 11 Me. 338; *Jaquith v. Richardson*, 8 Mete. (Mass.) 213; *Week v. Reno Traction Co.*, 38 Nev. 285, 149 Pac. 65; *Smith v. Dygert*, 12 Barb. (N. Y.) 613; *Easring v. Lansingh*, 7 Wend. (N. Y.) 185.

**41.** *Athens Ry. & Elec. Co. v. McKinney*, 16 Ga. App. 741, 86 S. E. 83; *Bragdon v. Kellogg* (Me.), 105 Atl. 433.

**42.** *Alabama*.—*Morrison v. Clark*, 196 Ala. 670, 72 So. 305.

*California*.—*Shupe v. Rodolph* (Cal.), 197 Pac. 57.

*Illinois*.—*Brandenberg v. Klehr*, 197 Ill. App. 459.

*Iowa*.—*Buzich v. Todman*, 179 Iowa, 1019, 162 N. W. 259.

*Kansas*.—*Arrington v. Horner*, 82 Kans. 817, 129 Pac. 1159.

*Maine*.—*Bragdon v. Kellogg*, 118 Me. 42, 105 Atl. 433; *Stobie v. Sullivan*, 118 Me. 483, 105 Atl. 714; *Sylvester v. Gray*, 118 Me. 74, 105 Atl. 815.

*Minnesota*.—*Molin v. Wark*, 113 Minn. 190, 129 N. W. 383.

*Mississippi*.—*Flynt v. Fondren* (Miss.), 84 So. 188.

*Missouri*.—*Hayden v. McColly*, 166

Mo. App. 675, 150 S. W. 1132; *Harris v. Pew*, 185 Mo. App. 275, 170 S. W. 344; *Columbia Taxicab Co. v. Roemich* (Mo. App.), 208 S. W. 859.

*Montana*.—*Savage v. Boyce*, 53 Mont. 470, 164 Pac. 887.

*New York*.—*Millman v. Appleton*, 139 N. Y. App. Div. 738, 124 N. Y. Suppl. 482; *Clarke v. Woop*, 159 N. Y. App. Div. 437, 144 N. Y. Suppl. 595.

*North Dakota*.—*Hendricks v. Hughes*, 37 N. Dak. 180, 163 N. W. 268.

*Oklahoma*.—*Tulsa Ice Co. v. Wilkes*, 54 Okla. 519, 153 Pac. 1169.

*Oregon*.—*Pinder v. Wickstrom*, 80 Ore. 118, 156 Pac. 583.

*South Dakota*.—*Schnabel v. Kafer*, 39 S. Dak. 70, 162 N. W. 935.

*Utah*.—*Stanton v. Western Macaroni Mfg. Co.*, 174 Pac. 821.

*Washington*.—*Lloyd v. Calhoun*, 82 Wash. 35, 143 Pac. 458; *Paton v. Cashmere Warehouse & Storage Co.*, 176 Pac. 544; *Zuccone v. Main Fish Co.*, 177 Pac. 314.

*Wisconsin*.—*John v. Pierce* (Wis.), 178 N. W. 297.

**43.** *Hoover v. Reichard*, 63 Pa. Super. Ct. 517.

## Sec. 250. Meeting and passing other travelers—right of center line of highway.

Custom, as well as positive statutory and ordinance provisions in many States, require that the turning to the right upon meeting other travelers shall be to such an extent that each traveler shall be on his own side of the center line of the highway.<sup>44</sup> That is to say, even if the road were so wide that the travelers could safely pass each other on the same side of the center line, the law of the road disapproves such practice.<sup>45</sup> Such regulations do not require a driver to remain at all times on the right side of the center, but require only that he shall so turn when meeting another vehicle.<sup>46</sup> The phrase "center of the road," as used in regulations of this nature, has been held to mean the center of the traveled or wrought part of the road.<sup>47</sup> When the road is covered with snow, travelers who meet must turn to the right of traveled part of the road as it then appears, regardless of what would be the traveled part when the snow is gone.<sup>48</sup> But under a statute requiring a person on a public highway in any vehicle to turn to the right and give one-half of the traveled road upon meet-

44. *California*.—Diehl v. Roberts, 134 Cal. 164, 66 Pac. 202.

*Illinois*.—Dunn v. Moratz, 92 Ill. App. 277.

*Iowa*.—Buzich v. Todman, 179 Iowa, 1019, 162 N. W. 259.

*Maine*.—Bragdon v. Kellogg, 118 Me. 42, 105 Atl. 433; Ricker v. Gray, 118 Me. 492, 107 Atl. 295.

*Massachusetts*.—Rice v. Lowell Buick Co., 229 Mass. 53, 118 N. E. 185.

*Minnesota*.—Molin v. Wark, 113 Minn. 190, 129 N. W. 383; Morken v. St. Pierre, 179 N. W. 681.

*Montana*.—Savage v. Boyce, 53 Mont. 470, 164 Pac. 887.

*New York*.—Wright v. Fleischman, 41 Misc. 533, 85 N. Y. Suppl. 62.

*Oklahoma*.—Tulsa Ice Co. v. Wilkes, 54 Okla. 519, 153 Pac. 1169.

*South Carolina*.—Smoak v. Martin, 108 S. Car. 472, 94 S. E. 869.

*South Dakota*.—Schnabel v. Kafer,

39 S. Dak. 70, 162 N. W. 935.

*Wisconsin*.—Hoppe v. Peterson. 165 Wis. 200, 161 N. W. 738.

*Compare* Nordley v. Sorlie, 35 N. Dak. 395, 160 N. W. 70.

45. Wright v. Fleischman, 41 Misc. (N. Y.) 533, 85 N. Y. Suppl. 62.

46. Walker v. Lee (N. C.), 106 S. E. 682; Sims v. Eleazer (S. C.), 106 S. E. 854.

47. Clark v. Commonwealth, 4 Pick. (Mass.) 125. See, however, Daniel v. Clegg, 38 Mich. 32, holding that the phrase "traveled part of the road" in such a statute means that part which is wrought for traveling, and is not confined simply to the most traveled wheel track. See also Baker v. Zimmerman, 179 Iowa, 272, 161 N. W. 479; Schnabel v. Kafer (S. Dak.), 162 N. W. 935.

48. Jaquith v. Richardson, 8 Mete. (Mass.) 213.

ing another vehicle, it has been held that the fact that one does not give the other half of the road is not conclusive evidence of negligence, and in an action to recover for injuries alleged to have been caused by the defendant's failure to give the plaintiff's buggy half of the road, it was decided that if the plaintiff's horse and buggy were outside the traveled road, the defendant need not give one-half of the road, but could run his automobile on the traveled path, provided there was room to pass and the plaintiff's horse had shown no signs of fright.<sup>49</sup>

**Sec. 251. Meeting and passing other travelers — seasonable turn to right.**

The statutory provisions in the various jurisdictions as to the turn which the driver of a vehicle shall make when meeting another vehicle, are slightly variant as to language. In a few States the lawmakers have required that the drivers shall "reasonably" or "seasonably" turn to the right.<sup>50</sup> This requirement has been held to mean that each should turn to the right in such season that neither shall be retarded by reason of the other's occupying his half of the way.<sup>51</sup> Under such an enactment, it is held that it is not necessary for a person to turn to the right so that all of his vehicle is on the right of the center of the highway, but it is sufficient if he turns out far enough so that the approaching vehicle may pass safely without turning at all.<sup>52</sup> Statutory provisions in some States may make an exception in favor of heavily laden vehicles, permitting them to continue along the center of the road.<sup>53</sup>

49. *Needy v. Littlejohn*, 137 Iowa, 704, 115 N. W. 483.

50. *Martin v. Carruthers* (Colo.), 195 Pac. 105; *Lemmon v. Broadwater*, 30 Del. (7 Boyce) 472, 108 Atl. 273; *Cupples Merchantile Co. v. Bow*, 32 Idaho, 774, 189 Pac. 48; *Flemt v. Fondern* (Miss.), 84 So. 188; *Edwards v. Yarbrough* (Mo. App.), 201 S. W. 972; *Puick v. Thurston*, 25 R. I. 36,

54 Atl. 600; *Stanton v. Western Macaroni Mfg. Co.* (Utah), 174 Pac. 821.

51. *Neal v. Randall*, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 668; *Brigdon v. Kellogg*, 118 Me. 42, 105 Atl. 433; *Stanton v. Western Macaroni Mfg. Co.* (Utah), 174 Pac. 821.

52. *Buxton v. Ainsworth*, 138 Mich. 532, 101 N. W. 817, 11 Det. Leg. N. 684, 5 Ann. Cas. 146.

## Sec. 252. Overtaking and passing other travelers — turning to left to pass.

Under the English custom, when one traveler overtakes and wishes to pass another traveling in the same direction, the faster one should turn toward the right and the slower one toward the left. In this country, it has sometimes been thought that there was no custom on the subject having the force of law;<sup>54</sup> but, even in the absence of statute especially prescribing the course to be pursued, it was thought generally that the law of the road required the overtaking traveler to pass to the left of the forward vehicle. In any event that course is now in practically every State required by statutory enactment.<sup>55</sup> If an automobilist attempts to pass on the wrong

53. See *Hayden v. McColly*, 166 Mo. App. 675, 150 S. W. 1132.

54. *Bolton v. Colder*, 1 Watts (Pa.) 360. "Unless there is a statute or municipal regulation to the contrary, one overtaking and passing another may pass on either side, using proper caution, and keeping a safe distance behind when not passing. The leading team may travel anywhere it pleases, using, however, due care. . . . It necessarily follows that, if the leading team should use the left side of the highway, leaving insufficient space for the rear team to pass, the latter may pass to the right. If for any other reason, such as the obstruction of the highway on the left of the leading team by other teams proceeding in the opposite direction, so as to prevent a passage to the left of the team in front, the rear team may, if there is sufficient space and it can be done by the exercise of proper care, pass to the right of the team in front. The general rule, therefore, that teams traveling in the same direction on a highway should pass each other to the left has its exceptions, and must be applied with reference to the circumstances of the particular case." *Wright v. Mitchell*, 252 Pa. St. 325, 97 Atl. 478.

In Louisiana, it has been held that

the driver or owner of the rear vehicle passes, at his peril, the forward one, and is responsible for all damage caused thereby. *Avegno v. Hart*, 35 La. Ann. 235.

See also, to same effect, *Menard v. Lussier*, 50 Que. S. C. (Canada) 159.

55. *California*.—*Weaver v. Carter*, 23 Cal. App. 241, 152 Pac. 323.

*Connecticut*.—*Feehan v. Slater*, 89 Conn. 697, 96 Atl. 159.

*Indiana*.—*Hamilton, Harris & Co. v. Larrimer*, 183 Ind. 429, 105 N. E. 43; *Borg v. Larson*, 60 Ind. App. 514, 111 N. E. 201.

*Louisiana*.—*Manceaux v. Hunter Canal Co.*, 148 La. —, 86 So. 665.

*Missouri*.—*Pannell v. Allen*, 160 Mo. App. 714, 142 S. W. 482.

*New Jersey*.—*Unwin v. State*, 73 N. J. L. 529, 64 Atl. 163, affirmed *State v. Unwin*, 75 N. J. L. 500, 68 Atl. 110; *Decou v. Dexheimer*, 73 Atl. 49; *Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262.

*North Carolina*.—*Cooke v. Jerome*, 172 N. C. 626, 90 S. E. 767.

*Rhode Island*.—*Ribas v. Revere Rubber Co.*, 37 R. I. 189, 91 Atl. 58.

*Wisconsin*.—*Riggles v. Priest*, 163 Wis. 199, 157 N. W. 755; *Mahar v. Loehen*, 166 Wis. 152, 164 N. W. 847.



side of another traveler, he may be responsible for the injuries sustained by such traveler.<sup>56</sup> The left side is the proper side to pass on, though it brings the automobilist on the left side of the highway;<sup>57</sup> but, because of the fact that when he passes the left of the center of the highway he is perhaps violating the law of the road as to a third vehicle approaching from the opposite direction, he should attempt the passage only when he can do so with safety to the travelers he is meeting as well as to the vehicle he is passing.<sup>58</sup> He must exercise reasonable care in making the passage in order that injury will not result to other travelers.<sup>59</sup> The law of the road relative to overtaking and passing other travelers, is not generally applicable to pedestrians.<sup>60</sup> Nor is it applicable to street cars, for the law contemplates that the forward conveyance shall give way toward the right, and street cars are unable to do so on account of the fixity of their route.<sup>61</sup> An ordinance may require an automobilist to pass to the right of a street car which he is overtaking.<sup>62</sup>

### **Sec. 253. Overtaking and passing other travelers — turning to right after passing.**

After passing the rear of the forward vehicle, an automobilist must exercise reasonable care in turning back toward the right into the center of the highway. If he makes the turn sooner than reasonable prudence would dictate, he may be liable for damages for striking or frightening the horses drawing the forward carriage,<sup>63</sup> or for striking one riding in

56. *Borg v. Larson*, 60 Ind. App. 514, 111 N. E. 201; *Schaffer v. Miller*, 185 Iowa, 472, 170 N. W. 787.

57. *Paschel v. Hunter*, 88 N. J. L. 445, 97 Atl. 40.

58. *Pratt v. Burns*, 189 N. Y. App. Div. 33, 177 N. Y. Supp. 817. And see section 254.

59. *Bishard v. Engelbeck*, 180 Iowa, 1132, 164 N. W. 203.

60. *Brown v. Thayer*, 212 Mass. 392, 99 N. E. 237.

61. *Harris v. Johnson*, 174 Cal. 55, 161 Pac. 1155. Compare *McGourty v.*

*Marco*, 200 Mass. 57, 85 N. E. 891.

62. *City of Chicago v. Keogh*, 291 Ill. 188, 125 N. E. 881.

Proper side for motor car to pass tram car proceeding in same direction. *Burton v. Nicholson* (K. B. Div.), 100 Law T. R. (N. S.) 344.

63. *House v. Fry*, 30 Cal. App. 157, 157 Pac. 500; *Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236; *Zellmer v. McTague*, 170 Iowa, 534, 153 N. W. 77; *Dunkelbeck v. Meyer*, 140 Minn. 283, 167 N. W. 1034.

the forward conveyance.<sup>64</sup> In some States, the return to the beaten path is regulated by statute, the enactments prescribing a definite distance from the carriage for the return of the automobilist.<sup>65</sup> Where the evidence tended to show that defendant's car approached plaintiff from the rear, was within a few feet of his horse when passing, and turned in front of him but a short distance ahead, and that a well broken horse is likely to be frightened under such circumstances unless some warning is given, it was held that the question of whether defendant exercised reasonable caution in thus passing plaintiff's horse, was for the jury.<sup>66</sup> And the driver of the vehicle which is left in the rear must also exercise reasonable care to avoid a collision with the passing vehicle.<sup>67</sup>

**Sec. 254. Overtaking and passing other travelers — meeting third vehicle after passing toward left.**

One vehicle should not attempt to pass another, unless the passage can be made with reasonable safety to third persons. Although statutes or municipal ordinances may permit a faster vehicle to pass another on the left side thereof, the driver of the rear vehicle should not attempt this course when injury is likely to be thereby occasioned to a cyclist or vehicle approaching from the opposite direction.<sup>68</sup> If he does attempt the passage without information of his intention to the traveler approaching from the other way, and such traveler is unable by an exercise of due diligence to avoid a collision, he is liable for the injuries sustained by such traveler, for he should wait a suitable opportunity before attempting the passage.<sup>69</sup> From the point of view of a traveler approaching

64. *Moreno v. Los Angeles Transfer Co.* (Cal. App.), 186 Pac. 800.

65. *Zellmer v. McTague*, 170 Iowa, 534, 153 N. W. 77.

66. *Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236.

67. *Winslow v. New England Co op. Soc.*, 225 Mass. 576, 114 N. E. 748.

68. *Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262; *Ribas v. Revere Rubber Co.*, 37 R. I. 189, 91 Atl. 58.

The traffic law requirement that a vehicle driver pass a vehicle ahead of him to the left does not excuse him from exercising care in ascertaining whether it can be done with safety to those on the left side of the street. *Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262.

69. *Nafziger v. Mahan* (Mo. App.), 191 S. W. 1080; *Ribas v. Revere Rubber Co.*, 37 R. I. 189, 91 Atl. 58. "As

from the opposite direction at the time a rear vehicle attempts to pass another going in the same direction, the passing conveyance is on the left or wrong side of the highway. In some jurisdictions the matter is specifically regulated by statute. Regulations may prohibit the passage by the rear vehicle unless the way is clear for a specified distance ahead, such as one hundred yards.<sup>70</sup>

### **Sec. 255. Overtaking and passing other travelers — slower vehicles at curb.**

For the regulation of traffic in some of the larger cities, ordinances have been adopted requiring slower moving vehicles to keep toward the curb and allowing the faster ones a course nearer the center of the street.<sup>71</sup> But, though the forward vehicle is not traveling as near to the curb as the ordinance requires, the rear one is not justified in running into it; the fact that there is plenty of room on the left side of the forward vehicle for passing without injury to other travelers tends to show that the violation of the regulation by the forward vehicle is not a proximate cause of the injury, and hence it does not preclude a recovery for injuries thereto.<sup>72</sup>

we have before substantially said, a person attempting to pass a vehicle ahead of him and going in the same direction must exercise proper care in so doing. If a vehicle is approaching from the opposite direction at the moment when he desires to pass the vehicle in front, and the highway is not wide enough to safely accommodate all three teams abreast, then it would be the duty of the person in charge of the rear vehicle, in the exercise of proper care under the circumstances, to wait until the vehicle coming in the opposite direction had passed by before he attempted to turn out. It is not necessary to involve the question as to the duty of the vehicle in the rear, in passing, towards another vehicle that may be approaching in an opposite direction. The approach of

the vehicle in the opposite direction is simply one of the circumstances which must be considered by the rear man when he attempts to pass. It is simply one of the things which demands the exercise of care upon his part under all circumstances, and in some circumstances he would be required to refrain from attempting to pass until the approaching vehicle had gone by." *Ribas v. Revere Rubber Co.*, 37 R. I. 189, 91 Atl. 58.

<sup>70</sup> See *Wiley v. Young*, 178 Cal. 681, 174 Pac. 316.

<sup>71</sup> *House v. Fry*, 30 Cal. App. 157, 157 Pac. 500; *Herdman v. Zwart*, 167 Iowa, 500, 149 N. W. 631; *Harnau v. Haight*, 189 Mich. 600, 155 N. W. 563.

<sup>72</sup> *House v. Fry*, 30 Cal. App. 157, 157 Pac. 500.

**Sec. 256. Overtaking and passing other travelers — duty of forward vehicle to permit passage.**

A slower vehicle has no right to obstruct a faster one desiring to pass if the situation is such that the rear one can pass in safety.<sup>73</sup> When the driver of the faster conveyance desires to pass, it is the duty of the forward one to turn toward the right so as to give the rear one a reasonable opportunity for passage.<sup>74</sup> The driver of the forward vehicle cannot, however, be expected to turn toward the right, until he has some knowledge that the rear one is approaching and that its driver wishes to pass.<sup>75</sup> The driver of the rear machine should give a signal of his wishes in respect to passing.<sup>76</sup> Moreover, the forward driver cannot be required to give way unless the condition and width of the road is such that the passage can be made with reasonable safety.<sup>77</sup> If the driver of the slower vehicle is not allowed sufficient time to turn to the right before the rear vehicle strikes him, he cannot be charged with contributory negligence.<sup>78</sup> If a person on horseback apparently does not hear the approach of an automobile from the rear, the driver of the machine cannot proceed regardless of the fact that the horseback rider does not turn out, but he should slacken the speed of the machine and even stop it if necessary.<sup>79</sup> A horseback rider is not generally required to yield but half of the beaten track to an automobilist who desires to pass him.<sup>80</sup>

73. *Dunkelbeck v. Meyer*, 140 Minn. 283, 167 N. W. 1034.

74. *Paschel v. Hunter*, 88 N. J. L. 445, 97 Atl. 40; *Laudenberger v. Easton Transit Co.*, 261 Pa. 288, 104 Atl. 588.

75. *Morrison v. Clark*, 196 Ala. 670, 72 So. 305; *House v. Fry*, 30 Cal. App. 157, 157 Pac. 500; *Dunkelbeck v. Meyer*, 140 Minn. 283, 167 N. W. 1034.

76. *Dunkelbeck v. Meyer*, 140 Minn. 283, 167 N. W. 1034.

77. *Dunkelbeck v. Meyer*, 140 Minn. 283, 167 N. W. 1034.

78. *Pens v. Kreiter*, 98 Kans. 759, 160 Pac. 200.

79. *Furtado v. Bird*, 26 Cal. App. 153, 146 Pac. 58.

80. *Traeger v. Wasson*, 163 Ill. App. 572, wherein it was said: "While it may be known as a matter of general knowledge that out of courtesy a man traveling upon horseback usually leaves the beaten track for the use of a vehicle for the reason that it may be easier for the horse without a vehicle attached to travel upon that portion of the highway which is not included in the beaten track, the statute does not require that a person traveling upon horseback so do. Under the rule that persons' rights upon the public

**Sec. 257. Overtaking and passing other travelers — passing at corner where forward vehicle turns to left.**

When two vehicles are proceeding along a street in the same direction, and the forward one starts to turn a corner toward the left, it is not an appropriate time for the rear vehicle to attempt to pass on the left of the forward vehicle. Whether the driver of the rear vehicle under such circumstances is guilty of negligence, may be a question for the jury.<sup>81</sup> Appropriate statutory and municipal regulations have been enacted in some jurisdictions to relieve the danger of the situation. It is a matter of regulation in some cities that the driver of the forward vehicle shall by some signal make known to the driver of the rear machine his intention to turn the corner.<sup>82</sup> If the driver of the forward vehicle gives a signal in compliance of the statute and a collision nevertheless occurs, the negligence of the rear driver may be found by the jury.<sup>83</sup> But when no signal is given, the driver of the rear carriage is not charged with notice that the forward traveler may attempt to dart across the course. An accident of such a nature may happen so quickly that liability will not be charged against the driver of the rear vehicle.<sup>84</sup>

**Sec. 258. Turning corners — turning toward the right.**

When an automobilist is proceeding along the right-hand side of a street, a turn toward the right is not a difficult matter. If other vehicles are obeying the law of the road, there

highway are equal, plaintiff had the right to continue to use at least one-half of the beaten track and the record discloses that he did no more than this, that he surrendered the right side of the beaten track for the use of the defendant, and that was all that he was required to do. The fact that the parties were going in the same direction instead of in opposite directions imposed no greater obligation upon the plaintiff to leave the beaten track, and the plaintiff was not guilty of contributory negligence by traveling on the left side of the beaten track as the record

discloses that he did."

**81.** *Wingert v. Cohill* (Md.), 110 Atl. 857; *Mendelson v. Van Rensselaer*, 118 N. Y. App. Div. 516, 103 N. Y. Suppl. 578.

**82.** Section 264.

**83.** *Frank C. Weber Co. v. Stevenson Grocery Co.*, 194 Ill. App. 432; *Wingert v. Cohill* (Md.), 110 Atl. 857; *Daly v. Case*, 88 N. J. L. 295, 95 Atl. 973.

**84.** *Newbauer v. Nassau Elec. R. Co.*, 191 N. Y. App. Div. 732, 182 N. Y. Suppl. 20; *Hartley v. Lasater*, 96 Wash. 407, 165 Pac. 106.

is little danger of collision. The principal duties of the driver of a motor vehicle when turning toward the right are reasonable diligence to avoid pedestrians who may be on the street crossing, and the obedience of regulations prescribing his distance from the corner. He must anticipate that foot travelers will be using the crossing, and reasonable care on his part requires that he have the machine under control<sup>85</sup> and give warning to pedestrians,<sup>86</sup> and stopping if necessary to avoid them.<sup>87</sup> One turning a corner at an excessive rate of speed may be found guilty of negligence.<sup>88</sup> Affirmative regulations, as well as custom, require that one turning toward the right shall keep to the right of the center of the intersecting streets.<sup>89</sup> Statutes and municipal ordinances, in some cases, require that the automobilist shall keep as close to the curb as possible,<sup>90</sup> or keep to the right of the intersecting point of the street.<sup>91</sup> Under such regulations, if the proper course of the driver is temporarily blocked by other travelers, he is not justified in violating the requirement and turning toward the left, but he should slacken his speed or delay the turn.<sup>92</sup> A statute requiring a turn as closely to the curb as possible is designed more for the protection of other vehicles than for the safety of pedestrians using the crosswalk. Foot

85. See sections 326, 441.

86. See sections 329-331, 448.

87. *Kuchler v. Stafford*, 185 Ill. App. 199; *Buscher v. New York Transp. Co.*, 106 N. Y. App. Div. 493, 94 N. Y. Suppl. 796; *Taylor v. Stewart*, 172 N. Car. 203, 90 S. E. 134; and see sections 327, 442.

88. Sections 305, 308.

89. *Pemberton v. Army* (Cal. App.), 183 Pac. 356, affirmed 182 Pac. 964; *Bogdan v. Pappas*, 95 Wash. 579, 164 Pac. 208.

90. *Pemberton v. Army* (Cal. App.), 183 Pac. 356, affirmed 182 Pac. 964; *Anderson v. Schorn*, 189 N. Y. App. Div. 495, 178 N. Y. Suppl. 603; *Russell v. Kemp*, 95 Misc. (N. Y.) 582, 159 N. Y. Suppl. 865; *City of Oshkosh v. Campbell*, 151 Wis. 567, 139 N. W. 316.

91. *Walters v. Davis* (Mass.), 129 N. E. 443.

92. *City of Oshkosh v. Campbell*, 151 Wis. 567, 139 N. W. 316, wherein it was said: "The mere fact, without any fault of appellant, that he had to choose between slackening speed or, even, stopping for a moment for a clearance of the way, or violating the ordinance by turning as he did, is no justification for his act. If it were left to every owner of an automobile to violate such a city regulation when otherwise he would experience some inconvenience, there would be very little use of having such an ordinance, and the difficulty, now very great, of guarding against automobiles being a serious menace to the personal safety of people while on the public ways would be intolerable."

travelers are better protected by a requirement that a certain number of feet shall be left between the machine and curb corner. Hence regulations are sometimes enacted which are designed for the safety of pedestrians and prohibit the turning within a specified distance of the curb.<sup>93</sup> General regulations governing the conduct of drivers when meeting or overtaking other vehicles are not usually applicable at street intersections.<sup>94</sup>

### Sec. 259. Turning corners — turning toward the left.

The turning of a corner by a motor vehicle toward the left is fraught with greater danger to other travelers than is a turning toward the right. Obviously, when making the turn, the driver will be intercepting the course which other vehicles may properly take in accordance with the law of the road. Regulations generally require that one turning toward the left shall pass to the right of the center of the intersecting streets; and negligence may be founded on the act of a driver cutting the corner.<sup>95</sup> Especially should the driver turn so as

93. *Domke v. Gunning*, 62 Wash. 629, 114 Pac. 436.

**Obstructed corner.**—Where an ordinance required a person driving an automobile, upon turning the corner of any street "to leave a space of at least six feet between the curb and the . . . automobile" and it appeared that on the lot fronting the street where the accident happened a building was being erected and that debris had been piled up at the corner of the street around which a fence or barricade had been constructed, compelling pedestrians to leave the regular walk, step into the street and walk around the outside of the fence or barricade, it was held that the fence became the curb within the meaning of the ordinance. *Domke v. Gunning*, 62 Wash. 629, 114 Pac. 436.

94. *Buzieh v. Todman*, 179 Iowa, 1019, 162 N. W. 259.

95. *Alabama*.—*Karples v. City Ice*

*Delivery Co.*, 198 Ala. 449, 73 So. 642. *Arkansas*.—*Temple v. Walker*, 127 Ark. 279, 192 S. W. 200.

*California*.—*Cook v. Miller*, 175 Cal. 497, 166 Pac. 316; *Perez v. Hartman*, 39 Cal. App. 601, 179 Pac. 706; *Martinelli v. Bond* (Cal. App.), 183 Pac. 463.

*Indiana*.—*Reitz v. Hodgkins*, 185 Ind. 163, 112 N. E. 386.

*Iowa*.—*Walterick v. Hamilton*, 179 Iowa, 607, 161 N. W. 684.

*Kansas*.—*Cross v. Rosencranz*, 195 Pac. 857.

*Massachusetts*.—*Walters v. Davis*, 129 N. E. 443.

*Michigan*.—*Reed v. Martin*, 160 Mich. 253, 125 N. W. 61; *Holdem v. Hadley*, 180 Mich. 568, 147 N. W. 482; *Everhard v. Dodge Bros.*, 202 Mich. 48, 167 N. W. 953.

*Minnesota*.—*Molin v. Wark*, 113 Minn. 190, 129 N. W. 383; *Day v. Duluth St. R. Co.*, 121 Minn. 445, 141

to enter upon the right side, not the left side, of the cross-street.<sup>96</sup> Liability does not necessarily follow because at the time of a collision, one's vehicle is found on the wrong side of the center point; on the contrary, he may be allowed to explain his course and may possibly succeed in charging the driver of the other vehicle with negligence.<sup>97</sup> The purpose of this class of regulations is to keep vehicles moving, as far as practicable, with the course of travel, and hence there may be no violation where the driver proceeds to the right of their intersection as defined by customary use, though his course is to the left of the intersecting point as the streets were laid out.<sup>98</sup> The driver is bound to know that, when making the turn, the rear wheels of the machine will not follow exactly

N. W. 795; *Unmacht v. Whitney*, 178 N. W. 886; *Elvidge v. Strong & Warner Co.*, 181 N. W. 346.

*Missouri*.—*Heryford v. Spiteanfsky* (Mo. App.), 200 S. W. 123.

*Nebraska*.—*Rule v. Claar Transfer & Storage Co.*, 102 Neb. 4, 165 N. W. 883.

*New Jersey*.—*Winch v. Johnson*, 92 N. J. L. 219, 104 Atl. 81.

*New York*.—*Beickhemer v. Empire Carrying Corp.*, 172 N. Y. App. Div. 866, 158 N. Y. Suppl. 836; *MacDonald v. Kusch*, 188 App. Div. 491, 176 N. Y. Suppl. 823; *Jacobs v. Richard Carvel Co.*, 156 N. Y. Suppl. 766. See also *Mendelson v. Van Rensselaer*, 118 N. Y. App. Div. 516, 103 N. Y. Suppl. 578.

*Oregon*.—*White v. East Side Mill & Lumber Co.*, 84 Oreg. 224, 161 Pac. 969, 164 Pac. 736.

*South Dakota*.—*Boll v. Gruesner*, 176 N. W. 517.

*Texas*.—*Zucht v. Brooks* (Civ. App.), 216 S. W. 684.

*Washington*.—*Hellan v. Supply Laundry Co.*, 94 Wash. 683, 163 Pac. 9; *Stubbs v. Molberget*, 108 Wash. 89, 182 Pac. 936, 6 A. L. R. 318; *Kane v. Nakmoto*, 194 Pac. 381.

*Wisconsin*.—*Foster v. Bauer*, 180 N. W. 817.

*Canada*.—*Bain v. Fuller*, 29 D. L. R. 113.

**Question for jury.**—In an action for negligent injuries claimed to have resulted from the collision of a bicycle and an automobile, the owner of which was shown by undisputed evidence to have failed in complying with the statute requiring the driver of a motor vehicle to keep to the right of street intersections in turning corners, while the bicyclist was claimed to have been negligent, under disputed testimony in failing to avoid the accident, the questions of negligence and of contributory negligence were held to be questions of fact. *Reed v. Martin*, 160 Mich. 253, 125 N. W. 61.

**Proximate cause.**—The violation of the rule as to cutting corners is not generally the proximate cause of an injury arising after the driver has completed the turn and is passing along the proper side of the intersecting street. *Wilkinson v. Rohrer* (Cal. App.), 190 Pac. 650.

**96.** *Wortman v. Trott*, 202 Ill. App. 528.

**97.** See sections 270-275.

**98.** *Karpeles v. City Ice Delivery Co.*, 198 Ala. 449, 642, *Hamilton v. Young* (Iowa), 171 N. W. 694.



in the tracks of the forward wheels, and he should exercise reasonable care to avoid causing an injury from the rear as well as front wheels.<sup>99</sup>

## Sec. 260. Intersecting streets — equal rights of travelers.

In the absence of statute or ordinance or special circumstances affecting the question, the rights of travelers along intersecting streets are equal,<sup>1</sup> each being bound to exercise ordinary care to avoid injury to the other.<sup>2</sup> An automobilist approaching a street intersection should run at a proper speed,<sup>3</sup> have his car under reasonable control,<sup>4</sup> and give warning to other travelers who might be injured by his machine.<sup>5</sup> Moreover, he should be running on the right-hand side of the street in accordance with the law of the road applicable to such travel.<sup>6</sup> If two travelers approach the street crossing at the same time, neither is justified in assuming that the other will stop to let him pass.<sup>7</sup> The equalities of the different travelers may be modified by statute or municipal ordinance,<sup>8</sup> or special circumstances may affect the rights of the parties.<sup>9</sup> But it has been held that one party cannot show a custom

99. *White v. East Side Mill & Lumber Co.*, 84 Oreg. 224, 161 Pac. 969. 164 Pac. 736.

1. See sections 48-50, 361, 414, 488.

2. *California*.—*Bidwell v. Los Angeles & S. D. Ry. Co.*, 169 Cal. 780. 148 Pac. 197.

*Indiana*.—*Elgin Dairy Co. v. Shephard* (Ind. App.), 103 N. E. 433.

*Iowa*.—*Wagner v. Kloster*, 175 N. W. 840.

*Louisiana*.—*Shields v. Fairchild*, 130 La. 648. 58 So. 497.

*Missouri*.—*Rowe v. Hammond*, 172 Mo. App. 203, 157 S. W. 880; *Clark v. General Motor Car Co.*, 177 Mo. App. 623, 160 S. W. 576.

*New Hampshire*.—*Gilbert v. Burquo*, 72 N. H. 521, 57 Atl. 97.

*New York*.—*Towner v. Brooklyn Heights R. Co.*, 44 N. Y. App. Div. 628. 60 N. Y. Suppl. 289; *Ebling Brewing Co. v. Linch*, 80 Misc. (N. Y.) 517. 141 N. Y. Suppl. 480; *Miller v. New*

*York Taxicab Co.*, 120 N. Y. Suppl. 899.

*New Jersey*.—*Spawn v. Goldberg* (N. J.), 110 Atl. 565.

*Pennsylvania*.—*Brown v. Chambers*, 65 Pa. Super. Ct. 373.

And see sections 277-282, as to the care to be exercised by automobilists.

3. Section 311.

4. Section 326.

5. Sections 329-331.

6. And see section 347; *Lawrence v. Goodwill* (Cal. App.), 186 Pac. 781; *Walleigh v. Bean*, 248 Pa. St. 339, 93 Atl. 1069.

7. *Elgin Dairy Co. v. Shephard* (Ind. App.), 103 N. E. 433; *Pascagoula St. Ry. & Power Co. v. McEachern*, 109 Miss. 380, 69 So. 185.

8. Sections 261, 262.

9. One approaching a main artery of traffic from an intersecting street, should, it is held in Canada, wait and give way thereto. *Monruef v. B. C. Electric Co.*, 9 Dom. Law Rep. 569.

which has permitted vehicles on one street to have a priority over those on the cross street.<sup>10</sup> Statutes relating to the meeting and passing of vehicles along the streets and requiring that each turn to the right, do not apply when the meeting is on intersecting streets at right angles.<sup>11</sup>

### Sec. 261. Intersecting streets — superior right of first arrival.

When one vehicle reaches a street intersection distinctly in advance of one approaching along the intersecting street, he is generally accorded the right of way, and the other should delay his progress to enable the first arrival to pass in safety.<sup>12</sup>

10. *Carson v. Turrish*, 140 Minn. 445, 168 N. W. 349, wherein it was said: "The propriety of the proffered proof of custom has had careful attention. That on an issue of negligence a known custom or usage may in a proper case be proved as bearing upon negligence or the absence of it is not to be questioned. *Dunnell's Minn. Dig. & Supp.* §§ 7049, 7050. So in *O'Neil v. Potts*, 130 Minn. 353, 153 N. W. 856, it was held proper to show a practice among drivers of autos to extend the hand to the side before stopping as a signal to cars following. The question presented by the offer of proof is different. It was sought to show that main street traffic has a right of way over side street traffic, something more than an equal right at the crossing, and that the side street traffic is bound to exercise special care and caution to avoid collisions with the traffic on main thoroughfares. In effect it was sought to establish something approximating a rule or law of the road, though we do not understand counsel to claim that the custom for which he contends gives an arbitrary right, though a substantial advantage. We think the ruling was correct. Indeed it is the rule in many jurisdictions that the vehicle first at the crossing without negligence has the right of way across." See also. *Whatley v. Neshitt*

(Ala.), 85 So. 550.

11. *Buzich v. Todman*, 179 Iowa, 1019, 162 N. W. 259; *Wagner v. Kloster* (Iowa), 175 N. W. 840.

12. *Rupp v. Keebles*, 175 Ill. App. 619; *Walker v. Hilland*, 205 Ill. App. 243; *Carson v. Turrish* (Minn.), 168 N. W. 349; *Minnis v. Lemp Brewing Co.* (Mo. App.), 226 S. W. 999; *Barrett v. Alamito Dairy Co.* (Neb.), 181 N. W. 550; *Rabinowitz v. Hawthorne*, 89 N. J. L. 308, 98 Atl. 315; *Reed v. Public Service Ry. Co.*, 89 N. J. Law, 431, 99 Atl. 100; *Boggs v. Jewell Tea Co.*, 263 Pa. St. 413, 106 Atl. 781; *Simon v. Lit Bros.*, 264 Pa. St. 121, 107 Atl. 635; *Yuill v. Berryman*, 94 Wash. 458, 162 Pac. 513; *W. F. Jahn & Co. v. Paynter*, 99 Wash. 614, 170 Pac. 132. "That rule [referring to the common law rule] is that the driver of the automobile would have the right of way if, proceeding at a rate of speed which under the circumstances of the time and locality was reasonable, he should reach the point of crossing in time to go safely upon the tracks in advance of the approaching car; the latter being sufficiently distant to be checked, and, if need be, stopped, before it should reach him." *Reed v. Public Service Ry. Co.*, 89 N. J. Law, 431, 99 Atl. 100.

And see sections 393, 394.

If, in such a case, while the driver of the vehicle, in the exercise of his right, is proceeding across, and a later arriving vehicle continues, neglectful of the other's rights, and a collision ensues, the collision may properly be attributed to the negligence of the later arrival.<sup>13</sup> The first arrival is entitled to proceed, though he sees the other approaching, for, in the absence of anything indicating a contrary intention, he is entitled to assume that the latter will slacken his speed and give him the priority to which he is entitled.<sup>14</sup> The priority of the first arrival is not inconsistent with the principle of equal rights to the use of the streets.<sup>15</sup> The fact that the first arrival is a slow moving vehicle, does not abridge its right of priority.<sup>16</sup>

## Sec. 262. Intersecting streets — regulations giving superior rights along one street.

The doctrine that approaching vehicles have equal rights to the use of a street intersection, is one which may be, and in recent years frequently has been, modified by statute or municipal ordinance. In some cities where traffic is more congested in certain directions than on cross streets, ordinances have been promulgated giving vehicles on the main thoroughfares priority over vehicles approaching on the cross streets.<sup>17</sup>

13. *Rupp v. Keebles*, 175 Ill. App. 619; *Yuill v. Berryman*, 94 Wash. 458, 162 Pac. 513.

14. *Minnis v. Lemp Brewing Co.* (Mo. App.), 226 S. W. 999; *Simon v. Lit Bros.*, 264 Pa. St. 121, 107 Atl. 635; *Brown v. Chambers*, 65 Pa. Super. Ct. 373.

15. "Such cases as these are not in hostility to the principle of equality of right in the streets. As a part of such equality they suggest the right of the one first at a crossing first to use it. In none is the right an absolute one exercisable arbitrarily, or irrespective of other conditions present, or without regard to the rights and safety of others. It is little if anything more than a convenient and

usually fair rule of guidance for travelers; and in no sense is it a fixed test of negligence. It must be exercised with decent respect to the rights of others and with due regard to the character of the travel and other conditions present." *Carson v. Turrish*, 140 Minn. 445, 168 N. W. 349.

16. *Barrett v. Alamito Dairy Co.* (Neb.), 181 N. W. 550.

17. *California*.—*Whitelaw v. McGil-lard*, 179 Cal. 349, 176 Pac. 679.

*Illinois*.—*Johnson Oil Refining Co. v. Galesburg, etc. Power Co.*, 200 Ill. App. 392.

*Iowa*.—*Seager v. Foster*, 185 Iowa. 32, 169 N. W. 681, S. A. L. R. 690.

*Kentucky*.—*Louisville Ry. Co. v. Birdwell*, 189 Ky. 424, 224 S. W. 1065.

Regulations of this character are lawful and must be obeyed.<sup>18</sup> Greater care to avoid a collision is imposed on the driver not having the right of way than upon the other.<sup>19</sup> Another form of regulation which has become popular during the last few years, is a statute or ordinance giving a prior right at intersecting streets to vehicles approaching from the right.<sup>20</sup> It has

*Maryland.*—Cook v. United Rys. & Elec. Co. of Baltimore, 132 Md. 553, 104 Atl. 37.

*Minnesota.*—Bruce v. Ryan, 138 Minn. 264, 164 N. W. 982.

*Missouri.*—Freeman v. Green (Mo. App.), 186 S. W. 1166.

*New York.*—Boston Ins. Co. v. Brooklyn Heights R. Co., 182 N. Y. App. Div. 1, 169 N. Y. Suppl. 251; Essig v. Lumber Operating & Mfg. Co., 183 N. Y. App. Div. 198, 170 N. Y. Suppl. 192; Ebling Brewing Co. v. Linch, 80 Misc. (N. Y.) 517, 141 N. Y. Suppl. 480; Van Ingen v. Jewish Hospital, 182 N. Y. App. Div. 10, 169 N. Y. Suppl. 412.

*Washington.*—Shilliam v. Newman, 94 Wash. 637, 162 Pac. 977; Barth v. Harris, 95 Wash. 166, 163 Pac. 401.

**Exclusion of ordinance.**—In an action to recover damages to plaintiff's automobile truck, which, while going north on the north-bound track of defendant's railway, collided at a street intersection in the city of New York with a trolley car moving south on the other track, the exclusion of evidence of a city ordinance which provides that on all the public streets and highways all vehicles going in a northerly or southerly direction shall have the right of way over any vehicle going in an easterly or westerly direction was prejudicial error where the jury was charged that the rights of the plaintiff and defendant at the street intersection were equal, and where the evidence as to how the accident occurred, the truck being struck in attempting to cross the street, was conflicting, and a judgment entered on a verdict in favor of plaintiff will be reversed.

Ebling Brewing Co. v. Linch, 80 Mich. (N. Y.) 517, 141 N. Y. Suppl. 480.

18. Essig v. Lumber Operating & Mfg. Co., 183 N. Y. App. Div. 198, 170 N. Y. Suppl. 192.

19. Shilliam v. Newman, 94 Wash. 637, 162 Pac. 977.

20. *California.*—Mathes v. Aggler & Musser Seed Co., 179 Cal. 697, 178 Pac. 713; Lawrence v. Goodwill (Cal. App.), 186 Pac. 781; Baker v. Western Auto Stage Co. (Cal. App.), 192 Pac. 73; Howard v. Worthington (Cal. App.) 195 Pac. 709.

*Connecticut.*—Lamke v. Harty Bros. Trucking Co. (Conn.), 114 Atl. 533.

*Maryland.*—Buckey v. White, 111 Atl. 777; Chiswell v. Nichols, 112 Atl. 363.

*New Jersey.*—Erwin v. Traud, 90 N. J. Law, 289, 100 Atl. 184; Paulsen v. Klinge, 92 N. J. Law, 99, 104 Atl. 95; Nolan v. Davis, 112 Atl. 188.

*New York.*—Brillinger v. Ozias, 186 N. Y. App. Div. 221, 274 N. Y. Suppl. 282.

*Pennsylvania.*—Dickler v. Pullman Taxi Service Co., 66 Pitts Leg. Jour. (Pa.) 93.

*Texas.*—El Paso Elec. Ry. Co. v. Benjamin (Tex. Civ. App.), 202 S. W. 996.

*Washington.*—Chilberg v. Parsons, 109 Wash. 90, 186 Pac. 272; Soari v. Wells-Fargo Exp. Co., 109 Wash. 415, 186 Pac. 898; Greater Motors Corp. v. Metropolitan Taxi Co., 197 Pac. 327.

**Traffic officer.**—Such a regulation has no effect at a busy corner where a traffic officer is located. North State Lumber Co. v. Charleston, etc. Co. (S. Car.), 105 S. E. 406.

been held in some states, that a street car is not a "vehicle" within the meaning of such an enactment,<sup>21</sup> but a contrary conclusion has been reached.<sup>22</sup> The burden is upon the one who has the inferior right to use reasonable care to ascertain whether there is a likelihood of a collision and to have his car under control and to slow his machine, or, if necessary, to stop, in order to give the other machine the benefit of its superior right.<sup>23</sup> Though one is given the right of way by such a regulation, it remains his duty to exercise reasonable care to avoid collisions with other vehicles.<sup>24</sup> But the fact that one is entitled to the right of way at the intersection is a very material element in determining whether he has exercised the required degree of vigilance.<sup>25</sup> Manifestly, the driver of a machine cannot look in both directions at the same time, and a question for the jury is usually presented as to the negligence of the respective parties.<sup>26</sup> But in some cases the one not having the superior right has been adjudged negligent *per se* in proceeding across the intersection.<sup>27</sup> The right of precedence at

21. *Reed v. Public Service Ry. Co.*, 89 N. J. Law. 431, 99 Atl. 100.

22. *Syck v. Duluth St. Ry. Co.* (Minn.), 177 N. W. 944.

23. *Robinson v. Clemons* (Cal. App.), 190 Pac. 203; *Golden Eagle Dry Goods Co. v. Mockbee* (Colo.), 189 Pac. 850; *Roseman v. Peterson* (Minn.), 179 N. W. 647; *Lindahl v. Morse* (Minn.), 181 N. W. 323; *Brillinger v. Ozias*, 186 N. Y. App. Div. 221, 174 N. Y. Suppl. 282.

24. *Alabama*.—*Ray v. Brannan*, 196 Ala. 113, 72 So. 16.

*Colorado*.—*Golden Eagle Dry Goods Co. v. Mockbee*, 189 Pa. 850.

*Maryland*.—*Cook v. United Rys. & Elec. Co. of Baltimore*, 132 Md. 553, 104 Atl. 37; *Criswell v. Nichols* (Md.), 112 Atl. 363.

*Michigan*.—*Weber v. Beason*, 197 Mich. 607.

*Minnesota*.—*Syck v. Duluth St. Ry. Co.*, 177 N. W. 944; *Rosenau v. Peterson*, 179 N. W. 647.

*Missouri*.—*Freeman v. Green* (Mo. App.), 186 S. W. 1166.

*New Jersey*.—*Erwin v. Traud*, 90 N. J. Law, 289, 100 Atl. 184; *Paulsen v. Klinge*, 92 N. J. Law, 99, 104 Atl. 95; *Spawn v. Goldberg*, 110 Atl. 565.

*New York*.—*Van Ingen v. Jewish Hospital*, 182 N. Y. App. Div. 10, 169 N. Y. Suppl. 412; *Ward v. Clark*, 189 N. Y. App. Div. 344, 179 N. Y. Suppl. 466; *Hood v. Stowe*, 191 N. Y. App. Div. 614, 181 N. Y. Suppl. 734.

*Oklahoma*.—*Lee v. Pesterfield*, 77 Okla. 317, 188 Pac. 674.

*Texas*.—*El Paso Elec. Ry. Co. v. Benjamin* (Tex. Civ. App.), 202 S. W. 996.

*Washington*.—*Clark v. Wilson*, 108 Wash. 127, 183 Pac. 103.

*Wisconsin*.—*Glatz v. Kroeger Bros. Co.*, 168 Wis. 635, 170 N. W. 934.

25. *Glatz v. Kroeger Bros. Co.*, 168 Wis. 635, 170 N. W. 934.

26. *Oberholtzer v. Hubbell* (Cal. App.), 171 Pac. 436; *Carbaugh v. White Bus Line* (Cal. App.), 195 Pac. 1066.

27. *Kiuney v. King* (Cal. App.), 190 Pac. 834.

a crossing, whether given by law or established by custom, has no proper application, except where the travelers or vehicles on the intersecting streets approach the crossing so nearly at the same time and at such rates of speed that, if both proceed, each without regard to the other, a collision or interference between them is reasonably to be apprehended. In such case it is the right of the one having the precedence to continue his course, and it is the duty of the other to yield him the right of way.<sup>28</sup> But if a traveler, not having such right of precedence, comes to the crossing and finds no one approaching it upon the other street within such distance as reasonably to indicate danger of interference or collision, he is under no obligation to stop or to wait, but may proceed to use such crossing as a matter of right.<sup>29</sup> It is easily deduced from the above rules, that it is frequently a question for the jury as to which party has the right of way.<sup>30</sup>

### Sec. 263. Turning or backing machine.

The driver of an automobile may be charged with negligence if he, without warning to a vehicle approaching from the rear, turns or backs his machine so that the rear vehicle is unable to stop or avoid a collision.<sup>31</sup> It may be regarded as negligent for a chauffeur to back his machine upon a city street or public highway without looking backward to see if there is any apparent danger in so doing.<sup>32</sup> If one backs an

28. *Johnson v. Hendrick* (Cal. App.), 187 Pac. 782; *Ward v. Gildea* (Cal. App.), 186 Pac. 612; *Neuman v. Aster* (Conn.), 112 Atl. 350; *Bettilyon v. C. E. Smith & Son* (Md.), 112 Atl. 649; *Schultz v. Nickolson*, 116 Misc. (N. Y.) 114; *Lee v. Pesterfield*, 77 Okla. 317, 188 Pac. 674; *Noot v. Hunter*, 109 Wash. 343, 186 Pac. 851.

29. *Barnes v. Barnett*, 184 Iowa, 936, 169 N. W. 365; *Lee v. Pesterfield*, 77 Okla. 317, 188 Pac. 674; *Virginia Ry. & Power Co. v. Grocery Co.* (Va.), 101 S. E. 878; *Hull v. Crescent Mfg. Co.*, 109 Wash. 129, 186 Pac. 322; *Weber v. Greenbaum* (Pa.), 113 Atl. 413. See also, *Blum v. Gerardi*, 111

Misc. (N. Y.) 617, 182 N. Y. Suppl. 297.

30. *Mead Co. v. Products Mfg. Co.*, 110 Misc. (N. Y.) 648, 180 N. Y. Suppl. 641.

31. *Koenig v. Semran*, 197 Ill. App. 624; *Alyea v. Junge Baking Co.* (Mo. App.), 230 S. W. 341; *Ackerman v. Fifth Ave. Coach Co.*, 175 N. Y. App. Div. 508, 162 N. Y. Suppl. 49; *Lee v. Donnelly* (Vt.), 113 Atl. 542.

32. *Pease v. Gardner*, 113 Me. 264, 93 Atl. 550; *Enstrom v. Neumoegen*, 126 N. Y. Suppl. 660.

The sudden backing of an automobile which theretofore was standing by the curb, whereby a person is injured.

automobile on a street car track without looking for approaching street cars, he is clearly negligent.<sup>33</sup> And it has been said that it is gross negligence for a chauffeur to move an automobile backward suddenly with great speed, without warning that he is about to do so or looking out for the safety of persons near by or of those who may be getting on or off the cars at such place.<sup>34</sup> One intending to turn his machine or back it into a street where other travelers are passing should give a warning of his intention.<sup>35</sup> But, nevertheless, the law does not under all circumstances forbid the backing of motor vehicles either on private driveways<sup>36</sup> or on public streets. Even a statute requiring vehicles to proceed along the right-hand side of the street does not forbid the driver of a vehicle from backing for a short distance so as to bring the car into a position by the curb.<sup>37</sup> The backing of a machine may put greater precautions on the driver, but, if he takes the proper precautions under the circumstance, he is not necessarily liable.<sup>38</sup> Statutes have been enacted in some jurisdictions forbidding the driver of a vehicle to make a turn in any street at a time when the turn would interfere with other vehicles, and requiring the driver under such circumstances to go around the block or to a street sufficiently wide that the turn can be made without backing.<sup>39</sup> And regulations have been prescribed which forbid a turning except at street intersections.<sup>40</sup> But, even if a regulation provides for turns to be

calls for some explanation on the part of its operator. *Grudberg v. Ehret*, 79 Misc. 627, 140 N. Y. Suppl. 379.

33. *Birch v. Athol, etc. Ry. Co.*, 198 Mass. 257, 84 N. E. 310.

34. *Shamp v. Lambert*, 142 Mo. App. 567, 121 S. W. 770.

35. *Wirth v. Burns Bros.*, 229 N. Y. 148, 128 N. E. 111.

36. *Caplan v. Reynolds* (Iowa), 182 N. W. 641.

37. *Sheldon v. James* (Cal.), 163 Pac. 8.

38. *Hahn v. P. Graham & Co.*, 148 La. —, 86 So. 651.

39. *Pyers v. Tiers*, 89 N. J. Law, 520, 99 Atl. 130.

**Question for jury.**—Backing an automobile out into a street without warning to other users of the street, including the plaintiff, who was injured while riding a motorcycle, by coming into collision with another automobile, in an attempt to avoid the automobile backing. The defendant's negligence and the plaintiff's contributory negligence are questions of fact to be decided by a jury. It was not error for the trial court to refuse a motion to nonsuit the plaintiff or direct a verdict for the defendant. *Pyers v. Tiers*, 89 N. J. Law, 520, 99 Atl. 130.

40. *Coonan v. Straka*, 204 Ill. App. 17.

made at street intersections, they must be made with due regard to the rights of other travelers.<sup>41</sup>

In a case in *Massachusetts*, which was an action by one who, while riding a bicycle, was run into and injured by an automobile, at or near the junction of two intersecting streets that ran at right angles to each other, it appeared that the driver of the automobile was turning around so as to go back in an opposite direction upon the same street on which he came. The defendant requested that a ruling be made that the law of the road as contained in the statute did not apply at the place where the accident occurred. The judge refused to make such ruling and did not in any part of his charge put the plaintiff's right to recover upon the law of the road so referred to, but said to the jury: "You are to take all the evidence, all the circumstances, and determine whether he was doing anything he ought not to have done, that an ordinarily reasonable and prudent man would not have done under all the circumstances. He had the right to make that turn. He had a right to use any part of the street that he was coming into, subject only to the rights of other people who might be there. If two vehicles meet in the street, it is the duty of each other of them, as seasonably as they can, to get each on his own right-hand side of the traveled way of that street. But that law does not compel a man always to be on the right side. He can use any part of the street so long as he is not interfering with the rights of other people, and the fact this happened on the right-hand side of the street is only another piece of evidence to be considered by you. You are to consider whether Peterson was endeavoring, in making a turn, to get on the right-hand side near the hydrant, where under certain circumstances he properly belonged." The foregoing was held to be a proper presentation of the law applicable to the evidence.<sup>42</sup>

41. *Ackerman v. Fifth Ave. Coach Co.*, 175 N. Y. App. Div. 508. 162 N. Y. Suppl. 49.

42. *Johnson v. Shaw*, 204 Mass. 165, 90 N. E. 518.



**Sec. 264. Signals from one driver to another.**

In some of the larger cities traffic has become so congested at certain points that mere regulations as to the course of vehicles are not always sufficient to avoid collisions. It has been found expedient to require, not only that the drivers shall keep a certain course in their progress, but also when turning corners or stopping or making some maneuver outside of normal progress that they shall signal their intention to other vehicles in proximity.<sup>43</sup> Thus one about to turn a corner should slacken his speed so that he can make the turn in safety to himself and other travelers on the cross street, and it is a wise requirement that he should signal a following vehicle of his intention in order that no collision result on account of his decreased speed or the change in his course.<sup>44</sup> An ordinance which requires the driver to give a signal with a whip or his hand when turning, so as to indicate the direction in which the turn is to be made, is a reasonable requirement for the regulation of traffic.<sup>45</sup> Also, when a rear vehicle wishes to pass a forward one, it is proper that some signal be given of such intention in order that the forward driver may be prepared to surrender a part of the road.<sup>46</sup> A signal that a forward vehicle is to be brought to a stop should not be given unless the driver actually does so.<sup>47</sup> A co-related duty is also imposed on other travelers to take heed of warning signals and govern their movements accordingly, and

<sup>43.</sup> *Clark v. Weathers*, 178 Iowa, 432, 159 N. W. 585.

<sup>44.</sup> See *Litherbury v. Kimmet* (Cal.), 195 Pac. 660; *Wingert v. Cohill* (Md.), 110 Atl. 857.

**Extending whip.**—One driving a horse and wagon may extend his whip to the sight of the driver of motor vehicle following, as a signal of his intention to turn a corner. *Daly v. Case*, 88 N. J. L. 295.

<sup>45.</sup> *Johnson Oil Refining Co. v. Galesburg, etc. Power Co.*, 200 Ill. App. 392. See also, *Frank C. Weber Co. v. Stevenson Grocery Co.*, 194 Ill. App.

432.

<sup>46.</sup> *Dunkelbeck v. Meyer* (Minn.), 167 N. W. 1034. And see section 256.

<sup>47.</sup> **Negligence of driver.**—The act of the driver of plaintiff's automobile, who while driving twenty-five feet from the right-hand curb in violation of a traffic ordinance, twice gave a stop signal but stopped only after the second one, constitutes such contributory negligence as precludes a recovery for damages by defendant's automobile running into the rear of plaintiff's car. *Russell v. Kemp*, 95 Misc. (N. Y.) 582, 159 N. Y. Suppl. 865.

negligence may be charged against them in case of their failure.<sup>48</sup>

### Sec. 265. Obedience to directions of traffic officer.

A municipal ordinance which requires that the drivers of vehicles shall at all times obey the orders of police officers, cannot be sustained. Such a regulation would put the citizen in the arbitrary power of the officer regardless of the circumstances of the case, and is beyond the power of a municipality.<sup>49</sup>

### Sec. 266. Driving on walk or place reserved for pedestrians.

When it is shown that the operator of a motor vehicle drove the machine on a sidewalk or other place reserved for the use of foot travelers and there inflicted injury to such a traveler, it is incumbent on the driver to show that his machine intruded without his negligence.<sup>50</sup> This question is further discussed in the chapter particularly relating to injuries to pedestrians.<sup>51</sup>

### Sec. 267. Effect of violation of law of road — as evidence of negligence.

The general rule with regard to the evidentiary value of proof of a violation of the law of the road is that, the viola-

48. *Paulsen v. King*, 92 N. J. L. 99, 104 Atl. 95. See also, *Clark v. Weathers*, 178 Iowa, 97, 159 N. W. 585.

49. *City of St. Louis v. Allen*, 275 Mo. 501, 204 S. W. 1083. See also, *North State Lumber Co. v. Charleston* (S. Car.), 105 S. E. 406.

50. *Brown v. Des Moines Steam Bottling Works*, 174 Iowa, 715, 156 N. W. 829, 1 A. L. R. 835; *McGettigan v. Quaker City Automobile Co.*, 48 Pa. Super. Ct. 602. "The general rule is that where a collision occurs between a vehicle on the wrong side of the road, or at a place where the vehicle has no right to be, with a person rightfully occupying the place, there is a presumption that the collision was caused by the negligence of the person who

was in the wrong. This however, of course, is open to explanation. The fact, however, remains, that if the defendant left the public traveled highway and came upon the sidewalk where people were congregated, and, in so doing, collided with one rightfully upon the walk, he is *prima facie* guilty of negligence, and is liable for the injury, unless his act in so doing is excused by reason of the intervention of some independent agency, over which he had no control, which operating upon his movement, forced him, without fault on his part, into the position as hereinbefore explained." *Brown v. Des Moines Steam Bottling Works*, 174 Iowa, 715, 156 N. W. 829.

51. Sections 429-431.

tion is not negligence *per se*, but that it is merely *prima facie* evidence of negligence, and the issue of negligence should, therefore, be generally decided by the jury and not be disposed of by the judge as a matter of law.<sup>52</sup> Or, to state the

**52. Alabama.**—See *McCray v. Sharpe*, 188 Ala. 375, 66 So. 441; *Morrison v. Clark*, 196 Ala. 670, 72 So. 305.

**Arkansas.**—*Temple v. Walker*, 127 Ark. 279, 192 S. W. 200.

**California.**—*Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319. See also, *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90; *Mathes v. Aggeler & Musser Seed Co.*, 179 Cal. 697, 178 Pac. 713.

**Connecticut.**—*Irwin v. Judge*, 81 Conn. 492, 71 Atl. 572.

**Delaware.**—*Grier v. Samuel*, 4 Del. 74, 85 Atl. 759.

**Georgia.**—*McGee v. Young*, 132 Ga. 606, 64 S. E. 689.

**Illinois.**—*Frank C. Weber Co. v. Stevenson Grocery Co.*, 194 Ill. App. 432; *Culver v. Harris*, 211 Ill. App. 474.

**Indiana.**—*Conder v. Griffith*, 61 Ind. App. 218, 111 N. E. 816.

**Iowa.**—*Hubbard v. Bartholomew*, 163 Iowa. 58, 140 N. W. 13; *Herdman v. Zwart*, 167 Iowa, 500, 149 N. W. 631; *Carpenter v. Campbell Automobile Co.*, 159 Iowa, 52, 140 N. W. 225.

**Kansas.**—*Giles v. Ternes*, 93 Kan. 140, 143 Pac. 491.

**Maine.**—*Palmer v. Barker*, 11 Me. 338; *Neal v. Rendall*, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 668; *Bragdon v. Kellogg*, 118 Me. 42, 105 Atl. 433.

**Massachusetts.**—*Parker v. Adams*, 12 Metc. 416; *Spofford v. Harlow*, 3 Allen, 176; *Steele v. Burkhardt*, 104 Mass. 59; *Perlstein v. American Exp. Co.*, 177 Mass. 530, 59 N. E. 194, 52 L. R. A. 959.

**Michigan.**—*Buxton v. Ainsworth*, 138 Mich. 532, 101 N. W. 817, 818, 11 Det. Leg. N. 684, 5 Ann. Cas. 177.

**Minnesota.**—See *Day v. Duluth St. R. Co.*, 121 Minn. 445, 141 N. W. 795.

**Montana.**—*Savage v. Boyce*, 53 Mont. 470, 164 Pac. 887.

**Nebraska.**—*Rule v. Claar Transfer & Storage Co.*, 102 Neb. 4, 165 N. W. 863.

**New Hampshire.**—*Brooks v. Hart*, 14 N. H. 307; *Taylor v. Thomas*, 77 N. H. 410, 92 Atl. 740.

**New Jersey.**—*Kolankiewiz v. Burke*, 91 N. J. L. 567, 103 Atl. 249.

**New York.**—*Burdick v. Worrall*, 4 Barb. 596.

**North Carolina.**—“The statute in force at the time of the injury complained of . . . required the defendant to turn to the right when he met the plaintiff's intestate on the road, and if he failed to do so he was guilty of a breach of a statutory duty, which is negligence.” *Goodrich v. Matthews*, 177 N. Car. 198, 98 S. E. 529.

**Oklahoma.**—*Tulsa Ice Co. v. Wilkes*, 54 Okla. 519, 153 Pac. 1169.

**Rhode Island.**—*Angell v. Lewis*, 20 R. I. 391, 39 Atl. 521.

**South Carolina.**—*Sims v. Eleazer*, 106 S. E. 854.

**Washington.**—*Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876; *Hartley v. Lasater*, 96 Wash. 407, 165 Pac. 106; *Peterson v. Pallis*, 103 Wash. 180, 173 Pac. 1021. See also *Mickelson v. Fisher*, 81 Wash. 423, 142 Pac. 1160; *Moy Quon v. M. Furuya Co.*, 81 Wash. 526, 143 Pac. 99; *Hiscoek v. Phinney*, 81 Wash. 117, 142 Pac. 461; *Sheffield v. Union Oil Co.*, 82 Wash. 386, 144 Pac. 529; *Lloyd v. Calhoun*, 82 Wash. 35, 143 Pac. 458; *Johnson v. Heitman*, 88 Wash. 595, 153 Pac. 331; *Walters v. City of Seattle*, 97 Wash. 657, 167 Pac. 124.

**Canada.**—*Osborne v. Landis*, 34 W. L. R. 118.

rule in other language, in case of a collision between vehicles, a presumption of negligence arises against the driver who was on the wrong side of the road at the time of the collision.<sup>53</sup> Decisions can be found, however, which hold that a violation

**Evidence of negligence.**—In Pennsylvania, it has been held that the violation of a city ordinance requiring a vehicle to travel on the right-hand side of the street could be considered with other evidence, but that in itself it was not sufficient evidence of negligence of one going on the other side. *Foot v. American Produce Co.*, 195 Pa. St. 190, 45 Atl. 934, 49 L. R. A. 764.

**Children.**—The effect of a violation of an ordinance is the same in the case of a child as in the case of an adult. *Kolankiewiz v. Burke*, 91 N. J. L. 567, 103 Atl. 249.

**Instructions as to assuming risk from violation.**—In a case in *Georgia*, a charge was held proper, which, in part was "that the rule of the road, as established by the laws of *Georgia*, requires travelers with vehicles, whether carts, wagons, automobiles, or bicycles, when meeting, to each turn to the right, and that it was the duty of the plaintiff to know and observe the rule of the road. Persons using the public streets, as conscious human agents, are bound to exercise their faculties of seeing and hearing, and are further bound to exercise ordinary care to avoid the consequences of the negligence of others who are using the public streets, by either remaining away or getting out of the way of probable or known danger after they discover it, if in the exercise of ordinary care and prudence they should discover it. If a person voluntarily assumes a risk or does a thing in a dangerous way which can be safely done, he assumes the risk of what he does, and if an accident occurs and injury results to him in consequence thereof, he cannot recover; and in this connection I charge you that if you

find from the evidence that the plaintiff's injuries were occasioned, wholly or in part, by his violation of the rule of the road, or in his voluntarily assuming a risk or in doing a thing in a dangerous way which he could have done in another way in safety, he cannot recover." *McGee v. Young*, 132 Ga. 606, 64 S. E. 689.

**53. California.**—*Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90; *Harris v. Johnson*, 174 Cal. 55, 161 Pac. 1155; *Hagenah v. Bidwell* (Cal. App.), 189 Pac. 799.

**Delaware.**—*Grier v. Samuel*, 4 Boyce (Del.), 74, 85 Atl. 759.

**Georgia.**—*McGee v. Young*, 132 Ga. 606, 64 S. E. 689.

**Iowa.**—*Herdman v. Zwart*, 167 Iowa, 500, 149 N. W. 631. See also, *Baker v. Zimmerman*, 179 Iowa, 272, 161 N. W. 479.

**Massachusetts.**—*Perlstein v. American Exp. Co.*, 177 Mass. 530, 59 N. E. 194, 52 L. R. A. 959.

**Michigan.**—*Daniels v. Clegg*, 38 Mich. 32; *Buxton v. Ainsworth*, 138 Mich. 532, 101 N. W. 817, 11 Det. Leg. N. 684, 5 Ann. Cas. 177; *Black v. Parke, Davis & Co.* (Mich.), 178 N. W. 700.

**Mississippi.**—*Flynt v. Fondern* (Miss.), 84 So. 188.

**Missouri.**—*Columbia Taxicab Co. v. Roemmich* (Mo. App.), 208 S. W. 859.

**Montana.**—*Savage v. Boyce*, 53 Mont. 470, 164 Pac. 887.

**New Hampshire.**—*Brooks v. Hart*, 14 N. H. 307.

**New York.**—*Clarke v. Woop*, 159 App. Div. 437, 144 N. Y. Suppl. 595, holding that a boy riding a bicycle on the wrong side of the road was not free from contributory negligence where there was nothing to obstruct

of statute or municipal ordinance prescribing a rule of traffic, constitute negligence *per se*.<sup>54</sup> But, generally, as the violation is only presumptive evidence of negligence, the guilty party is given an opportunity to rebut the presumption,<sup>55</sup> and he may rebut the presumption by showing some good excuse for traveling in violation of the law of the road.<sup>56</sup> But, if no excuse is presented for the apparent violation, the evidence of wrongful conduct is sufficient for a finding of negligence. In fact, an unexplained or unexcused violation may be deemed conclusive on the issue of law, and the court may in some cases dispose of the question as a matter of law.<sup>57</sup>

### Sec. 268. Effect of violation of law of road — imposition of higher degree of care.

When the driver of a vehicle is not taking the course prescribed by the law of the road, the danger of injury to others

his view of an approaching automobile or to prevent him from obeying the law of the road.

*Pennsylvania*.—*Presser v. Dougherty*, 239 Pa. 312, 86 Atl. 854, holding, in the case of a bicyclist who was injured while riding upon the wrong side of the street, a non-suit was properly granted where it did not appear that the automobile was being driven at a dangerous or careless rate of speed.

*Rhode Island*.—*Angell v. Lewis*, 20 R. I. 391, 39 Atl. 521.

*Utah*.—*Stanton v. Western Macaroni Mfg. Co.*, 174 Pac. 821.

**Ordinances not pleaded.**—In an action for negligence consisting of reckless and careless driving in a public street, municipal ordinances regulating the speed of vehicles and the manner of turning from one street into another and proof of their violation, although not pleaded, are admissible not as conclusive evidence of negligence but as some evidence thereof. *Meyers v. Barrett*, 167 N. Y. App. Div. 170, 152 N. Y. Suppl. 921.

Negligence is indicated by the fact

that a person was driving an automobile upon the wrong side of the road. *Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404, 35 L. R. A. (N. S.) 701.

**54.** *Kinney v. King* (Cal. App.), 190 Pac. 834; *Hedges v. Mitchell* (Colo.), 194 Pac. 620; *Cupples Mercantile Co.*, 189 Pac. 48, 32 Idaho, 774; *Elvidge v. Stronge & Warner Co.* (Minn.), 181 N. W. 346; *Borak v. Mosler Safe Co. (Mo.)*, 231 S. W. 623; *Zucht v. Brooks* (Tex. Civ. App.), 216 S. W. 684; *John v. Pierce* (Wis.), 178 N. W. 297; *Foster v. Bauer* (Wis.), 180 N. W. 817. And see section 297.

**55.** *Lawrence v. Goodwill* (Cal. App.), 186 Pac. 781; *Foster v. Curtis*, 213 Mass. 79, 99 N. E. 961, Ann. Cas. 1913 E. 1116; *Buxton v. Ainsworth*, 138 Mich. 532, 101 N. W. 817, 818, 11 Det. Leg. N. 684, 5 Ann. Cas. 146; *Piper v. Adams Exp. Co. (Pa.)*, 113 Atl. 562.

**56.** *Cook v. Miller*, 175 Cal. 497, 166 Pac. 316; *Potter v. Glassell*, 146 La. 687, 83 So. 898. And see sections 270-274.

**57.** *Martin v. Carruthers* (Colo.), 193 Pac. 105; *Vickery v. Armstead*

is thereby increased. Other travelers assume that the driver of a motor vehicle will obey the law of the road, and they may rely on such assumption, until a contrary intention is indicated.<sup>58</sup> Under the general rule that the degree of care to be exercised is commensurate with the dangers to be anticipated,<sup>59</sup> it may be said that one traveling on the wrong side of the road is required to exercise a higher degree of care than if he were following the proper course.<sup>60</sup>

**Sec. 269. Effect of violation of law of road — proximate cause.**

The doctrine of proximate cause runs through the entire law of negligence and applies whether the wrongful act in question consisted of the violation of a law of the road founded on custom, or of the infringement of a municipal ordinance or statute regulating the use of the highways. That is, in the case of a violation of the law of the road by a traveler, he is not liable for injuries sustained by another traveler, unless the injuries are such as proximately result from the violation.<sup>61</sup> And, when the defendant sets up the

(Iowa), 180 N. W. 893; *Marsh v. Burnham* (Mich.), 179 N. W. 300.

58. See sections 352, 409, 473, 512.

59. Section 278.

60. *New York Transp. Co. v. Gar-side*, 157 Fed 521, 85 C. C. A. 285; *Fahrney v. O'Donnell*, 107 Ill. App. 608; *Columbia Taxicab Co. v. Roem-mich* (Mo. App.), 208 S. W. 859; *Greenbaum v. Costa* (Pa.), 113 Atl. 79; *Angell v. Lewis*, 20 R. I. 391, 39 Atl. 521; *Moy Quon v. M. Furuya Co.*, 89 Wash. 526, 143 Pac. 99; *Plickwell v. Wilson*, 5 Carr. & Payne (Eng.) 103; *Osborne v. Landis*, 34 W. L. R. (Canada) 118.

And see section 280.

**Where a chauffeur in leaving a garage** is compelled, in order to proceed in the direction he desires to go, to cross on the wrong side of the street, and there is an obstruction to his view of vehicles on such side, it is his duty to

proceed with care to the point where he can see beyond the obstruction and learn whether it is safe for him to proceed. *Mason-Seaman Transp. Co. v. Wineburgh*, 130 N. Y. Suppl. 178.

61. *Morrison v. Clark*, 196 Ala. 670, 72 So. 305; *Needy v. Littlejohn*, 137 Iowa, 704, 115 N. W. 483; *Herdman v. Zwart*, 167 Iowa, 500, 149 N. W. 631; *Buxton v. Ainsworth*, 138 Mich. 532, 101 N. W. 817, 11 Det. Leg. N. 684, 5 Ann. Cas. 146; *Horowitz v. Gottwalt* (N. J.), 102 Atl. 930; *Baker v. Fogg & Hires Co.* (N. J.), 112 Atl. 406; *Peterson v. Pallis*, 103 Wash. 180, 173 Pac. 1021. "But the driver of a vehicle proceeding on the 'wrong side' of the highway is not liable for injury sustained by another in collision with his conveyance, unless the negligent act of driving on the wrong side was the proximate cause of the injury. There must be casual connection be-

violation of the law of the road by the plaintiff as a matter of contributory negligence, to constitute a bar to the plaintiff's action, it must appear that the violation was a contributing cause of the injury sustained by the plaintiff.<sup>62</sup> Contributory negligence is a defense to an action based on a violation of traffic regulations.<sup>63</sup>

### Sec. 270. Excuse for violation of law of road — in general.

The violation of the law of the road is not conclusive on the question of the violator's negligence; it is only *prima facie* evidence of his negligence,<sup>64</sup> and he is permitted to show circumstances excusing his conduct and rebutting the presumption of negligence.<sup>65</sup> He may show the surrounding circum-

stances between the unlawful or wrongful act of driving on the left side, and the resulting injury." *Morrison v. Clark*, 196 Ala. 670, 72 So. 305.

**Liability for turning out.**—Under the provision of the Iowa statute, requiring a person in a vehicle to give to another vehicle one-half of the road on meeting, liability on failing to do so arises only when such failure is the proximate cause of resulting injury. *Needy v. Littlejohn*, 137 Iowa, 704, 115 N. W. 483.

**62.** *Feehan v. Slater*, 89 Conn. 697, 96 Atl. 159; *Walters v. Davis* (Mass.), 129 N. E. 443; *Boulton v. City of Seattle* (Wash.), 195 Pac. 11.

**63.** *Weihe v. Rathjen Mercantile Co.*, 34 Cal. App. 302, 167 Pac. 287. And see section 301.

**64.** Section 267.

**65.** *Alabama*.—*Morrison v. Clark*, 196 Ala. 670, 72 So. 305.

*California*.—*Langford v. San Diego Elec. Ry. Co.*, 174 Cal. 729, 164 Pac. 398; *Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319. "But it is not to be understood that we intend to hold that the fact that the driver of a motor vehicle may violate the statute by driving on the wrong side of the road or street is itself necessarily an act of negligence in all cases. He might for

a sufficient reason be compelled to drive on the left of the center of the road or street, and do so in such manner as to leave to approaching vehicles, pedestrians, or animals ample opportunity to pass with perfect safety to themselves, in which case, if damage occurred by collision with his vehicle, the question as to whose negligence was directly responsible therefor would depend for its solution upon the other circumstances attending the accident. In brief, and in other words, the fact that he was driving over the highway on the left of the center of the roadway might, where injury to another had resulted therefrom, constitute *prima facie* evidence of negligence, but it would amount to no more than that, and its evidentiary effect might properly be overcome or dispelled by other evidence." *Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319.

*Indiana*.—*Conder v. Griffith*, 61 Ind. App. 218, 111 N. E. 816; *Borg v. Larson*, 60 Ind. App. 514, 111 N. E. 201. "It may be said that facts which will excuse such technical violation must result from causes or things beyond the control of the person charged with the violation. In such instances there may or may not be actionable negligence, and it is a question of fact, to

stances indicating a necessity for turning to the left side of the highway.<sup>66</sup> A deviation from the rule is sometimes necessary in the crowded streets of a metropolis,<sup>67</sup> though it may be argued that a congestion of traffic is a reason for adhering to the law of the road rather than an excuse for its violation.<sup>68</sup> And, in order to allow street railway passengers to alight, it is said that the driver of a motor vehicle may use the left side of a street.<sup>69</sup> But the fact that, on account of the darkness, the driver was unable to see the vehicle he was approaching does not excuse his conduct in driving on the wrong side; on the contrary, the darkness is a circumstance in aggravation, rather than in mitigation, of an omission to use the proper side of the highway.<sup>70</sup> Ignorance of the law is no ex-

be determined by the court or jury trying the case, from all the facts and circumstances shown by the evidence: First, whether there was a sufficient and reasonable excuse for such violation; and, second, whether in doing or omitting the act complained of the defendant was, in fact, guilty of actionable negligence." *Conder v. Griffith*, 61 Ind. App. 218, 111 N. E. 816.

*Iowa*.—*Riepe v. Elting*, 89 Iowa. 82, 56 N. W. 285, 26 L. R. A. 769; *Carpenter v. Campbell Automobile Co.*, 159 Iowa, 52, 140 N. W. 225; *Herdman v. Zwart*, 167 Iowa, 500, 149 N. W. 631; *Giese v. Kimball*, 184 Iowa, 1283, 169 N. W. 639.

*Massachusetts*.—*Foster v. Curtis*, 213 Mass. 79, 99 N. E. 961, Ann. Cas. 1913 E. 1116.

*Michigan*.—*Eberle Brewing Co. v. Briscoe Motor Co.*, 94 Mich. 140, 160 N. W. 440.

*New Jersey*.—*Winch v. Johnson*, 92 N. J. L. 219, 104 Atl. 81.

*New York*.—*Clark v. Woop*, 159 App. Div. 437, 144 N. Y. Suppl. 595.

*Oklahoma*.—*Tulsa Ice Co. v. Wilkes*, 54 Okla. 519, 153 Pac. 1169.

*Pennsylvania*.—*Wright v. Mitchell*, 252 Pa. St. 325, 97 Atl. 478.

*Washington*.—*Hartley v. Lasater*, 96 Wash. 407, 165 Pac. 106; *Kane v.*

*Nakmoto*, 194 Pac. 381.

*Wisconsin*.—*Mahar v. Lochen*, 166 Wis. 152, 164 N. W. 847.

*England*.—*Turley v. Thomas*, 8 C. & P. 103.

**Injured party on wrong side of road.**  
—Under the *Rhode Island General Laws 1896*, chapters 74, 51, providing that a person traveling with a vehicle on a highway shall seasonably turn to the right of the center of the traveled road on meeting any other person so traveling, a person injured by collision with a vehicle while riding a bicycle on the left side of the road must show a sufficient excuse for being there, to attribute negligence to the driver of the vehicle. *Puick v. Thurston*, 25 R. I. 36, 54 Atl. 600.

66. *Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319; *Carpenter v. Campbell Automobile Co.*, 159 Iowa, 52, 140 N. W. 225; *Lee v. Foley*, 113 Ia. 663, 37 So. 594; *Burlie v. Stephens* (Wash.), 193 Pac. 684.

67. *Wayde v. Carr*, 2 Dow. & Ry. (Eng.) 255.

68. *Stubbs v. Molberget*, 108 Wash. 49, 182 Pac. 936, 6 A. L. R. 318.

69. *Banhofer v. Crawford*, 16 Cal. App. 676, 117 Pac. 931.

70. *Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319.



cuse.<sup>71</sup> And a local custom in violation of positive law cannot be shown as an excuse.<sup>72</sup> If for any reason one travels on the wrong side of the highway, he should exercise a higher degree of care than if he were traveling in accordance with the law of the road.<sup>73</sup> If one is so near the right-hand side of the road that it is impracticable for him to turn out to permit an approaching vehicle to pass, he is justified in holding the position, as the statute does not justify a turn to the left.<sup>74</sup>

**Sec. 271. Excuse for violation of law of road — avoiding obstacle in road.**

If an obstruction exists on the right-hand side of a highway, the driver of a motor vehicle may be justified in passing to the other side and in driving along that side until he is past that obstacle.<sup>75</sup> Under such circumstances he has a right to be on the left side temporarily; and, if he exercises the proper degree of care while there, he is not liable for injuries arising from a collision with another traveler.<sup>76</sup> But, if the obstruction is merely temporary, it may be the duty of the driver to wait for its removal and not to pass upon the wrong side of the highway, for the circumstance that it is inconvenient to obey the law of the road does not warrant a violation.<sup>77</sup> For example, one intending to turn into a cross street should not attempt to go on the left side of the street, merely because the proper course was obstructed by street cars and persons standing around them.<sup>78</sup> When the road is impassable, one may properly drive upon the street car tracks; in fact, he may sometime exercise this privilege when another course could be taken without serious difficulty.<sup>79</sup>

71. *Rosenau v. Peterson* (Minn.), 97 Atl. 478.  
179 N. W. 647.

72. *Casey v. Boyer* (Pa.), 113 Atl. 364.

73. Section 268.

74. *Cupples Mercantile Co. v. Bow*, 32 Idaho, 774, 189 Pac. 48.

75. *Strouse v. Whittlesey*, 41 Conn. 559; *Conder v. Griffith*, 61 Ind. App. 218, 111 N. E. 816; *Clark v. Van Vleck*, 135 Iowa, 194, 112 N. W. 648; *Wright v. Mitchell*, 252 Pa. St. 325,

97 Atl. 478.  
76. *Clark v. Van Vleck*, 135 Iowa, 194, 112 N. W. 648.

77. *Link v. Skeeles*, 207 Ill. App. 48; *City of Oshkosh v. Campbell*, 151 Wis. 567, 139 N. W. 316.

78. *City of Oshkosh v. Campbell*, 151 Wis. 567, 139 N. W. 316.

79. *Langford v. San Diego Elec. Ry. Co.*, 174 Cal. 729, 164 Pac. 398; and see sections 600-602.

**Sec. 272. Excuse for violation of law of road — turning to avoid negligence driving of another.**

The driver of a vehicle may be justified in leaving the right-hand side of the road when he is in danger of a collision with another vehicle which is violating the law of the road.<sup>80</sup> A better practice in such a case, however, would be for the driver to obviate the danger by stopping the machine, for it may happen that the offending vehicle will attempt to reach the proper side of the road at the same time, and consequently at the time of the collision, the driver would be on the wrong side of the highway and the offending machine would be on the right side.<sup>81</sup> When a defendant claims that he went to the left side of the road to avoid a threatened collision with plaintiff who, he says, was traveling along the wrong side, it is difficult to fix the blame for the accident, and the questions of negligence and contributory negligence are generally for the jury.<sup>82</sup> It is held that where the primary cause of the collision was the violation of the law of the road by the defendant running on the wrong side thereof, he cannot evade the consequences of his violation by setting up that the plaintiff, who was originally on the proper side, swerved in the emergency to the wrong side in an attempt to avoid the collision.<sup>83</sup>

80. *Temple v. Walker*, 127 Ark. 279, 192 S. W. 200; *Hammer v. Connecticut Co. (Conn.)*, 108 Atl. 534; *Potter v. Glassell*, 146 La. 687, 83 So. 898; *Aberle Brewing Co. v. Briscoe Motor Co.*, 194 Mich. 140, 160 N. W. 440; *Bragdon v. Kellogg*, 118 Me. 42, 105 Atl. 433; *Clarke v. Woop*, 159 App. Div. (N. Y.) 437, 144 N. Y. Suppl. 595; *Cooke v. Jerome*, 172 N. C. 626, 90 S. E. 767; *Lloyd v. Calloun*, 78 Wash. 438, 139 Pac. 231; *Shelly v. Norman (Wash.)*, 195 Pac. 243. See also, *Lloyd v. Calloun*, 82 Wash. 35, 143 Pac. 458.

81. "We can conceive of no condition

that would justify a driver of a motor vehicle when meeting any other vehicle, motor or otherwise, in turning across the path of the approaching vehicle if that vehicle is approaching on its proper side. If in such circumstances it should be impracticable to turn to the right, then it is his plain duty to stop." *Edwards v. Yarbrough (Mo. App.)*, 201 S. W. 972.

82. *Cooke v. Jerome*, 172 N. Car. 626, 90 S. E. 767.

83. *Bragdon v. Kellogg*, 118 Me. 42, 105 Atl. 433; *Bain v. Fuller*, 29 D. L. R. (Canada) 113.

**Sec. 273. Excuse for violation of law of road — insufficient time to obey rule.**

When one is driving along a highway in a proper manner as another vehicle suddenly approaches, he may be excused from a failure to turn to the right and to avoid a collision, on theory, that, with an exercise of due diligence, he did not have sufficient time to turn out far enough to avoid the other vehicle. The mere fact that one is pursuing a proper course along the highway does not permit him to run down everything in his path, and such a person may be liable for his conduct, as the jury may conclude that the injured person did not have sufficient time to turn aside and permit a passage.<sup>84</sup> Thus, it may happen that, when a rapidly moving machine comes up behind a slowed conveyance, the driver of such conveyance may be free from fault though he did not turn toward the right so as to permit the faster vehicle to pass. His failure to obey the law of the road in that respect would be excused if the driver of the rear vehicle did not afford him reasonable time in which to make the turn.<sup>85</sup>

**Sec. 274. Excuse for violation of law of road — skidding to wrong side of road.**

The failure of the driver of a motor vehicle to keep to the right side of the highway is excused where, without fault on his part, the machine skids across the center line of the road.<sup>86</sup>

**Sec. 275. Negligence in adhering to law of road.**

The fundamental duty of the driver of a motor vehicle is to exercise reasonable care under all circumstances. If under the circumstances of a particular case, an ordinarily careful driver would deviate from the law of the road, the jury may find that an adherence to the rule would constitute negligence.<sup>87</sup> This principle has been denied, however, where the

<sup>84.</sup> *Hoover v. Reichard*, 63 Pa. Super. Ct. 517.

<sup>85.</sup> *Pens v. Kreitzer*, 98 Kans. 759, 160 Pac. 200.

<sup>86.</sup> *Chase v. Tingdale Bros.*, 127 Minn. 401, 149 N. W. 654.

<sup>87.</sup> See the following cases: *Allen v. Mackey*, 1 Sprague (U. S.) 219;

law of the road was a matter of statute law.<sup>88</sup> One cannot get his machine on the right-hand side of the road and then proceed regardless of other travelers and rely on the law of the road as defense to injuries thereby occasioned to others.<sup>89</sup>

*Lawrence v. Goodwill* (Cal. App.), 186 Pac. 781; *Herdman v. Zwart*, 167 Iowa, 500, 149 N. W. 631; *Johnson v. Small*, 5 B. Mon. (Ky.) 25; *Smith v. Gardner*, 11 Gray (Mass.) 418; *Clarke v. Woop*, 159 N. Y. App. Div. 437, 144 N. Y. Suppl. 595; *Ellison v. Atlantic Refining Co.*, 62 Pa. Super. Ct. 370; *O'Malley v. Dorn*, 7 Wis. 236; *Turley v. Thomas*, 8 C. & P. (Eng.) 103; *The Commerce*, 3 W. Rob. (Eng.) 295.

88. *Cupples Mercantile Co. v. Bow*, 32 Idaho, 774, 189 Pac. 48.

89. *Hoover v. Reichard*, 63 Pa. Super. Ct. 517. "Neither the ordinance nor the statute purports to lay down a hard and fast rule of the road, to be followed under all circum-

stances. Circumstances may confront a person, and often do, when due care would require him to avoid or relinquish the side of the street to which he was otherwise entitled. In such case, he would be required to exercise such due care, and, if he failed to do so, he would be liable for negligence, even though he had planted himself on the side of the street to which he would ordinarily be entitled. In all cases, therefore, the ultimate question is: What was required by due care, under all the circumstances confronting the actor at the time?" *Herdman v. Zwart*, 167 Iowa, 500, 149 N. W. 631.

## CHAPTER XV.

### NEGLIGENCE IN OPERATION OF MOTOR VEHICLES, IN GENERAL.

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317. Speed of machine—regulation prohibiting “unreasonable” speed.  
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319. Speed of machine—military or mail vehicle.  
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321. Speed of machine—violation of speed regulations as negligence *per se*.  
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**Sec. 276. Analogy to law governing horse-drawn vehicles.**

The general rules governing the movement of automobiles, except as modified by statute, are said to be the same as those which, as a result of long usage, have been formulated for the government of simple vehicles such as wagons.<sup>1</sup> This is true to the extent that it is the duty to exercise reasonable care under the circumstances to avoid injury to other travelers.<sup>2</sup> The same rule can be stated with reference to the care to be observed by the drivers of horses or wagons. The circumstance that new elements of locomotion such as electricity, steam, etc., have been added to vehicles using the public highways, has not wrought any legal change in the general principles of the law of the use of highways.<sup>3</sup> But "ordinary" or "reasonable" care, when analyzed, imports that degree of care which an ordinarily prudent man would exercise under the circumstances, and is commensurate with the danger of the situation.<sup>4</sup> "Commensurate" care under some circumstances implies more caution than under other circumstances. In determining whether the driver of an automobile has exercised proper care, the size and speed of the machine, its capability of frightening horses or causing other injuries, are to be considered. Considering the question from this point of view, it is clear that greater precautions and diligence are required of an automobile than is to be expected from the driver of a horse drawn conveyance.<sup>5</sup>

1. *Bona v. S. R. Thomas Auto Co.*, 137 Ark. 217, 208 S. W. 306. v. Brown, 89 N. J. Law, 314, 98 Atl. 262.

2. Section 277.

4. Section 278.

3. *Hood & Wheeler Furniture Co. v. Royal*, 200 Ala. 607, 76 So. 965; *Pool* 5. *White v. Rukes*, 56 Okla. 476, 153 Pac. 1184. "Because of the appear

### Sec. 277. Degree of care required of automobilists—in general.

An automobilist is required to exercise "reasonable" or "ordinary" care to avoid injury to other persons lawfully using the highway.<sup>6</sup> This means the care which an ordinarily

ance and attributes of a motor driven vehicle there is manifest difference in the situation presented when one meets or passes a team and when two teams meet or pass. The prudence demanded of the automobile driver is by no means the same as if he, too, were driving a team. He must order his conduct in the light of the conditions created by the presence and operation of his peculiar kind of conveyance, and in doing so must observe every precaution which would occur to a reasonably prudent man occupying his place." *Arrington v. Horner*, 88 Kans. 817, 129 Pac. 1159. "An automobile is not an inherently dangerous vehicle, but in the hands of a reckless operator—and there are many of them—it becomes exceedingly dangerous; and so, for the protection and safety of pedestrians, as well as other persons using and having the right to use the streets and highways, in ordinary vehicles, it is necessary that a higher degree of care should be exacted from those using motor vehicles than from persons using vehicles propelled by horses. *Weidner v. Otter*, 171 Ky. 167, 168 S. W. 335.

6. *United States*.—*Lane v. Sargent*, 217 Fed. 237. See also *Taxicab Co. v. Parks*, 202 Fed. 909, 121 C. C. A. 267.

*Alabama*.—*Dozier v. Woods*, 190 Ala. 279, 67 So. 283; *White Swan Laundry Co. v. Wehrhan*, 202 Ala. 87, 79 So. 479; *Hood & Wheeler Furniture Co. v. Royal* (Ala. App.), 76 So. 965.

*Arkansas*.—*Minor v. Mapes*, 102 Ark. 351, 144 S. W. 219; *Russ v. Strickland*, 130 Ark. 406, 197 S. W. 709; *Texas Motor Co. v. Buffington*, 134 Ark. 320, 203 S. W. 1013; *Carter*

*v. Brown*, 136 Ark. 23, 206 S. W. 71.  
*California*.—*Bidwell v. Los Angeles, etc. Ry. Co.*, 169 Cal. 780, 148 Pac. 197.

*Delaware*.—*Cecchi v. Lindsay*, 1 Boyce (Del.) 185, 75 Atl. 376; *Grier v. Samuel*, 4 Boyce (Del.) 106, 86 Atl. 209; *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44.

*Georgia*.—*Wodley v. Dooly*, 138 Ga. 275, 75 S. E. 153; *Giles v. Voiles*, 144 Ga. 853, 88 S. E. 207; *Powell v. Berry*, 145 Ga. 696, 89 S. E. 753.

*Illinois*.—*Kerchner v. Davis*, 183 Ill. App. 600; *Miller v. Eversole*, 184 Ill. App. 362; *Petty v. Maddox*, 190 Ill. App. 381; *Brautigan v. Union Overall Laundry & Supply Co.*, 211 Ill. App. 354.

*Indiana*.—*Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. (N. S.) 328, 6 Ann. Cas. 656; *Brinkman v. Pacholke*, 41 Ind. App. 662; 84 N. E. 762; *East v. Amburn*, 47 Ind. App. 530, 94 N. E. 895; *Elgin Dairy Co. v. Sheppard* (Ind. App.), 103 N. E. 433; *Frank Bird Transfer Co. v. Shaw* (Ind. App.), 124 N. E. 776.

*Iowa*.—*Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236; *Wiar v. Wabash R. Co.*, 162 Iowa, 702, 144 N. W. 703; *Herdman v. Zwart*, 167 Iowa, 500, 149 N. W. 631.

*Kansas*.—*Arrington v. Horner*, 88 Kans. 817, 129 Pac. 1159.

*Kentucky*.—*Shinkle v. McCullough*, 116 Ky. 960, 77 S. W. 196; *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335.

*Louisiana*.—*Shields v. Fairchild*, 130 La. 648, 58 So. 497.

*Maryland*.—*Geiselman v. Schmidt*, 106 Md. 580, 68 Atl. 202.



prudent automobilist would exercise under the same circumstances, considering the nature of the machine, the condition of the highway, the amount of traffic, and other surrounding circumstances.<sup>7</sup> In the case of two automobiles or other

*Massachusetts*.—*Massie v. Barker*, 224 Mass. 420, 113 N. E. 199.

*Michigan*.—*Simmons v. Peterson*, 207 Mich. 508, 174 N. W. 536.

*Minnesota*.—*Kling v. Thompson-McDonald Lumber Co.*, 127 Minn. 468, 149 N. W. 947; *Noltmeir v. Rosenberger*, 131 Minn. 369, 155 N. W. 618.

*Missouri*.—*Bongner v. Ziegenheim*, 165 Mo. App. 328, 147 S. W. 182; *Graham v. Sly*, 177 Mo. App. 348, 164 S. W. 136.

*New Hampshire*.—*Gilbert v. Burque*, 72 N. H. 521, 57 Atl. 97.

*New Jersey*.—*Pool v. Brown*, 89 N. J. Law. 314, 98 Atl. 262; *Erwin v. Traud*, 90 N. J. L. 289, 100 Atl. 184.

*New York*.—*Towner v. Brooklyn Heights R. Co.*, 44 App. Div. 628, 60 N. Y. Suppl. 289; *Knight v. Lanier*, 69 App. Div. 454, 74 N. Y. Suppl. 999; *Murphy v. Wait*, 102 App. Div. 121, 92 N. Y. Suppl. 253; *Kalb v. Redwood*, 147 App. Div. 77, 131 N. Y. Suppl. 789; *Caesar v. Fifth Ave. Stage Co.*, 45 Misc. 331, 90 N. Y. Suppl. 359; *Ackerman v. Fifth Ave. Coach Co.*, 175 App. Div. 508, 162 N. Y. Suppl. 49.

*Pennsylvania*.—*Virgilio v. Walker*, 254 Pa. St. 241, 98 Atl. 815.

*Rhode Island*.—*Marsh v. Boyden*, 33 R. I. 519, 82 Atl. 393.

*Utah*.—*McFarlane v. Winters*, 47 Utah. 598, 155 Pac. 437; *Musgrave v. Studebaker Bros. Co. of Utah*, 48 Utah, 410, 160 Pac. 117; *Richards v. Palace Laundry Co.*, 186 Pac. 439.

*Vermont*.—*Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669.

*Washington*.—*Stephenson v. Parton*, 89 Wash. 653, 155 Pac. 147.

*Wisconsin*.—*Weber v. Swallow*, 136 Wis. 46, 116 N. W. 844; *Raymond v. Sauk County*, 167 Wis. 125, 166 N. W. 29.

7. *Alabama*.—*McCray v. Sharpe*, 188 Ala. 375, 66 So. 441; *Reaves v. Maybank*, 193 Ala. 614, 69 So. 137; *White Swan Laundry Co. v. Wehran*, 202 Ala. 87, 79 So. 479; *Hester v. Hall* (Ala. App.), 81 So. 361.

*Arkansas*.—*Carter v. Brown*, 136 Ark. 23, 206 S. W. 71; *Bona v. S. R. Thomas Auto Co.*, 137 Ark. 217, 208 S. W. 306.

*California*.—*Bellinger v. Hughes*, 31 Cal. App. 464, 160 Pac. 838.

*Colorado*.—*Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 Pac. 460, Ann. Cas. 1914 B. 29.

*Connecticut*.—*Brown v. New Haven Taxicab Co.*, 105 Atl. 706.

*Delaware*.—*Trimble v. Philadelphia B. & W. R. Co.*, 4 Boyce (Del.) 519, 89 Atl. 370.

*Georgia*.—*Giles v. Voiles*, 144 Ga. 853, 88 S. E. 207; *O'Dowd v. Newnham*, 13 Ga. App. 220, 80 S. E. 36.

*Illinois*.—*Kessler v. Washburn*, 157 Ill. App. 532.

*Indiana*.—*Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. (N. S.) 238, 6 Ann. Cas. 656; *Brinkman v. Pacholke*, 41 Ind. App. 662, 84 N. E. 762; *Ft. Wayne & N. I. Tr. Co. v. Schoeff*, 56 Ind. App. 540, 105 N. E. 924; *Central Indiana Ry. Co. v. Wishard* (Ind. App.), 104 N. E. 593; *Martin v. Lilley*, 188 Ind. 139, 121 N. E. 443.

*Iowa*.—*Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236; *Scott v. O'Leary*, 157 Iowa, 222, 138 N. W. 512; *Kendall v. City of Des Moines*, 183 Iowa, 866, 167 N. W. 864. "One may travel in a motor vehicle on the streets; but, in doing so, the care exacted necessarily depends somewhat on the rate of speed, size and appearance, manner of movement, noise, and the like of

vehicles traveling on the same road or approaching the same highway intersection, it is the duty of each to exercise reasonable precautions to avoid a collision.<sup>8</sup> The law does not denounce motor vehicles as such on the public ways. For so long as they are constructed and propelled in a manner consistent with the use of the highways, and are calculated to subserve the public as a beneficial means of transportation with reasonable safety to travelers by ordinary modes, they have equal rights with other vehicles in common use to occupy the streets and roads.<sup>9</sup> While an automobile is not an instrument of such a character as to render the owner or driver liable for an injury caused in consequence of its operation,<sup>10</sup> its use, nevertheless, should be accompanied with that degree

such vehicle, as well as the means of locomotion of others on the highway." *Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236.

*Kansas*.—*Super v. Modell Twp.*, 88 Kans. 698, 129 Pac. 1162; *Arrington v. Horner*, 88 Kans. 817, 129 Pac. 1159.

*Kentucky*.—*Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335.

*Maryland*.—*Fletcher v. Dixon*, 107 Md. 420, 68 Atl. 875; *Winner v. Linton*, 120 Md. 276, 87 Atl. 674; *American Express Co. v. Terry*, 126 Md. 254, 94 Atl. 1026.

*Massachusetts*.—*Commonwealth v. Horsfall*, 213 Mass. 232, 100 N. E. 362.

*Michigan*.—*Winchowski v. Dodge*, 183 Mich. 303, 149 N. W. 1061; *Simmons v. Peterson*, 207 Mich. 508, 174 N. W. 536.

*Missouri*.—*Edmonston v. Barrock* (Mo. App.), 230 S. W. 650.

*New Hampshire*.—See *Goge v. Boston & M. R. R.*, 77 N. H. 289, 90 Atl. 855.

*New Jersey*.—*Jacobson v. New York L. & W. R. Co.*, 87 N. J. L. 378, 94 Atl. 577; *Spawn v. Goldberg*, 110 Atl. 565.

*North Carolina*.—*Manly v. Abernathy*, 167 N. Car. 220, 83 S. E. 343.

*Oklahoma*.—*St. Louis & S. F. R. Co. v. Model Laundry*, 42 Okla. 501, 141

Pac. 970.

*Pennsylvania*.—*Lorah v. Rinehart*, 243 Pa. St. 231, 89 Atl. 967; *Follmer v. Pennsylvania R. Co.*, 246 Pa. 367, 92 Atl. 340.

*Rhode Island*.—*Greenhalch v. Barber*, 104 Atl. 769.

*Tennessee*.—*Leach v. Asman*, 130 Tenn. 510, 172 S. W. 303.

*Texas*.—*Houston Belt & T. R. Co. v. Rucker* (Tex. Civ.), 167 S. W. 301; *Adams v. Galveston H. & S. A. R. Co.* (Tex. Civ.), 164 S. W. 853; *Ward v. Cathey* (Civ. App.), 210 S. W. 289.

*Washington*.—*Chase v. Seattle Taxicab & Transfer Co.*, 78 Wash. 537, 139 Pac. 499; *Stephenson v. Parton*, 89 Wash. 653, 155 Pac. 147.

*West Virginia*.—*Deputy v. Kimmell*, 73 W. Va. 595, 80 S. E. 919.

See also section 278.

8. *Bidwell v. Los Angeles, etc. Ry. Co.*, 169 Cal. 780, 148 Pac. 197; *Elgin Dairy Co. v. Shepard* (Ind. App.), 103 N. E. 433; *Shields v. Fairchild*, 130 La. 648, 58 So. 497; *Gilbert v. Burque*, 72 N. H. 521, 57 Atl. 97; *Towner v. Brooklyn Heights R. Co.*, 44 App. Div. 628, 60 N. Y. Suppl. 289; *Weber v. Swallow*, 136 Wis. 46, 116 N. W. 844. And see sections 361, 391.

9. Section 48.

10. Section 623.

of prudence in the management and consideration for the rights of others which is consistent with their safety.<sup>11</sup>

**Sec. 278. Degree of care required of automobilists — commensurate with dangers.**

It is a general rule in the law of negligence that the criterion of "reasonable" or "ordinary" care varies according to the circumstances. What would constitute reasonable care in one case might be considered recklessness under other circumstances. In other words, the care to be exercised under given circumstances is commensurate to the dangers involved.<sup>12</sup>

11. *Ternes v. Giles*, 93 Kans. 140, 435, 144 Pac. 1014; *Shinkle v. McCullough*, 116 Ky. 960, 77 S. W. 196; *Knight v. Lanier*, 69 N. Y. App. Div. 454, 74 N. Y. Suppl. 999. "Travelers upon a public highway owe a duty to others traveling upon such highway, and that duty requires them to so reasonably conduct themselves in the use of the highway as that they will not injure others who are also traveling upon such highway." *Dozier v. Woods*, 190 Ala. 279, 67 So. 283. "The rules governing the degree of care which individuals upon the highway should exercise for mutual safety are well settled and relate in their application to the danger to be reasonably apprehended under every-varying conditions of exposure and peril. While the automobile is a lawful means of conveyance and has equal rights upon the road with the horse and carriage, its use cannot be lawfully countenanced unless accompanied with that degree of prudence in management and consideration for the rights of others which is consistent with safety." *Knight v. Lanier*, 69 N. Y. App. Div. 454, 74 N. Y. Suppl. 999. "It can no longer be questioned that the use of automobiles or motor cars, such as the one here in question, upon streets and other public highways, is lawful. Such vehicles furnish a convenient and use-

ful mode of travel and transportation not incompatible with the proper use of the highway by others; but in consequence of the great speed with which they may be run; their size and general appearance, the noises made in their use, the infrequency of their use in particular localities, and the circumstances of the particular occasions of their use, commensurate care, skill and diligence must be required of the persons employing such means of transportation. The general rule applies that he must so use his own as not to injure another. Automobiles may be used with safety to other users of the highway, and in their proper use upon the highways their owners have equal rights with the users of other vehicles properly upon the highway. The law recognizes such right of use upon general principles, and at the time of the appellee's injury the right was expressly recognized by statute." *Brinkman v. Pacholke*, 41 Ind. App. 662, 84 N. E. 762.

12. "The terms 'ordinary care' and 'reasonable prudence,' as applied to the conduct and the affairs of men, are declared to have only a relative significance, depending upon the special circumstances and surroundings of the particular case, and to defy arbitrary definition. When a given state of facts is such that reasonable men may

This general principle is applicable to the operation of motor vehicles in two ways. In the first place, the operation of automobiles, on account of their speed, size and other characteristics, is attendant with greater danger to pedestrians and other travelers than is the movement of a horse-drawn carriage. Thus, it may be said that the care required of the driver of a motor vehicle is "commensurate" with the danger of such a machine.<sup>13</sup> This may require that the driver shall at all times

differ as to whether or not negligence intervened, as whether or not ordinary care and reasonable prudence characterized the actions and conduct of an actor the determination of such question becomes a matter for the jury." *White Swan Laundry Co. v. Wehrhan*, 202 Ala. 87, 79 So. 479.

**13. Alabama.**—*Reaves v. Maybank*, 193 Ala. 614, 69 So. 137; *McCray v. Sharpe*, 188 Ala. 375, 66 So. 441.

**California.**—*Bellinger v. Hughes*, 31 Cal. App. 464, 160 Pac. 838; *Weihe v. Rathjen Mercantile Co.*, 34 Cal. App. 302, 167 Pac. 287.

**Colorado.**—*Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 Pac. 460, Ann. Cas. 1914 B 29.

**Delaware.**—*Brown v. City of Wilmington*, 4 Boyce, 492, 90 Atl. 44.

**Georgia.**—*O'Dowd v. Newnham*, 13 Ga. App. 220, 80 S. E. 36.

**Illinois.**—*Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337. "The degree of care and caution to be used in each case depends upon the character of the vehicle used and the locality and surroundings in which it is being used. The more dangerous the character of the vehicle and the greater its liability to do injury to others, the higher is the degree of care and caution to be exercised by the person charged with the duty of its operation." *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337.

**Indiana.**—"It can no longer be questioned that the use of automobiles or motor cars, such as the one here in question, upon streets and other public highways, is lawful. Such vehicles

furnish a convenient and useful mode of travel and transportation not incompatible with the proper use of the highway by others; but in consequence of the great speed with which they may be run, their size and general appearance, the noises made in their use, the infrequency of their use in particular localities, and the circumstances of the particular occasions of their use, commensurate care, skill and diligence must be required of the persons employing such means of transportation." *Brinkman v. Paeholke*, 41 Ind. App. 662, 84 N. E. 762.

**Iowa.**—*Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236; *Scott v. O'Leary*, 157 Iowa, 222, 138 N. W. 512; *Bishard v. Engelbeck*, 180 Iowa, 1132, 164 N. W. 203.

**Kentucky.**—*Collett v. Standard Oil Co.*, 186 Ky. 142, 216 S. W. 356.

**Maine.**—*Savoy v. McLeod*, 111 Me. 234, 88 Atl. 721; *Bragdon v. Kellogg*, 118 Me. 42, 105 Atl. 433.

**Maryland.**—*Winner v. Linton*, 120 Md. 276, 87 Atl. 674; *Fletcher v. Dixon*, 107 Md. 420, 68 Atl. 875.

**Massachusetts.**—*Commonwealth v. Horsfall*, 213 Mass. 232, 100 N. E. 362.

**Michigan.**—*Winckowski v. Dodge*, 183 Mich. 303, 149 N. W. 1061; *Patterson v. Wagner*, 204 Mich. 593, 171 N. W. 356.

**Missouri.**—"The possession of a powerful and dangerous vehicle, instead of giving defendant any right of way, imposed on him the duty of employing care commensurate to the risk of danger to others endangered by the

use greater diligence than would be imposed on the driver of a horse and wagon or on other travelers.<sup>14</sup> Secondly, the danger from the operation of a motor vehicle may be greater at some places than at others. The precautions which are sufficient when used by an operator running along a rural highway with few travelers are entirely insufficient when driving along a crowded city street. In this way, the care of the driver must be commensurate with the dangers arising from the surrounding circumstances.<sup>15</sup> Thus, it is sometimes

presence of his vehicle on the public thoroughfare." *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122.

*Pennsylvania*.—*Lorah v. Rinehart*, 243 Pa. 231, 89 Atl. 967.

*Tennessee*.—*Leach v. Asman*, 130 Tenn. 510, 172 S. W. 303.

*Vermont*.—"The defendant was driving a machine, which on account of its speed, weight, and quietness was capable of doing great damage, and the law puts upon one so situated a greater and more constant caution. He was bound to exercise care commensurate with the dangers arising from the lack of it." *Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669.

*Washington*.—*Chase v. Seattle Taxicab & Transfer Co.*, 78 Wash. 537, 139 Pac. 499.

*Canada*.—*Osborne v. Landis*, 34 W. L. R. 118.

**14. Instruction.**—The following instruction, relative to the comparative degree of care required of automobilists and pedestrians, has been approved: "While both parties are charged with the same degree of care, . . . the amount of care exacted of the driver of a motor vehicle is far greater than the amount of care exacted of the foot passengers." *Weihe v. Rathjen Mercantile Co.*, 34 Cal. App. 302, 167 Pac. 287, the court saying: "As said by counsel for the plaintiff, the degree of care exacted of both users of the highway is the same; the amount of care must of necessity vary in order that the degree may not.

The driver of a motor vehicle—a dangerous instrumentality capable of inflicting fatal injuries—is charged with a greater amount of care than the pedestrian, in order that he may be bound to the same standard of ordinary care. 'Ordinary care' and 'negligence' are relative terms."

**15. Alabama.**—*McCray v. Sharpe*, 188 Ala. 375, 66 So. 441; *Reaves v. Maybank*, 193 Ala. 614, 69 So. 137; *Karpeles v. City Ice Delivery Co.*, 198 Ala. 449, 73 So. 642; *White Swan Laundry Co. v. Wehrhan*, 202 Ala. 87, 79 So. 479. "What is the exercise of reasonable care by an operator of a motor vehicle on public highways depends upon the circumstances of the particular case, as bearing upon the conduct and the affairs of men: for what may be deemed reasonable and prudent in one case may, under different circumstances and surroundings, be gross negligence." *White Swan Laundry Co. v. Wehrhan*, 202 Ala. 87, 79 So. 479.

*Arkansas*.—*Bona v. S. R. Thomas Auto Co.*, 137 Ark. 217, 208 S. W. 306.

*California*.—*Bellinger v. Hughes*, 31 Cal. App. 464, 160 Pac. 838.

*Colorado*.—*Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 Pac. 460, Ann. Cas. 1914 B. 29. See also, *Kent v. Tweworgy*, 22 Colo. App. 441, 125 Pac. 128.

*Connecticut*.—*Brown v. New Haven Taxicab Co.*, 105 Atl. 706. "While owners of automobiles have the right to drive them upon public streets, yet the proper protection of

said that higher care is required of an automobile traveler

the equal rights of all to use the highways necessarily requires the adoption of different regulations for the different methods of such use; and what may be a safe rate of speed at which to ride a bicycle or drive a horse may be an unreasonably rapid rate at which to drive an automobile in the same place. For the reasons stated, and others which might be given, driving of an automobile at a high rate of speed through city streets at times when and places where other vehicles are constantly passing, and men, women and children are liable to be crossing; around corners at the intersection of streets, or in passing street cars from which passengers have just alighted, or may be about to alight; or in other similar places and situations where people are liable to fail to observe an approaching automobile, the driver is bound to take notice of the peculiar danger of collisions in such places. He cannot secure immunity from liability by merely sounding his automobile horn. He must run his car only at such speed as will enable him to timely stop it to avoid collisions. If he fails to do so, he is responsible for the damage he thereby causes." *Irwin v. Judge*, 81 Conn. 492, 71 Atl. 572.

*Delaware*.—*Cecchi v. Lindsay*, 1 Boyce, 185, 75 Atl. 376, reversed on other grounds, 80 Atl. 523; *Brown v. City of Wilmington*, 4 Boyce, 492, 90 Atl. 44.

*Georgia*.—*O'Dowd v. Newnham*, 13 Ga. App. 220, 80 S. E. 36.

*Illinois*.—*Graham v. Hagamann*, 270 Ill. 252, 110 N. E. 337.

*Indiana*.—*Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 616, 1 L. R. A. (N. S.) 238, 6 Ann. Cas. 656.

*Iowa*.—*Scott v. O'Leary*, 157 Iowa, 222, 138 N. W. 512; *Bishard v. Engelbeck*, 180 Iowa, 1132, 164 N. W. 203;

*Guy v. Des Moines City Ry. Co.*, 180 N. W. 294.

*Maine*.—*Savoy v. McLeod*, 111 Me. 234, 88 Atl. 721.

*Maryland*.—*Fletcher v. Dixon*, 107 Md. 420, 68 Atl. 875; *Winner v. Linton*, 120 Md. 276, 87 Atl. 674.

*Massachusetts*.—*Commonwealth v. Horsfall*, 213 Mass. 232, 100 N. E. 362.

*Michigan*.—*Winckowski v. Dodge*, 183 Mich. 303, 149 N. W. 1061; *Patterson v. Wagner*, 204 Mich. 593, 171 N. W. 356.

*Missouri*.—*Ginter v. O'Donoghue* (Mo. App.), 179 S. W. 732.

*North Carolina*.—*Manly v. Abernathy*, 167 N. Car. 220, 83 S. E. 343; *Cates v. Hall*, 171 N. Car. 360, 88 S. E. 524.

*Oklahoma*.—*White v. Rukes*, 56 Okla. 476, 155 Pac. 1184.

*Pennsylvania*.—*Lorah v. Rinehart*, 243 Pa. 231, 89 Atl. 967.

*South Carolina*.—*North State Lumber Co. v. Charleston, etc. Co.*, 105 S. E. 406.

*Tennessee*.—*Leach v. Asman*, 130 Tenn. 510, 172 S. W. 303; *Coca Cola Bottling Works v. Brown*, 139 Tenn. 640, 202 S. W. 926.

*Utah*.—"In this case the driver of the autotruck was required to exercise ordinary and reasonable care and vigilance under the conditions and circumstances surrounding him. The law under certain conditions and circumstances requires greater vigilance and care on the part of the operator of a vehicle, and especially of an automobile in order to constitute ordinary care and vigilance than under other conditions and circumstances. If one operates an auto vehicle, which is a swift and silently moving machine, in a crowded city street, a high degree of care and vigilance is required, and the driver should not relax that care and vigilance, but keep a constant lookout to prevent collisions with and injury

when he is approaching a street intersection.<sup>16</sup> So, too, it has been held proper for the presiding judge to charge the jury that in busy streets "exceeding carefulness" is required on the part of the driver of an automobile.<sup>17</sup> And greater care may be required when there are children playing in the streets,<sup>18</sup> or when crossing a railway track,<sup>19</sup> or passing a street car.<sup>20</sup>

to others. But even in a crowded street a greater degree of care and vigilance is required in approaching intersections and crossings where both pedestrians and vehicles of all kinds have a right to pass both ways than is the case between street crossings. The care and vigilance that is required must always measure up to the standard required by law, which is to exercise ordinary and reasonable care under all the circumstances. The exercise of ordinary and reasonable care, therefore, means that degree of care which the circumstances and surroundings require, and which is commensurate with the danger that may be encountered." *Richards v. Palace Laundry Co. (Utah)*, 186 Pac. 439.

*Washington*.— *Chase v. Seattle Taxicab & Transfer Co.*, 78 Wash. 537, 139 Pac. 499.

16. Section 279.

17. *Domke v. Gunning*, 62 Wash. 629, 114 Pac. 436. "The operation of an automobile upon the crowded streets of a city necessitates exceeding carefulness on the part of the driver. Moving quietly as it does, without the noise which accompanies the movement of a street car or other ordinary heavy vehicles, it is necessary that caution should be continuously exercised to avoid collision with pedestrians unaware of its approach. The speed should be limited, warning of approach given, and skill and care in its management so exercised as to anticipate such collision as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions. The pedes-

trian must also use such care as an ordinary prudent man would use under like circumstances." *Lampe v. Jacobsen*, 46 Wash. 533, 90 Pac. 654.

18. *Thies v. Thomas*, 77 N. Y. Suppl. 276; *State v. Gray (N. Car.)*, 104 S. E. 647. And see section 418.

**Instruction requiring higher care.**— An instruction to the effect that the driver of an automobile is required to exercise a higher degree of care at a place in a street where school children are congregated at certain hours in the day than at a point where pedestrians are fewer and the travel limited. has been held to be erroneous and misleading as requiring the defendant to exercise more than ordinary care. *Miller v. Eversole*, 184 Ill. App. 362, wherein it was said: "Appellant was not required to use a higher degree of care at one place than another, but he was only required to use ordinary care wherever he might be. While it is a correct proposition that what might be ordinary care where there were no children or persons crossing a street would not be ordinary care and might be negligence where there were children and a crowded street, yet ordinary care is all he was required to use, and ordinary care is such care as an ordinary reasonable and prudent person would use under all circumstances and conditions existing at the time and place and which are or ought to be known to the party."

19. *Helvey v. Princeton Power Co. (W. Va.)*, 99 S. E. 180.

20. *Rose v. Clark*, 21 Man. (Canada) 635.

**Sec. 279. Degree of care required of automobilists — higher care at street crossings.**

It is too clear for dispute that the operation of an automobile is attendant with greater danger to other travelers at street crossings than at points between crossings. Under the rule that the care to be taken by the driver of such a machine is commensurate with the dangers to be encountered,<sup>21</sup> it may properly be said that the care to be observed by the driver is greater at such points.<sup>22</sup> But some courts, giving an elastic interpretation to the expression "reasonable care" prefer to define the degree of care at such points as "reasonable" care under the circumstances.<sup>23</sup> In using the streets and high-

21. Section 278.

22. *Cecchi v. Lindsay*, 1 Boyce (Del.) 185, 75 Atl. 376, reversed, 80 Atl. 523; *Grier v. Samuel*, 4 Boyce (Del.) 106, 86 Atl. 209; *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44; *Virgilio v. Walker*, 254 Pa. St. 241, 98 Atl. 815; *Richards v. Palace Laundry Co.* (Utah), 186 Pac. 439; *Moy Quon v. M. Furnya Co.*, 81 Wash. 526, 143 Pac. 99. "Greater care is required at street crossings and in the more crowded streets of a city than in the less obstructed streets in the open or suburban parts. There is a like duty of exercising reasonable care on the part of the pedestrian. The person having the management of the vehicle and the traveler on foot are both required to use such reasonable care as the circumstances of the case demand, an exercise of greater care on the part of each being required where there is an increase of danger." *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44. "Unlike street cars or railroad trains, which in their noisy progress are confined to the narrow line of their rail tracks, automobiles, with practically equal capacity for speed, can range the road in substantial silence. They can and do traverse the streets at much greater speed, with much less noise, than other

highway vehicles in common use, and, on the other hand, can be more surely and easily controlled by those experienced in their use. The duty and responsibility of those driving them should be, and is, proportioned to the possibilities and dangers attending the use upon the public highways of such an instrumentality of travel and transportation. It is but a rational rule which emphasizes the driver's duty of special vigilance at crossing points on city streets where the right of passage is not only free and common to all, but in common and frequent use both by pedestrians and vehicles. While the duties of reasonable care for their own safety and that of others are imposed upon both pedestrian and driver, the driver's comparative personal safety in case of collision with a pedestrian is not to be overlooked in measuring his duty to exercise commensurate care for the safety of others." *Patterson v. Wagner*, 204 Mich. 593, 171 N. W. 356.

"**Intersecting highways.**"—A statute relative to the operation of motor vehicles at interesting highways has been held applicable where a street ran to, but not across, another street. *Manly v. Abernathy*, 167 N. Car. 220, 83 S. E. 343.

23. A charge to the jury that the



ways, an automobilist does so with the knowledge that at street intersections other vehicles may approach to cross or turn into the one over which he is traveling, and that at such points crosswalks are ordinarily provided for the use of pedestrians. He should, therefore, operate his car with that degree of care which is consistent with the conditions thus existing, the rate of speed and his control over the car varying according to the traffic at the particular place.<sup>24</sup> Where there is an obstruction to an automobilist's view of a street crossing, he must exercise a degree of care such as a reasonably prudent man would exercise under the same circumstances, to avoid injury to pedestrians or other vehicles at such point.<sup>25</sup> The weather conditions also are a factor to be considered as bearing upon the question of the negligence of the driver of an automobile. Thus in the case of a blinding snow storm it may be difficult for either the driver or a pedestrian to see, less so for the former where he is protected by a shield. Under such circumstances more caution should be exercised by him in the management of the car and consideration must be given to the less favorable conditions under which the pedestrian may be proceeding. A similar situation may exist in the case of a heavy rain storm.<sup>26</sup> Also in the case of ice or snow upon the crosswalks which make it more difficult for a person to walk and of necessity compel him to proceed at a slower pace, the operator of a car should exercise a degree of care which is consistent with the conditions presented.

operation of an automobile requires the use of ordinary care, that it includes the duty of having the car under control when approaching street intersections, and that defendant, driving an automobile, must use such care as an ordinarily prudent man would have used, with further instructions concerning the duty of exercising due care on the part of both plaintiff and

defendant, held to sufficiently define the issues of negligence. *Ketchum v. Fillingham*, 162 Mich. 704, 127 N. W. 702.

24. *Rowe v. Hammon*, 172 Mo. App. 203, 157 S. W. 880.

25. *Deputy v. Kimmell*, 73 W. Va. 595, 80 S. E. 919.

26. *Harting v. Knapwurst*, 178 Ill. App. 409.

**Sec. 280. Degree of care required of automobilists — higher care when driving on wrong side of highway.**

To a large extent the different travelers along a highway rely on the obedience by other travelers of the recognized rules of the road. When one is traveling at variance with the law of the road, his conduct is charged with greater danger to other travelers. Hence, it may be said that, inasmuch as the danger of his conduct is greater, it is proper to impose on him a higher caution for the avoidance of collisions with others. Thus, it is held that one driving an automobile along the wrong side of a street or highway must exercise greater vigilance than if he were traveling on the proper side.<sup>27</sup>

**Sec. 281. Degree of care required of automobilists — higher care imposed by statute.**

In some jurisdictions statutes have in form changed the degree of care to be exercised by one driving an automobile. Thus, in *Missouri*, a statute was formerly in force imposing on all persons owning, operating or controlling an automobile on a public highway the "highest degree of care" that a very careful person would use to prevent injury to persons on the highway.<sup>28</sup> The statute was repealed in 1917.<sup>29</sup> Such a statute may be deemed in derogation of the common law and

27. *New York Transp. Co. v. Gar-side*, 157 Fed. 521, 85 C. C. A. 285; *Fahrney v. O'Donnell*, 107 Ill. App. 608; *Heryford v. Spitcanfsky* (Mo. App.), 200 S. W. 123; *Angell v. Lewis*, 20 R. I. 391, 39 Atl. 521; *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876; *Osborne v. Landis*, 34 W. L. R. (Canada) 118; *Pluckwell v. Wilson*, 5 C. & P. (Eng.) 375. "But a person on the wrong side of the way must always exercise a care commensurate with his position. This is usually a higher degree of care than that required of him while on the correct side of the way." *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876. And see section 268.

28. *Frankel v. Hudson*, 271 Mo. 495, 196 S. W. 1121; *Nicholas v. Kelley*,

159 Mo. App. 20, 139 S. W. 248; *Bongner v. Ziegenheim*, 165 Mo. App. 328, 147 S. W. 182; *Hodges v. Chambers*, 171 Mo. App. 563, 154 S. W. 429; *Porter v. Hetherington*, 172 Mo. App. 502, 158 S. W. 469; *Huffa v. Dougherty*, 184 Mo. App. 374, 171 S. W. 17; *Williams v. Kansas City* (Mo. App.), 177 S. W. 783; *Young v. Bacon* (Mo. App.), 183 S. W. 1079; *Priebe v. Crandall* (Mo. App.), 187 S. W. 605; *Mee-nach v. Crawford* (Mo.), 187 S. W. 879; *Dignum v. Weaver* (Mo. App.), 204 S. W. 566; *Pullam v. Moore* (Mo. App.), 218 S. W. 938; *Yarvitz Dyeing & Cleaning Co. v. Erlenbach* (Mo. App.), 221 S. W. 411.

29. See *Edmonston v. Barrock* (Mo. App.), 230 S. W. 650.

hence entitled to receive a strict construction, but not so strict as to defeat the obvious intention of the law makers.<sup>30</sup> It applies to civil actions for damages, but not to criminal prosecutions of the automobilist.<sup>31</sup> It prescribes a rule for the conduct of the automobilist whether he is the plaintiff or the defendant in the action.<sup>32</sup> Hence, in an action for injuries sustained at a railroad<sup>33</sup> or street railway<sup>34</sup> crossing, his contributory negligence is determined on whether he has exercised the "highest degree of care." It may place such obligation on one controlling the operation as well as on the driver.<sup>35</sup> As a general proposition, a statute imposing a certain degree of care or requiring certain precautions to be exercised by automobilists is to be construed as imposing cumulative requirements and not as abrogating the common law requirements of prudence.<sup>36</sup> A statute requiring the automobilist to exercise every reasonable precaution is to be construed as meaning the precaution which a reasonable man would take in view of the danger to be apprehended, and adds little or nothing to the common law rule.<sup>37</sup>

**30.** *Nicholas v. Kelley*, 159 Mo. App. 20, 139 S. W. 248; *Hopkins v. Sweeney Automobile School Co.* (Mo. App.), 196 S. W. 772.

**Public highways.**—The statute applies, not only to public highways, but also to places "much used for travel." *Denny v. Randall* (Mo. App.), 202 S. W. 602.

**Animals on highways.**—The statute furnishes a guide for an automobile when he is approaching an animal loose on the highway as well as one under control. *Pullam v. Moore* (Mo. App.), 218 S. W. 938.

**31.** *State v. Horner*, 266 Mo. 109, 180 S. W. 873.

**32.** *Threadgill v. United Ry. Co. of St. Louis*, 279 Mo. 466, 214 S. W. 161; *Jackson v. Southwestern Bell Telep. Co.* (Mo.), 219 S. W. 655. Compare *Hopkins v. Sweeney Automobile School Co.* (Mo. App.), 196 S. W. 772; *Horyford v. Spiteanfsky* (Mo. App.), 200 S. W. 123.

#### **Contributory negligence of plaintiff.**

—A provision in the Missouri statute to the effect that the motorist shall not be liable when the injured person has been guilty of contributory negligence, does not have the effect of abrogating the humanitarian or last chance rule which are enforced in that State. *Ottofy v. Mississippi Valley Trust Co.*, 197 Mo. App. 473, 196 S. W. 428.

**33.** *Daniel v. Pryor* (Mo.), 227 S. W. 102. Compare *Advance Transfer Co. v. Chicago, etc., R. Co.* (Mo. App.), 195 S. W. 566.

**34.** *Threadgill v. United Rys. Co.*, 279 Mo. 466, 214 S. W. 161; *Davis v. United Rys. Co.* (Mo. App.), 218 S. W. 357.

**35.** *Foy v. United Rys. Co. of St. Louis* (Mo. App.), 226 S. W. 323.

**36.** *Giles v. Voiles*, 114 Ga. 853, 88 S. E. 207.

**37.** *Arrington v. Horner*, 88 Kans. 817, 129 Pac. 1159.

### Sec. 282. Degree of care required of automobilists — care by common carriers.

In case of the owner of a motor vehicle or "jitney" carrying passengers for hire, as between such owner and his passengers, the relation may be that of common carrier and passenger, and the degree of care to be exercised by the driver of the machine is governed by the law of carriers rather than by the law of negligence. The formula of care to be exercised by a carrier towards its passengers is generally expressed as the "highest degree of care."<sup>38</sup> But, as between the driver of the machine and other travelers or railroad or street railway companies, the precaution of the chauffeur is judged according to the formula of "ordinary" or "reasonable" care.<sup>39</sup>

### Sec. 283. Driver of auto not an insurer against accidents.

Where injury arises from the operation of an automobile liability to respond in damages for such injury does not necessarily follow; but facts additional to the mere circumstance of injury must be shown. Some negligent act or omission on the part of the defendant must be shown, for neither the driver nor the owner of an automobile is an insurer against accidents arising from its operation.<sup>40</sup> Ordinarily, the mere fact

38. *Singer v. Martin*, 96 Wash. 231, 164 Pac. 1105. And see sections 169, 179.

39. *Southern Ry. Co. v. Voughans adm'r*, 118 Va. 692, 88 S. E. 305, L. R. A. 1916E. 1222.

40. *Arkansas*.—*Millsaps v. Brogdon*, 97 Ark. 469, 134 S. W. 632.

*Connecticut*.—*Hyde v. Hubinger*, 87 Conn. 704, 87 Atl. 790; *Radwick v. Goldstein*, 90 Conn. 701, 98 Atl. 583.

*Delaware*.—*Simcone v. Lindsay*, 6 Penn. 224, 65 Atl. 778.

*Georgia*.—*Giles v. Voiles*, 144 Ga. 853, 88 S. E. 27.

*Kansas*.—*Arrington v. Horner*, 88 Kans. 817, 129 Pac. 1159.

*Maryland*.—*Havermale v. Houck*, 122 Md. 82, 89 Atl. 314.

*Michigan*.—*Tolmie v. Woodward*

*Taxicab Co.*, 178 Mich. 426, 144 N. W. 855; *Barger v. Bissell*, 188 Mich. 366, 154 N. W. 107; *Gardiner v. Studebaker Corp.*, 204 Mich. 313, 169 N. W. 823. "Drivers upon highways are not held as insurers against accidents arising from negligence of children or their parents, and though in law such negligence in a particular case may not be a defense, as contributory negligence, for a driver also guilty of negligence, the fact of an accident does not establish liability or raise a presumption that the driver is negligent." *Barger v. Bissell*, 188 Mich. 366, 154 N. W. 107.

*New York*.—*Cantanno v. James A. Stevenson Co.*, 172 N. Y. App. Div. 252, 158 N. Y. Suppl. 335; *Seaman v. Mott*, 110 N. Y. Suppl. 1040.

that a pedestrian or a vehicle is struck and injured by an automobile does not show that the injury was caused by the negligence of the automobilist.<sup>41</sup> On the other hand, the mere fact of the collision does not show, of itself, that the injured person was guilty of contributory negligence.<sup>42</sup> The burden is upon the person injured to show that the driver or owner of the motor vehicle was guilty of negligence which was one of the proximate causes of the injury of which he complains.<sup>43</sup> There may be, however, a few cases, where the happening of the accident raises a presumption that the driver of the motor vehicle has been guilty of negligence. Thus the doctrine of *res ipsa loquitur* may arise when the machine runs upon a sidewalk and strikes a pedestrian.<sup>44</sup> Moreover, the violation

*North Dakota*.—Vannett v. Cole, 170 N. W. 663.

*Washington*.—McCann v. Silke, 75 Wash. 383, 134 Pac. 1063.

*Philippines*.—Bernardo v. Legaspi, 29 Philippine Rep. 12.

**Erroneous instruction.**—An instruction on the trial of an action for the death of a horse by automobile to the effect that the operator of the machine was required to use such care and caution as to prevent injury to the person and property of others rightly on the highway, is erroneous as making the operator an insurer. Petty v. Maddox, 190 Ill. App. 381. Similarly, it is erroneous to charge that "the degree of diligence which must be exercised in a particular exigency is such as is necessary to prevent injuring others." Giles v. Voiles, 144 Ga. 853, 88 S. E. 207.

41. Millsaps v. Brogdon, 97 Ark. 469, 134 S. W. 632; Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38; Barger v. Bissell, 188 Mich. 366, 154 N. W. 107; Winter v. Van Blareom, 258 Mo. 418, 167 S. W. 498; Horowitz v. Gottwalt (N. J. Law), 102 Atl. 930; Vannett v. Cole (N. Dak.), 170 N. W. 663.

42. Aiken v. Metcalf, 90 Vt. 196, 97 Atl. 669.

43. Millsaps v. Brogdon, 97 Ark. 469, 134 S. W. 632; Diamond v. Weyerhaeuser (Cal.), 174 Pac. 38; Winter v. Van Blareom, 258 Mo. 418, 167 S. W. 498.

**Statutory change.**—The burden of proof may be shifted by statute to the driver or owner. See the following cases construing a statute of Ontario having that effect. Marshall v. Gowans, 24 O. L. R. 522; Maitland v. McKenzie, 28 O. L. R. 506; Hook v. Wylie, 10 O. W. N. 15, 237; White v. Hegler, 29 D. L. R. 480; Bradshaw v. Conlin, 40 O. L. R. 496; Whitten v. Burtwell, 47 O. L. R. 210.

44. Ivins v. Jacob, 245 Fed. 892, wherein it was said: "The argument of counsel, which concedes that the circumstances of the occurrence justify the inference of the negligence of some one, but not the negligence of the defendant, is a concession of everything, because one of the circumstances was that the defendant was driving the car. If this automobile had been without warning driven upon the sidewalk, there striking a pedestrian, no one could doubt that it would not only

of a positive regulation<sup>45</sup> or a rule of the road,<sup>46</sup> may constitute negligence, or raise such a presumption of negligence, so that a *prima facie* case is thereby presented.

### Sec. 284. Unavoidable accident — in general.

An accident to a traveler which is occasioned by an automobile, when no negligence or wrongful act on the part of the owner or driver of the machine is shown, can be classed as an unavoidable accident, and no liability will attach to the driver or owner.<sup>47</sup> This proposition necessarily follows from the rule that automobilists are not insurers.<sup>48</sup> The general principle is well illustrated in cases where the driver of an automobile is proceeding with due care along a street and a

justify, but compel, a finding of negligence. This inference of fact is not stayed by the possibility that it might not have been intentionally driven upon the sidewalk. If such possibility were suggested, the answer would be: Show me that, and I am prepared to believe it; but, unless you do, I must hold you to be in fault. This attitude is sensible and just, and in accord with the accepted principle of law of evidence that he who has control of the proofs shall produce them. If the car was beyond control, the driver knows it, and can offer evidence of the fact. All the pedestrian could do would be to know the fact that the car was where it should not be driven, and that the circumstances indicated negligence. This constitutes *prima facie* proof."

**Res ipsa loquitur.**—Where the plaintiff tied his horse at a hitching post at the curb of a street when a few feet further on an automobile was standing on the opposite side of the street, and a few minutes afterwards the plaintiff discovered that his horse had been injured by the automobile, it was held that under the doctrine of *res ipsa loquitur*, the burden of explaining that the accident did not occur from want of care devolved upon

the defendant. *Whitewell v. Wolf*, 127 Minn. 529, 149 N. W. 299.

45. Section 297.

46. Section 269.

47. *Delaware*.—*Simeone v. Lindsay*, 6 Penn. 224, 65 Atl. 778; *Brown v. City of Wilmington*, 4 Boyce, 492, 90 Atl. 441; *Traverse v. Hartman*, 5 Boyce, 302, 92 Atl. 855.

*Michigan*.—*Harnau v. Haight*, 189 Mich. 600, 155 N. W. 563.

*Missouri*.—*Winter v. Van Blarom*, 258 Mo. 418, 167 S. W. 498.

*New York*.—*Jordan v. American Sight Seeing Coach Co.*, 129 N. Y. App. Div. 313, 113 N. Y. Suppl. 786; *Caspehl v. New York Transp. Co.*, 150 N. Y. App. Div. 723, 135 N. Y. Suppl. 691; *Cantanno v. James A. Stevenson Co.*, 172 N. Y. App. Div. 252, 158 N. Y. Suppl. 335; *Dudley v. Raymond*, 148 App. Div. 886, 133 N. Y. Suppl. 17.

*North Carolina*.—*Baldwin v. Smitherman*, 171 N. Car. 772, 88 S. E. 854.

*Pennsylvania*.—*Stahl v. Sollenberger*, 246 Pa. St. 525, 92 Atl. 720; *McMillen v. Strathmann*, 264 Pa. St. 131, 107 Atl. 332.

*Wisconsin*.—*Linden v. Miller* (Wis.), 177 N. W. 909.

48. Section 283.

child suddenly darts in front of the machine so close thereto that the driver, although using every means to avoid the collision, is unable to do so.<sup>49</sup> Collisions with other vehicles may happen when neither party can be said to be negligent, and in such a case the injury is said to be the result of an unavoidable accident.<sup>50</sup> The driver of an automobile is not required to anticipate that a street railway passenger will jump from a moving street car at a place other than a regular stopping point; and when such a person jumps off so close to the automobile that the driver cannot with the exercise of reasonable care avoid a collision, the driver is not ordinarily chargeable with negligence.<sup>51</sup>

**Sec. 285. Unavoidable accident — conduct of driver in emergency.**

The law does not require supernatural poise or self control on the part of the driver of a motor vehicle; and, if some unforeseen emergency occurs which naturally would overpower the judgment of an ordinarily careful driver, so that momentarily he is not capable of intelligent action, he may not be negligent.<sup>52</sup> But no one should drive an automobile amid the dangers likely to be encountered on the modern highways who is not reasonably steady of nerve, quick in forming an opinion and calm in executing a design.<sup>53</sup> Whether under circumstances of emergency the conduct of the operator of the vehicle measures up to the standard of reasonable care, is generally a question for the jury.<sup>54</sup> In an emergency, the

49. Section 419.

50. Collision with mule.—Where an automobile which was properly equipped and under control was passing a mule with its owner riding thereon, and the mule suddenly backed directly against the machine, the driver of the machine used every effort to avoid the injury but was unable to do so, the owner of the mule cannot recover for his injuries. *Baldwin v. Smitherman*, 171 N. Car. 772, 88 S. E. 854.

51. *Brown v. Brashear*, 22 Cal. App. 135, 133 Pac. 505; *Starr v. Schenck*, 25 Mont. L. Rep. (Pa.) 18.

52. *Rhodes v. Firestone Tire & Rubber Co.* (Cal. App.), 197 Pac. 392; *Massie v. Barker*, 224 Mass. 420, 113 N. E. 199; *Barger v. Bissell*, 188 Mich. 366, 154 N. W. 107.

53. *Massie v. Barker*, 224 Mass. 420, 113 N. E. 199.

54. *Lawrence v. Goodwill* (Cal. App.), 186 Pac. 781; *Massie v. Barker*, 224 Mass. 420, 113 N. E. 199; *Hood v. Stowe*, 191 N. Y. App. Div. 614, 181 N. Y. Suppl. 734; *Chiappone v. Greencbaum*, 189 N. Y. App. Div. 579, 178 N. Y. Suppl. 854; *Lee v. Donnelly* (Vt.), 113 Atl. 542.

safety of human beings should be preferred to that of an animal or inanimate property in the street.<sup>55</sup> But one cannot escape liability for the negligent operation of an automobile on the ground that he acted in an emergency, when it appears that the emergency was created by his own negligence; or if, by the exercise of reasonable care, he might have avoided the injury notwithstanding the emergency.<sup>56</sup>

**Sec. 286. Unavoidable accident — avoidance of dangerous situation.**

A driver of a vehicle in a street must exercise care to prevent reaching a point from which he is unable to extricate himself without colliding with another vehicle, and, omitting such duty, the greatest vigilance on his part when the danger arises will not avail him.<sup>57</sup> This principle is not to be extended to include those cases where a driver by the negligent operation of his car is confronted with one danger and in his endeavor to avoid it causes the injury in question.<sup>58</sup>

**Sec. 287. Unavoidable accident — precedent negligence may bar claim of unavoidable accident.**

The assertion of an automobilist that an accident was unavoidable may fail where the automobilist was guilty of negligence prior to the accident.<sup>59</sup> To illustrate, ordinarily when a child suddenly darts in front of a moving vehicle so close thereto that the driver cannot stop the machine to avoid a collision, the automobilist is not deemed guilty of negligence,<sup>60</sup> but the claim that the accident was unavoidable may fail, if the machine just prior to the creation of the danger was being

55. See section 365.

56. *Carpenter v. Campbell Automobile Co.*, 159 Iowa, 52, 140 N. W. 225; *Adams v. Parrish* (Ky.), 225 S. W. 467; *Hood v. Stowe*, 191 N. Y. App. Div. 614, 181 N. Y. Suppl. 734; *Solomon v. Braufman*, 175 N. Y. Suppl. 835; *Allen v. Schultz*, 107 Wash. 393, 181 Pac. 916, 6 A. L. R. 676n; *Elliott v. Fabra*, 10 O. W. N. (Canada) 41.

57. *Altenkirch v. National Biscuit*

*Company*, 127 App. Div. (N. Y.) 307, 111 N. Y. Suppl. 234; *Yahnke v. Lange*, 168 Wis. 512, 170 N. W. 722. See also section 368.

58. *Mahegan v. Faber*, 158 Wis. 645, 149 N. W. 397.

59. *Hellan v. Supply Laundry Co.*, 94 Wash. 683, 163 Pac. 9; *Yahnke v. Lange*, 168 Wis. 512, 170 N. W. 722.

60. Section 419.



run at an excessive speed. The fact that he could not have foreseen the danger of the injury will not relieve him for liability for negligence based on the excessive speed.<sup>61</sup> Thus, in an action for injuries to an electric car struck by a heavy automobile while turning a corner, the defendant's liability may be sustained on the ground that he turned the corner at an excessive speed, though he claims that the accident was due to the driver's attempt to avoid children on the crosswalk.<sup>62</sup> Where, because of his own negligence, a driver is placed in such a position that it becomes necessary for him to change the course of his machine to avoid an injury to one person, and in so doing he injures another person, he may be liable to the latter.<sup>63</sup>

**Sec. 288. Unavoidable accident — moving automobile under directions of police officer.**

The fact that the driver of an automobile moves the machine by the order of a traffic policeman, does not excuse him from liability for subsequent negligent driving.<sup>64</sup> And the fact that one is authorized by a signal from a traffic officer to proceed across a street intersection, does not absolve him from the duty of exercising reasonable care in making the passage.<sup>65</sup>

**Sec. 289. Proximate cause — in general.**

One of the fundamental principles of the law of negligence is that liability for acts of negligence follows only so far as the injuries are the proximate result of the negligence. This rule applies in cases of automobile accidents, and it is held that the owner or driver of a motor vehicle is liable, assuming his negligence, only for such injuries as proximately result from the negligent acts.<sup>66</sup> On the other hand, the liability

61. *Schumacher v. Meinrath*, 177 Ill. App. 530; *Delohery v. Quinlan*, 210 Ill. App. 321.

62. *Conlon v. Trenkhorst*, 195 Ill. App. 335.

63. *Oakshott v. Powell*, 6 Alta. (Canada) 178, 12 D. L. R. 148.

64. *Melville v. Rollwage*, 171 Ky. 607, 188 S. W. 638.

65. *Walmer-Roberts v. Hennessey* (Iowa), 181 N. W. 798; *Melville v. Rollwage*, 171 Ky. 607, 188 S. W. 638.

66. *Arkansas*.—*Texas Motor Co. v. Buffington*, 134 Ark. 320, 203 S. W. 1013.

*California*.—*Weaver v. Carter*, 28 Cal. App. 241, 152 Pac. 323.

of the defending party generally extends to all injuries which can be found to be the proximate result of the negligent acts; and it is sufficient if it appears that the negligence of the defendant would probably cause harm to some person, though the precise form in which it in fact resulted could not have been foreseen.<sup>67</sup> The fact that the driver of an automobile has violated a statute regulating his conduct,<sup>68</sup> or has infringed the law of road applicable to his movements,<sup>69</sup> does not render him liable for injuries sustained by another traveler, unless the injuries proximately result from the wrongful act. The fact that the owner of the machine has not complied with the law pertaining to the registration of the machine is not, as a general rule, considered a proximate cause of an injury resulting either to or from the machine.<sup>70</sup> And, in an action for damages to an automobile sustained in a collision at a railroad crossing, the fact that the chauffeur did not have his badge in sight as required by statute, is not considered an efficient cause of the accident and does not preclude the owner from recovery.<sup>71</sup> Similarly, the fact that the driver of a machine does not stop after an accident and give information as to his identity and that he thereby violates a criminal statute relative to such conduct, is no evidence of his responsibility for

*Illinois*.—Kessler v. Washburn, 157 Ill. App. 532.

*Iowa*.—Herdman v. Zwart, 167 Iowa, 500, 149 N. W. 631.

*Kansas*.—Arrington v. Horner, 88 Kans. 817, 129 Pac. 1159.

*Kentucky*.—Coughlin v. Mark, 173 Ky. 728, 191 S. W. 503.

*Michigan*.—Johnston v. Cornelius, 200 Mich. 209, 166 N. W. 983, L. R. A. 1918D 880.

*Missouri*.—Priebe v. Crandall (Mo. App.), 187 S. W. 605.

*New York*.—Jerome v. Hawley, 147 App. Div. 475, 131 N. Y. Suppl. 897; Wolcott v. Renault Selling Branch, 175 App. Div. 858, 162 N. Y. Suppl. 496; Cohen v. Goodman & Sons, Inc., 189 App. Div. 209, 178 N. Y. Suppl. 528.

*North Carolina*.—Taylor v. Stewart, 172 N. Car. 203, 90 S. E. 134.

*Texas*.—Schoellkopf Saddlery Co. v. Crawley (Civ. App.), 203 S. W. 1172; Texas, etc., Co. v. Harrington (Civ. App.), 209 S. W. 685.

It is a question for the jury whether the injuries for which the action is brought were sustained at the time of the collision or subsequent thereto. Grimes v. Cathcart, 69 Wash. 519, 125 Pac. 764. See also section 359.

67. Regan v. Cummings, 228 Mass. 414, 117 N. E. 800.

68. Section 300.

69. Section 369.

70. Section 126.

71. Latham v. Cleveland, etc., R. Co., 164 Ill. App. 559.

the accident.<sup>72</sup> So, too, the fact that one takes a vehicle without the permission of the owner and thereby violates a criminal statute, does not necessarily render him liable for injuries sustained by a pedestrian through its operation.<sup>73</sup> The application of the proximate cause doctrine is discussed in detail in other parts of this book.<sup>74</sup>

### Sec. 290. Proximate cause — concurring negligence of third party.

When the negligence of the defendant is shown, the fact that a third person was also guilty of negligence which contributed to the injury of the plaintiff, will not relieve the defendant from liability for his negligence.<sup>75</sup> This principle is well illustrated in cases where the negligence of the driver of an automobile combines with the negligence of a railroad, street railway company, or driver of another vehicle, so that injury is occasioned to a passenger in the automobile, and it is generally held that the negligence of the driver thereof is not to be imputed to the passenger and does not deprive such passenger of his remedy against the railroad or other negligent defendant.<sup>76</sup> Where the negligence of the driver of an automobile and the negligence of a pedestrian whom he was trying to avoid, caused the machine to strike a third person, the fact that the pedestrian was also guilty of negligence does not relieve the auto driver from liability for the injuries to such third person.<sup>77</sup> And the jury may be justified in charging the

72. *Henderson v. Northam*, 176 Cal. 493, 168 Pac. 1044.

73. *Johnston v. Cornelius*, 200 Mich. 209, 166 N. W. 983, L. R. A. 1918D 880.

74. See sections 396, 415, 521, 705.

75. *King v. San Diego Elec. Ry. Co.*, 176 Cal. 266, 168 Pac. 131; *Solomon v. Braufman*, 175 N. Y. Suppl. 835. See also *Christl v. Hawert*, 164 Wis. 624, 160 N. W. 1061.

"A release of one joint tortfeasor by an instrument under seal is a conclusive discharge of all, but an unsealed discharge of one will not operate as a

discharge of all unless it appears that the payment made was received in full satisfaction. This case is not one of technical release, for the writings are not under seal. The writings do not acknowledge the receipt of full satisfaction, but affirm the contrary. Neither writing contains anything that imports a discharge of the cause of action." *Blackmer v. McCabe*, 86 Vt. 303, 85 Atl. 113.

76. Section 679.

77. *Mehegan v. Faber*, 158 Wis. 645, 149 N. W. 397.

driver of a motor vehicle with negligence where he wrongfully cut the corner and caused another vehicle to strike a pedestrian, although the accident would not have happened but for the wrongful speed of the other vehicle.<sup>78</sup>

### Sec. 291. Proximate cause — intervening agency.

The line of proximate results which follow from an act of negligence is sometimes said to be broken when an intervening agency interposes for which the defendant is not responsible. Thus, the negligence of one who leaves a motor vehicle unattended by the side of the highway does not create liability for injuries which result from a boy interfering with the brakes and causing the machine to start.<sup>79</sup> But, when the negligent conduct of the driver of an automobile causes it to strike a pedestrian and such pedestrian is thereby thrown so as to strike and cause injury to a third person, the driver may be liable for the injuries sustained by such third person.<sup>80</sup> Generally speaking, an intervening cause, in order to relieve from liability, must itself be a wrongful cause; that is, a cause for which the producer thereof would himself be liable to the plaintiff.<sup>81</sup> Thus, where a defendant wrongfully backed his automobile into a street without giving the proper statutory warning to other travelers, and one riding a motorcycle along the street was injured while attempting to avoid such automobile by colliding with another automobile, it was held that the other machine was not an intervening cause which would relieve the defendant from liability.<sup>82</sup> And, where an automobile, although driven carefully, was caused to skid by the slippery condition of the highway and struck a wagon of the plaintiff, it was held that the municipality was liable for the injuries to the wagon.<sup>83</sup>

78. *Hellan v. Supply Laundry Co.*, 94 Wash. 683, 163 Pac. 9.

79. *Rbad v. Duquesne Light Co.*, 255 Pa. St. 409, 100 Atl. 262. And see section 342.

80. *Walker v. Rodriguez*, 139 La. 251, 71 So. 499.

81. *Pyers v. Tiers*, 89 N. J. L. 520. 99 Atl. 130.

82. *Pyers v. Tiers*, 89 N. J. L. 520. 99 Atl. 130.

83. *Kelleher v. City of Newburyport*, 227 Mass. 462, 116 N. E. 807.

**Sec. 292. Competency of driver of motor vehicle — in general.**

One of the obligations imposed on the driver of an automobile is that he should have reasonable experience and skill in the management of automobiles and that he is physically capable of running the machine.<sup>84</sup> An unskillful or inexperienced driver is not to be excused from liability for injuries inflicted because of his inexperience and unskillfulness. On the contrary, he should not frequent places where injury is liable to result from inexperience or unskillfulness in handling a car. When a person operates an automobile along a public highway frequented by other travelers, he assumes the responsibility for injuries resulting from his own unskillfulness in the operation of the car.<sup>85</sup> And when one employs another to run a motor vehicle, he should exercise reasonable prudence in selecting an employee having the necessary requirements.<sup>86</sup>

**84.** *Fricker v. Philadelphia Rapid Transit Co.*, 63 Pa. Super. Ct. 381.

**Inexperienced driver learning to run machine.**—Where an inexperienced person is learning to drive an automobile in the presence of and under the tuition of an experienced operator, he is not liable for injuries occasioned thereby, unless there is positive negligence on his part. *Bertrand v. Hunt*, 89 Wash. 475, 154 Pac. 804. But see *Winslow v. New England Coop. Soc.*, 225 Mass. 576, 114 N. E. 748, holding such a person to the care of an ordinarily prudent driver.

**85.** *Hughey v. Lennox* (Ark.), 219 S. W. 323.

**86.** *Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87; *Gardiner v. Solomon*, 200 Ala. 115, 75 So. 621; *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Raub v. Donn*, 254 Pa. St. 203, 98 Atl. 861; *Allen v. Brand* (Tex. Civ. App.), 168 S. W. 35. See also *Brown v. Green & Flinn, Inc.*, 6 Del. (Boyce) 449, 100 Atl. 475. "But no one can deny that an automobile in the hands of a careless and incompetent driver would be a dangerous

machine to turn loose on busy streets, and would constitute a menace to travelers. The owner of a car must exercise reasonable care in the selection of a chauffeur, and, failing in this, will be held liable for the consequences of his own negligence in sending out his car in charge of an incompetent operator." *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351. "While automobiles are not inherently regarded as dangerous instrumentalities, and the owner thereof is not responsible for the negligent use of the same, except upon the theory of the doctrine of *respondet superior*, yet there is an exception if he intrusts it to one, though not an agent or servant, who is so incompetent in the handling of the same as to convert it into a dangerous instrumentality, and the incompetency is known to the owner when permitting the use of the vehicle." *Gardiner v. Solomon* (Ala.), 75 So. 621.

**Public automobiles.**—The driver of a public vehicle is bound to be a skillful driver, and any damage arising from his unskillful driving is a ground of action. A less degree of skill is to be

If the owner knowingly intrusts the machine to one who is incompetent, he may be liable for ensuing injuries.<sup>87</sup> But when the chauffeur takes the machine without the knowledge or consent of the owner and uses it for his own purposes, it has been held that liability for his conduct on such a trip is not imposed on the master on the theory that the chauffeur was not a competent and careful operator.<sup>88</sup> The owner's fault in employing an improper servant is not deemed a proximate cause of an injury occasioned to a third person when the servant has unlawfully taken the car for his own purposes.<sup>89</sup>

### **Sec. 293. Competency of driver of motor vehicle — presumption as to skill of driver.**

It is held that there is no presumption either as to the skill or want of skill of the driver of a vehicle. Thus it is not proper for the judge to charge the jury that the law presumes, in the absence of evidence to the contrary, that the driver of the machine in question was a reasonable, careful and skillful driver of such a machine.<sup>90</sup> But, in an action for injuries to an automobile, the burden of proof is not upon the owner to show that the driver was competent.<sup>91</sup>

looked for from the driver of a private vehicle, but he is bound to drive with reasonable care and skill. *Collier v. Chaplin*, U. P., C. P., cor. *Byles, J.*, Westminster, Feb. 1, 1865; *Oliphant's Law of Horses*, p. 283.

87. *Gardiner v. Solomon* (Ala.), 75 So. 621.

88. *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338; *Danforth v. Fisher*, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93; *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 125 Am. St. Rep. 915, 14 L. R. A. (N. S.) 216. And see chapter XXIII, as to liability of owner for negligence of driver.

89. "If it were conceded that McCauley was a reckless operator and that the defendant was aware of that fact, it could not be found that the continued employment of a careless ser-

vant by the defendant was the legal cause of the plaintiff's injury. Knowledge that McCauley was habitually careless in the operation of the automobile has no tendency to prove that the defendant ought to have known or anticipated that he would steal the vehicle, or use it for his own purposes contrary to the owner's explicit order; and unless that fact is found, it cannot be said that the defendant's fault in employing a chauffeur whom he knew to be reckless was the cause of the plaintiff's injury." *Danforth v. Fisher*, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670.

90. *Devine v. Brunswick-Balke Collender Co.*, 270 Ill. 504, 110 N. E. 780.

91. *Latham v. Cleveland C. C. & St. L. R. Co.*, 179 Ill. App. 324.

**Sec. 294. Competency of driver of motor vehicle — physical condition of driver.**

It is, of course, clear that one, whose physical condition forbids the operation of a motor vehicle with the precautions which a reasonably prudent man would take, should not attempt such an undertaking. Thus, negligence may be predicated on the fact that the owner of a machine permitted it to be run by a driver who was crippled so that he could not use the foot brake efficiently.<sup>92</sup> And where an innocent person is injured as the result of the violation of a statute which forbids the operation of a motor vehicle by an intoxicated driver, liability may be imposed.<sup>93</sup> So, too, if one voluntarily drinks liquor until he is intoxicated, and so negligently operates an automobile as to cause injury to another, his intoxication will furnish no excuse for his negligence or its proximate results.<sup>94</sup> One is not relieved of his duty of exercising reasonable care for his own safety by voluntary intoxication.<sup>95</sup> On the other

92. See *Blalack v. Blacksher*, 11 Ala. App. 545, 66 So. 863.

93. *Lincoln Taxicab Co. v. Smith*, 88 Misc. (N. Y.) 9, 150 N. Y. Suppl. 86. See also *Stewart v. Smith*, 16 Ala. App. 461, 78 So. 724.

**Proximate cause.**—The violation of a statute with reference to intoxicated drivers does not afford a basis of recovery, unless the injuries in question are the proximate result of the violation. *Allen v. Pearson*, 89 Conn. 401, 94 Atl. 277. And see sections 289-291 as to proximate cause.

94. *Powell v. Perry*, 145 Ga. 696, 89 S. E. 753; *Winston's Adm'r v. City of Henderson*, 179 Ky. 220, 200 S. W. 330. "As liquor may affect, not only the brain, but the nerves, the muscles, and the eyesight, if a person voluntarily becomes intoxicated, and in that condition undertakes to drive an automobile, and injury results to another from the negligent operation of it, his condition would be a fact for the consideration of the jury, in determining whether he acted with diligence or neg-

ligence." *Powell v. Berry*, 145 Ga. 696, 89 S. E. 753. See also, *Wigginton's Adm'r v. Rickert*, 186 Ky. 650, 217 S. W. 933.

95. *Winston's Adm'r v. City of Henderson*, 179 Ky. 220, 200 S. W. 330. "Voluntary drunkenness furnishes no excuse for negligence; nor does it relieve a drunken man from exercising the degree of care required of a sober man in the same circumstances. If a person is required to use ordinary care, this means that care which every prudent man would exercise under similar circumstances. In taking the conduct of every prudent man as a standard, reference is made to the normal man: that is, the sober man. Ordinary care is not to be measured by what every prudent drunken man would do under like circumstances, but what every prudent sober man would do under like circumstances. If ordinary care under certain circumstances would require that a certain thing should be done, the requirement is binding on a man whether sober or drunk: and get-

hand, intoxication of itself furnishes no ground for liability, if the driver has nevertheless exercised the care of a reasonably prudent driver.<sup>96</sup> The intoxication of a driver may be considered by the jury, but it does not of itself convict him of negligence.<sup>97</sup> There may be, however, a few jurisdictions where the driving of a car by an intoxicated person is forbidden by statute and the act, therefore, becomes negligence *per se*.<sup>98</sup> And the fact that the driver's eyesight is such that he is compelled to wear glasses does not forbid him from driving a motor vehicle on the highways,<sup>99</sup> but the standard of care required of one with defective sight and hearing is that usually exercised by an ordinarily prudent normal man.<sup>1</sup> Where the driver of an automobile drove over an embankment on the side of the road, and it appeared that it was broad daylight and the road was hard, dry and smooth and wide enough for two vehicles, and there was no obstruction or other vehicles along the road; and it further appeared that the car was in good condition and he had driven at previous times carelessly and too near the edge of the road, and it was a hot day and the driver's explanation was that he was suddenly taken with a period of dizziness, it was held that his negligence was a question for the jury.<sup>2</sup> Moreover, one who is subject to sudden attacks of vertigo, but who nevertheless attempts to run an automobile along a street frequented by other travelers, may be guilty of criminal negligence and liable to a criminal prosecution.<sup>3</sup>

ting drunk will not relieve the person from the duty. To hold otherwise would be to put a premium upon drunkenness." *Powell v. Berry*, 145 Ga. 696, 89 S. E. 753.

96. *Wise v. Schneider* (Ala.), 88 So. 662; *Sylvester v. Gray*, 118 Me. 74, 105 Atl. 815.

97. *Wise v. Schneider* (Ala.), 88 So. 662; *St. Louis, etc., Ry. Co. v. Morgan* (Tex. Civ. App.), 220 S. W. 281; *Southern Traction Co. v. Kirby* (Tex. Civ. App.), 222 S. W. 702; *Strang v.*

*City of Kenosha* (Wis.), 182 N. W. 741.

98. *Wise v. Schneider* (Ala.), 88 So. 662.

99. *Bigelow v. Town of St. Johnsbury*, 92 Vt. 423, 105 Atl. 34.

1. *Roberts v. Ring*, 143 Minn. 151, 173 N. W. 437.

2. *Myers v. Tri-State Auto Co.*, 121 Minn. 68, 140 N. W. 184.

3. *Tift v. State*, 17 Ga. App. 663, 88 S. E. 41. See chapter XXVII, as to criminal offenses.



**Sec. 295. Competency of driver of motor vehicle — permitting immature child to drive car.**

The owner of an automobile may be charged with negligence if he permits young children to run the machine and their immaturity or lack of judgment occasions injuries to other travelers.<sup>4</sup> Liability is not imposed on the owner because of the relationship between the parties or because of the ownership of the machine, but because of the owner's negligence or wrongful act in entrusting the machine to a person of immature years and judgment.<sup>5</sup> Thus, it is clear that if a father entrusts a heavy motor vehicle to his son who is only eleven years of age for running along the streets of a populous town, the owner may be responsible for injuries occasioned through the conduct of such boy.<sup>6</sup> Statutes which prohibit the operation of motor vehicles by children under a prescribed age may have a material bearing on this question. Such a statute is a legislative declaration that children under the age limit are incompetent to drive such vehicles on the public highways.<sup>7</sup> If the owner connives with his young son in the violation of such a statute, he should be responsible for all injuries which proximately result from the violation.<sup>8</sup> A question may remain, however, as to whether the immaturity of the driver was the proximate cause of the plaintiff's injuries.<sup>9</sup>

4. *Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87; *Gardiner v. Solomon*, 200 Ala. 115, 75 So. 621; *Linville v. Nissen*, 162 N. Car. 95, 77 S. E. 1096; *Raub v. Donn*, 254 Pa. St. 203, 98 Atl. 861; *Discepeo v. City of Ft. William*, 11 O. W. N. (Canada) 73. And see section 292, *et seq.*

5. *Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87; *Linville v. Nissen*, 162 N. Car. 95, 77 S. E. 1096.

6. *Allen v. Brand* (Tex. Civ. App.), 168 S. W. 35.

7. *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Schultz v. Morrison*, 91 Misc. (N. Y.) 248, 154 N. Y.

Suppl. 257.

8. *Taylor v. Stewart*, 172 N. Car. 203, 90 S. E. 134. "When the defendant permitted one of his own family, whose acts he had the right and authority to control, to operate his car, he became a party to the violation of the statute, and should be held responsible for the consequences which followed. *Schultz v. Morrison*, 1 Misc. (N. Y.) 248, 154 N. Y. Suppl. 257.

9. *Elmendorf v. Clark*, 143 La. 971, 79 So. 557; *Taylor v. Stewart*, 172 N. Car. 199, 95 S. E. 167. See also, *Koehl v. City of Seattle* (Wash.), 194 Pac. 572; *Benesch v. Pagel* (Wis.), 177 N. W. 860.

### Sec. 296. Competency of driver of motor vehicle — opinion of witness as to competency of driver.

In an action involving the competency of the driver of a motor vehicle, a witness should not be permitted to give his opinion as to the competency of the driver in question, for the jury is capable of drawing the proper inference from a statement of the facts.<sup>10</sup> So, too, where one of the issues was whether a crippled driver could efficiently manipulate the brakes of a Ford car, it is reversible error to permit a witness to state that one could run a car of that kind and operate the brake as effectively with his hands as with his feet.<sup>11</sup>

### Sec. 297. Effect of violation of statute or municipal ordinance — in general.

The courts in the different jurisdictions are not harmonious on the question as to the effect which shall be given to the violation of a statute or municipal ordinance regulating the use of highways. In some States, the view is taken that the violation is evidence of negligence;<sup>12</sup> in others, the courts say that the violation is *prima facie* evidence of negligence;<sup>13</sup> but the view generally taken is that the violation is negligence

10. *Pantages v. Seattle Elec. Co.*, 55 Wash. 453, 104 Pac. 629.

11. *Black v. Blacksher*, 11 Ala. App. 545, 66 So. 863.

12. *Nebraska*.—*Rule v. Claar Transfer & Storage Co.*, 102 Neb. 4, 165 N. W. 883; *Stevens v. Luther*, 180 N. W. 87; *Dorrance v. Omaha, etc., Ry. Co.*, 180 N. W. 90.

*New Jersey*.—*Horowitz v. Gottwalt* (N. J. L.), 102 Atl. 930; *Kolankiewiz v. Burke*, 91 N. J. L. 567, 103 Atl. 249.

*New York*.—*McCarragher v. Proal*, 114 N. Y. App. Div. 470, 100 N. Y. Suppl. 208; *Harding v. Cavanaugh*, 91 Misc. (N. Y.) 511, 155 N. Y. Suppl. 374; *People v. Scanlon*, 132 N. Y. App. Div. 528, 117 N. Y. Suppl. 57; *Meyers v. Barrett*, 167 N. Y. App. Div. 170, 152 N. Y. Suppl. 921; *Stern v. International Ry. Co.*, 167 App. Div. 503,

153 N. Y. Suppl. 520; *Crombie v. O'Brien*, 178 App. Div. 807, 165 N. Y. Suppl. 858. See also, *Beickhemer v. Empire Carrying Corp.*, 172 N. Y. App. Div. 866, 158 N. Y. Suppl. 853. And see *Martin v. Herzog*, 228 N. Y. 164, 126 N. E. 814, giving greater weight to a violation of statute.

*Canada*.—*Bears v. Central Garage Co.*, 3 D. L. R. 387; *Stewart v. Steele*, 6 D. L. R. 1; *Campbell v. Pugsley*, 7 D. L. R. 177.

13. *Ward v. Meredith*, 220 Ill. 66, 77 N. E. 119; *Lawrence v. Channahon*, 157 Ill. App. 560; *Schumacher v. Meinrath*, 177 Ill. App. 530; *Bruhl v. Anderson*, 189 Ill. App. 461, *Fippinger v. Glos*, 190 Ill. App. 238; *Frank C. Weber v. Stevenson Grocery Co.*, 194 Ill. App. 432; *Berg v. Michell*, 196 Ill. App. 509.

*per se*.<sup>14</sup> The distinction between mere "evidence of negligence" and "negligence *per se*" is very marked, in that in the former there must be an adjudication as to whether or not the violation constitutes negligence, whereas in the latter negligence necessarily follows the proof of the violation.<sup>15</sup> In at

**14. Alabama.**—Watts v. Montgomery Tr. Co., 175 Ala. 102, 57 So. 471; Hill v. Condon, 14 Ala. App. 332, 70 So. 208. "The decisions as to the legal effect of violating a statute or ordinance are not harmonious. In some cases, it is held that such violation is not negligence *per se*, but that it is competent evidence of negligence, and may be sufficient to justify a jury in finding negligence in fact. . . . However, it is settled in *Alabama*, and we think it is the weight of authority, that a violation of a statute or an ordinance is negligence *per se*, and a person proximately injured thereby may recover for such injuries against the violator of the law." Watts v. Montgomery Tr. Co., 175 Ala. 102, 57 So. 471.

**California.**—Seragg v. Sallee, 24 Cal. App. 133, 140 Pac. 706; Opitz v. Schenck, 174 Pac. 40; Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 Pac. 713; Lawrence v. Goodwill, 186 Pac. 781.

**Colorado.**—Denver Omnibus & Cab Co. v. Mills, 21 Colo. App. 582, 122 Pac. 798.

**Delaware.**—Travers v. Hartman, 5 Boyce 302, 92 Atl. 855; Lemmon v. Broadwater, 7 Boyce (30 Del.) 472, 108 Atl. 273; Wollaston v. Stiltz, 114 Atl. 198.

**Georgia.**—Sheppard v. Johnson, 11 Ga. App. 280, 75 S. E. 348; Columbus R. Co. v. Waller, 12 Ga. App. 674, 78 S. E. 52; O'Dowd v. Newnham, 13 Ga. App. 220, 80 S. E. 36; Ware v. Laman, 18 Ga. App. 673, 90 S. E. 364; Central of Ga. R. Co. v. Larsen, 19 Ga. App. 413, 91 S. E. 517; Wilkinson v. Bray (Ga. App.), 108 S. E. 133.

**Indiana.**—Fox v. Barekman, 178 Ind. 572, 99 N. E. 989; Carter v. Caldwell, 183 Ind. 434, 109 N. E. 355; Conder v. Griffith, 61 Ind. App. 218, 111 N. E. 816; Mayer v. Melleter, 65 Ind. App. 54, 114 N. E. 241.

**Iowa.**—Hubbard v. Bartholomew, 163 Iowa, 58, 144 N. W. 13; Fisher v. Ellston, 174 Iowa, 364, 156 N. W. 422.

**Kansas.**—Fisher v. O'Brien, 99 Kans. 621, 162 Pac. 317.

**Kentucky.**—National Casket Co. v. Powar, 137 Ky. 156, 125 S. W. 279; Collett v. Standard Oil Co., 186 Ky. 142, 216 S. W. 356.

**Minnesota.**—Hillstrom v. Mannheimer Bros., 178 N. W. 881; Unmacht v. Whitney, 178 N. W. 886; Thomas v. Stevenson, 178 N. W. 1021. See also, Day v. Duluth St. Ry. Co., 121 Minn. 445, 141 N. W. 795.

**Missouri.**—Barton v. Faeth, 193 Mo. App. 402, 186 S. W. 52; Carradine v. Ford, 195 Mo. App. 684, 187 S. W. 285; Rappaport v. Roberts (Mo. App.), 203 S. W. 676.

**North Carolina.**—Taylor v. Stewart, 172 N. Car. 203, 90 S. E. 134; Taylor v. Stewart, 175 N. Car. 199, 95 S. E. 167.

**Ohio.**—Schell v. DuBois, 94 Ohio, 93, 113 N. E. 664; Weimer v. Rosen, 100 Ohio, 361, 126 N. E. 307; Chesrown v. Bevier, 128 N. E. 94.

**South Carolina.**—Whaley v. Ostendorff, 90 S. Car. 281, 73 S. E. 186; McCoon v. Muldrow, 91 S. Car. 523, 74 S. E. 386.

**Texas.**—Staten v. Monroe (Civ. App.), 150 S. W. 222; Solon v. Pasche (Civ. App.), 153 S. W. 672; Keevil v. Ponsford (Civ. App.), 173 S. W. 518; Schoellkopf Saddlery Co. v. Crawley

least one jurisdiction, a distinction has been drawn between the violation of a statute and the violation of an ordinance, and it has been held that the violation of a statute is negligence *per se*, but that result does not follow from the violation of a municipal ordinance.<sup>16</sup> The effect of the violation of a statute is further discussed in this work in connection with particular regulations.<sup>17</sup> The rule is different in some jurisdictions where the regulation involved relates to the so-called "law of the road." Driving on the wrong side of the road is

(Civ. App.), 203 S. W. 1172; Carvel v. Kusel (Civ. App.), 205 S. W. 941; El Paso Elec. Ry. Co. v. Terrazas (Civ. App.), 208 S. W. 387; Southern Traction Co. v. Jones (Civ. App.), 209 S. W. 457; Ward v. Cathey (Civ. App.), 210 S. W. 289; Flores v. Garcia (Civ. App.), 226 S. W. 743.

*Utah*.—Beggs v. Clayton, 40 Utah, 389, 12 Pac. 7.

*Washington*.—Ballard v. Collins, 63 Wash. 493, 115 Pac. 1050; Hillebrant v. Manz, 71 Wash. 250, 128 Pac. 892; Ludwigs v. Dumas, 72 Wash. 68, 129 Pac. 903; Mickelson v. Fischer, 81 Wash. 423, 142 Pac. 1160; Moy Quon v. M. Furuya Co., 81 Wash. 526, 143 Pac. 99; Lloyd v. Calhoun, 82 Wash. 35, 143 Pac. 458, overruling 78 Wash. 438, 139 Pac. 231; Sheffield v. Union Oil Co., 82 Wash. 386, 144 Pac. 529; Bogdan v. Pappas, 95 Wash. 579, 164 Pac. 208; Ebling v. Nillson, 186 Pac. 887. "This court is definitely committed to the rule that 'a thing which is done in violation of positive law is in itself negligence,' in the absence of pleading and proof of such peculiar facts as would tend to justify the violation. . . . In consonance with that rule, this court, in common with others, has repeatedly held that in the absence of circumstances tending to excuse by making such a course reasonably necessary, a failure to observe the law of the road, resulting in injury, is negligence as a matter of law." John-

son v. Heitman, 88 Wash. 595, 153 Pac. 331.

*Wisconsin*.—Ludke v. Buick, 160 Wis. 440, 152 N. W. 190, L. R. A. 1915D 968; Riggles v. Priest, 163 Wis. 199, 157 N. W. 755.

*Canada*.—Stewart v. Steele, 5 Sask. L. R. 359, 6 D. L. R. 1.

15. Central of Georgia Ry. Co. v. Larsen, 19 Ga. App. 413, 91 S. E. 517. "When evidence of negligence is only *prima facie*, it is subject to rebuttal, but when there is negligence *per se*, it is conclusive of that question." Whaley v. Ostendorff, 90 S. Car. 281, 73 S. E. 186.

16. Cook v. Johnston, 58 Mich. 437, 25 N. W. 388, 55 Am. Rep. 703; Flater v. Fey, 70 Mich. 644, 38 N. W. 656; Sterling v. City of Detroit, 134 Mich. 22, 95 N. W. 986; Blickley v. Luce's Estate, 148 Mich. 233, 111 N. W. 752; Westover v. Grand Rapids R. Co., 180 Mich. 373, 147 N. W. 630; Rotter v. Detroit United Ry. (Mich.), 171 N. W. 514. See also, Zoltovski v. Gzella, 159 Mich. 620, 124 N. W. 527, 26 L. R. A. (N. S.) 435.

*Instructions*.—One suing for an injury occasioned by the operation of a motor vehicle in excess of a speed regulation, is entitled to have the jury given a clear and explicit instruction as to the legal effect of the violation. Levyn v. Koppin, 180 Mich. 232, 149 N. W. 993.

17. See sections 267, 320-322.

not so clearly a wrongful act as driving at a prohibited speed, for the circumstances may be such as to excuse a violation of the law of the road. Hence the violation is generally said to be *prima facie* negligence and the violator of the rule is given an opportunity to rebut the inference of negligence arising against him.<sup>18</sup> There are, however, a few jurisdictions where a violation of the law of the road is considered negligence *per se*.<sup>19</sup> And an unexcused violation may be negligence as a matter of law.<sup>20</sup> In any event, the failure to observe the re-

18. *Herdman v. Zwart*, 167 Iowa, 500, 149 N. W. 631; *Granger v. Far-rant*, 179 Mich. 19, 146 N. W. 218. See also section 267. "But it is not to be understood that we intend to hold that the fact that the driver of a motor vehicle may violate the statute by driving on the wrong side of the road or street is itself necessarily an act of negligence in all cases. He might for a sufficient reason be compelled to drive on the left of the center of the road or street, and do so in such manner as to leave to approaching vehicles, pedestrians, or animals ample opportunity to pass with perfect safety to themselves, in which case, if damage occurred by collision with his vehicle, the question as to whose negligence was directly responsible therefor would depend for its solution upon the other circumstances attending the accident. In brief, and in other words, the fact that he was driving over the highway on the left of the center of the roadway might, where injury to another had resulted therefrom, constitute *prima facie* evidence of negligence, but it would amount to no more than that, and its evidentiary effect might properly be overcome or dispelled by other evidence. . . . We can conceive no inconsistency between the rule thus stated and the declaration in the opinion in the case of *Scragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706, cited here, that one who drives a motor vehicle

over a street beyond the rate of speed prescribed and limited by a municipal ordinance and for which a penalty is provided is guilty of negligence *per se*. The two propositions, as we conceive them, are widely divergent. In the one case the drivers have the right to pass over public streets and highways, and, as before suggested, if they 'give reasonable warning of their approach' and 'use every reasonable precaution to insure the safety of' approaching vehicles, persons, or animals, the mere fact that they are traveling on the left of the center of the highway, while evidence of more or less significance, according to other circumstances of the case, is not itself negligence. In the other case one who violates a penal statute or municipal ordinance commits a public wrong, and such act is negligence *per se*, and nothing further need be proved if it be shown that the infraction of such law or ordinance was the direct and sole cause of an injury to another." *Stohman v. Martin*, 28 Cal. App. 338, 152 Pac. 319.

19. *Kinney v. King* (Cal. App.), 190 Pac. 831; *Hedges v. Mitchell* (Colo.), 194 Pac. 620; *Zucht v. Brooks* (Tex. Civ. App.), 216 S. W. 684; *John v. Pierce* (Wis.), 178 N. W. 297; *Foster v. Bauer* (Wis.), 180 N. W. 817. And see section 267.

20. *Viekery v. Armstead* (Iowa), 180 N. W. 893.

quirements of a statute, if such failure results in injury to one for whose protection it was enacted, may cause liability irrespective of whether such conduct would constitute negligence in the absence of the statute.<sup>21</sup>

**Sec. 298. Effect of violation of statute or municipal ordinance  
— violation as contributory negligence.**

The rule as to the effect of the violation of a statutory or municipal regulation does not work solely to the advantage of the plaintiff in an action. When the violation is committed by the plaintiff, the defending party is entitled to the benefits thereof as a defense to the plaintiff's claim.<sup>22</sup> In those jurisdictions where the violation is considered negligence *per se*, if it is a contributing cause to the injury, the plaintiff may be barred from recovering damages, although the negligence of the defendant is clearly shown.<sup>23</sup> Thus, in the case of an injury to an automobile or the driver thereof, from a collision with a locomotive, a street car, or other vehicle, the fact that the automobile was exceeding the limit of speed fixed by statute or ordinance, may bar an action for the injuries.<sup>24</sup> So,

21. *Benson v. Larson*, 133 Minn. 346, 158 N. W. 426.

22. "We are not cited to and have found no Alabama case where the violation of a statute or ordinance by the injured party was pleaded by the defendant by way of contributory negligence; yet we see no reason why such a violation, if proximately causing the injury complained of, cannot be set up as a defense to the simple negligence charged in the complaint." . . . The statute or ordinance violated, however, must have been enacted for the benefit of the party who seeks to invoke its violation as distinguished from the public generally or a class to whom the ordinance necessarily applies. *Watts v. Montgomery Tr. Co.*, 175 Ala. 102, 57 So. 471.

23. *Watts v. Montgomery Tr. Co.*, 175 Ala. 102, 57 So. 471; *Central of Georgia Ry. Co. v. Larsen*, 19 Ga. App.

413, 91 S. E. 517; *Wood Transfer Co. v. Shelton*, 180 Ind. 273, 101 N. E. 718; *Hinton v. Southern Ry. Co.*, 172 N. C. 587, 90 S. E. 756; *Lloyd v. Calhoun*, 82 Wash. 35, 143 Pac. 458; *Yahnke v. Lange*, 168 Wis. 512, 170 N. W. 722; *Kramer v. Chicago, etc. Ry. Co. (Wis.)*, 177 N. W. 874; *Foster v. Bauer (Wis.)*, 180 N. W. 817. See also *Martin v. Herzog*, 176 N. Y. App. Div. 614, 163 N. Y. Suppl. 189, *affirmed*. 228 N. Y. 164, 126 N. E. 814.

24. *Columbus R. Co. v. Waller*, 12 Ga. App. 674, 78 S. E. 52; *Central of Georgia Ry. Co. v. Larsen*, 19 Ga. App. 413, 91 S. E. 517; *Newton v. McSweeney*, 225 Mass. 402, 114 N. E. 667; *Barton v. Faeth*, 193 Mo. App. 402, 186 S. W. 52; *Keevil v. Ponsford (Tex. Civ. App.)*, 173 S. W. 518. "It is negligence *per se* for an autoist to run his car in excess of ordinance speed, and if such negligence is

too, a violation of the law of the road may have the effect of establishing *prima facie* the contributory negligence of the violator.<sup>25</sup> In those jurisdictions, where the violation is considered, not as negligence *per se*, but rather as mere evidence of negligence, a question for the jury may be presented though it is shown that the injured person has violated a positive regulation.<sup>26</sup> A violation will not bar the remedy of an injured person, unless the violation is a contributing cause of the injury.<sup>27</sup>

**Sec. 299. Effect of violation of statute or municipal ordinance — who may invoke violation.**

In case of the violation of a statute or municipal ordinance by an automobilist, only those classes of persons for whose benefit the regulation was enacted can plead the violation and secure the advantage afforded by the general rule.<sup>28</sup> Thus when the owner of an automobile brings an action against a street railway company for damages to his machine sustained in a collision with a street car, the street railway company cannot succeed on the theory that the plaintiff violated an ordinance requiring drivers of vehicles to keep on the right-hand side of the street, for the regulation was not intended for the protection of street railway companies.<sup>29</sup> And a stat-

a contributing cause of the infliction of an injury to him or his car, he will not be allowed to recover damages from another whose negligence also contributed to the injury." *Barton v. Faeth*, 193 Mo. App. 402, 186 S. W. 52. See sections 407, 572, 603.

25. *Wood Transfer Co. v. Shelton*, 180 Ind. 273, 101 N. E. 718; *Brickell v. Williams*, 180 Mo. App. 572, 167 S. W. 607. And see sections 367, 403, 510.

26. *Day v. Duluth St. R. Co.*, 121 Minn. 445, 141 N. W. 795; *McCaragher v. Proal*, 114 N. Y. App. Div. 47, 100 N. Y. Suppl. 208.

27. *House v. Fry*, 30 Cal. App. 157, 157 Pac. 500; *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl.

44; *Lawrence v. Channahon*, 157 Ill. App. 560; *Staack v. General Baking Co. (Mo.)*, 223 S. W. 89; *Hinton v. Southern Ry. Co.*, 172 N. C. 587, 90 S. E. 756; *Keevil v. Ponsford (Tex. Civ. App.)*, 173 S. W. 518.

28. *King v. San Diego Elec. Ry. Co.*, 176 Cal. 266, 168 Pac. 131; *Johnston v. Cornelius*, 200 Mich. 209, 166 N. W. 983, L. R. A. 1918D 880; *Schell v. DuBois*, 94 Ohio, 93, 113 N. E. 664; *Carter v. Redmond*, 142 Tenn. 258, 218 S. W. 217; *Bogdan v. Pappas*, 95 Wash. 579, 164 Pac. 208.

29. *Watts v. Montgomery Tr. Co.*, 175 Ala. 102, 57 So. 471, wherein it was said: "A municipality would no doubt have the right under its police power, to regulate the travel upon its

ute forbidding the use of a motor vehicle without the consent of the owner is not intended for the protection of pedestrians along the highway and cannot form the basis for an action for their injuries.<sup>30</sup> Likewise, a statute requiring an automobile driver to stop before crossing a railroad track is not important in an action by a pedestrian against the driver.<sup>31</sup> But a statute prescribing the speed of motor vehicles may be considered as enacted for the benefit of passengers in a jitney injured by the unlawful speed of such machine, as well as for pedestrians and other travelers outside of the jitney.<sup>32</sup> And a regulation regulating the conduct of drivers when passing a street car standing in the street, may be deemed for the protection of pedestrians crossing the street as well as street railway passengers.<sup>33</sup> So, too, an ordinance forbidding the obstruction of fire apparatus by street cars may be invoked by a pedestrian who is struck by a fire automobile diverted from its course by a street car.<sup>34</sup> But an ordinance forbidding the

streets so as to prevent congestion and collision, and could thereby protect all persons using the streets, including street cars; but it is manifest that the ordinance in question was not intended for the protection of street railways, as the wording and meaning of same does not exclude vehicles from their tracks. The ordinance does not require the drivers of vehicles to keep off of the street railway tracks, but only requires them to keep on the side of the street to the right; that is, they must remain at the right of the center of the street. If they do this, they do not violate the ordinance, notwithstanding they may be upon the track of a street care line. It may be that most of the street car tracks are laid in the center of the street, and an ordinance requiring vehicles to stay to the right of the track, if there is space enough for them to do so, would no doubt be a reasonable one; but such is not the present ordi-

nance, as it only requires the vehicle to be to the right of the center of the track. Again, there may be street car tracks laid within either side of the streets, and, if a driver kept to the right of the center of the street, he would not violate the ordinance, although he may drive upon or along the street car track. It is plain that the ordinance in question was not intended to keep vehicles off of street car tracks or for the protection of street car companies."

30. *Johnston v. Cornelius*, 200 Mich. 209, 166 N. W. 983, L. R. A. 1918D 880.

31. *Carter v. Redmond*, 142 Tenn. 258, 218 S. W. 217.

32. *Singer v. Martin*, 96 Wash. 231, 164 Pac. 1105.

33. *Kolankiewicz v. Burke*, 91 N. J. L. 567, 103 Atl. 249.

34. *King v. San Diego Elec. Ry. Co.*, 176 Cal. 266, 168 Pac. 131.



parking of cars within a certain distance of a hydrant is not for the benefit of the traveling public.<sup>35</sup>

**Sec. 300. Effect of violation of statute or municipal ordinance — proximate cause of injury.**

In order that an injured plaintiff shall reap the advantages arising from the fact that the defendant has violated a statute or municipal ordinance, it is essential that the injury of which the plaintiff complains is one which proximately follows from violation of the regulation.<sup>36</sup> On the other hand, if the viola-

35. *Denson v. McDonald Bros.*, 144 Minn. 252, 175 N. W. 108.

36. *Alabama*.—Taxicab & Touring Car Co. v. Cabiness, 9 Ala. App. 549, 63 So. 774.

*California*.—Fenn v. Clark, 11 Cal. App. 79, 104 Pac. 632; George v. McManus, 27 Cal. App. 414, 150 Pac. 73; Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323; House v. Fry, 30 Cal. App. 157, 157 Pac. 500; Henderson v. Northam, 176 Cal. 493, 168 Pac. 1044; Lawrence v. Goodwill (Cal. App.), 186 Pac. 781; Robinson v. Clemons (Cal. App.), 190 Pac. 203. "Counsel for the defendant are undoubtedly right in the contention that, where, as is the theory of the plaintiff here, a tort is the direct result of the violation of some statutory or other law, and the party suing for damages relies upon the infraction of such law for a recovery, it must be made to appear, and the court must so instruct the jury, that, before a recovery in such case is sustainable, the act of the defendant in violating such law was the proximate or direct cause of the tort or injury." *Weaver v. Carter*, 28 Cal. App. 241, 152 Pac. 323.

*Connecticut*.—Allen v. Pearson, 89 Conn. 401, 94 Atl. 277; Coffin v. Laskau, 89 Conn. 325, 94 Atl. 370; Feehan v. Slater, 89 Conn. 697, 96 Atl. 159; Radwick v. Goldstein, 90 Conn. 701, 98 Atl. 583.

*Delaware*.—Grier v. Samuel, 4 Boyce, 106, 86 Atl. 209; Lemmon v. Broadwater, 30 Del. (7 Boyce) 472, 108 Atl. 273; Wollaston v. Stiltz, 114 Atl. 198.

*Illinois*.—Graham v. Hagmann, 270 Ill. 252, 110 N. E. 337, affirming 189 Ill. App. 631; Kessler v. Washburn, 157 Ill. App. 532; Lawrence v. Channahon, 157 Ill. App. 560; Natham v. Cleveland, etc., R. Co., 164 Ill. App. 559; Moyer v. Shaw Livery Co., 205 Ill. App. 273.

*Indiana*.—Mayer v. Melleter, 65 Ind. App. 54, 114 N. E. 241.

*Iowa*.—Herdman v. Zwart, 167 Iowa, 500, 149 N. W. 631.

*Kentucky*.—Moore v. Hart, 171 Ky. 725, 188 S. W. 861.

*Massachusetts*.—Belleveau v. S. C. Lowe Supply Co., 200 Mass. 237, 86 N. E. 301.

*Michigan*.—People v. Barnes, 182 Mich. 179, 148 N. W. 400; Johnston v. Cornelius, 200 Mich. 209, 166 N. W. 983.

*Minnesota*.—Denson v. McDonald Bros., 144 Minn. 252, 175 N. W. 108.

*Missouri*.—Roper v. Greenspon (Mo. App.), 192 S. W. 149. "Where the negligence charged consists of the alleged violation of a municipal ordinance it is not sufficient to merely show the violation of the ordinance and plaintiff's injury. The fact of the violation of the ordinance alone raises no

tion is the proximate cause of the injury sustained by the plaintiff, and if the plaintiff has not been guilty of contributory negligence,<sup>37</sup> the defendant is liable.<sup>38</sup> Whether the injury in question is a proximate result of the violation, is frequently a jury question.<sup>39</sup> One excellent illustration of the rule is found in cases where the owner of an automobile has failed to have the machine registered and licensed according to the statute on the subject; but it is generally (not universally) held that such failure is not sufficient ground to charge the owner with responsibility for injuries sustained by another traveler by reason of a collision with such automobile; nor does it forbid the owner from recovering for injuries to the machine occasioned through the neglect of another traveler.<sup>40</sup> The fact the driver is under the lawful age of persons allowed to drive automobiles, will not bar an action by him, unless his age contributed to the injury.<sup>41</sup> Other illustrations will be found in connection with the violation of various statutes relating to the use of highways by automobilists.

presumption that the injury complained of was thereby caused. There must be evidence tending to reasonably establish a causal connection between such ordinance violation and the injuries for which plaintiff sues. In order to support a recovery there must be substantial evidence tending to make it appear that the injury would not have occurred had the ordinance in question been complied with." *Roper v. Greenspon* (Mo. App.), 192 S. W. 149.

*New York*.—*Linneball v. Levy Dairy Co.*, 173 N. Y. App. Div. 861, 160 N. Y. Suppl. 114.

*North Carolina*.—*Taylor v. Stewart*, 172 N. Car. 203, 90 S. E. 134; *Hinton v. Southern Ry. Co.*, 172 N. Car. 587, 90 S. E. 756; *Taylor v. Stewart*, 175 N. Car. 199, 95 S. E. 167.

*South Carolina*.—*Whaley v. Ostendorff*, 90 S. Car. 281, 73 S. E. 186.

*Texas*.—*Keevil v. Ponsford* (Civ. App.), 173 S. W. 518; *Schoellkopf Saddlery Co. v. Crawley* (Civ. App.), 203 S. W. 1172; *Texas etc. Co. v. Harrington* (Civ. App.), 209 S. W. 685

*Washington*.—*Johnson v. Heitman*, 88 Wash. 595, 153 Pac. 331.

37. Section 301.

38. *Weaver v. Carter*, 28 Cal. App. 241, 152 Pac. 323; *Carter v. Caldwell*, 183 Ind. 434, 109 N. E. 355; *Schell v. DuBois*, 94 Ohio, 93, 113 N. E. 664; *Whaley v. Ostendorff*, 90 S. Car. 281, 73 S. E. 186; *Johnson v. Heitman*, 88 Wash. 595, 153 Pac. 331; *Benesch v. Pagel* (Wis.), 177 N. W. 860.

39. *Molitor v. Blackwell Motor Co.* (Wash.), 191 Pac. 1103.

40. Section 126.

41. *Benesch v. Pagel* (Wis.), 177 N. W. 860.

**Sec. 301. Effect of violation of statute or municipal ordinance — contributory negligence of injured as a defense.**

The fact that the defendant has violated a statute or municipal ordinance regulating his conduct does not generally impose liability on him for the plaintiff's injuries, unless there is an absence of contributory negligence on the part of the plaintiff. That is to say, contributory negligence is a defense to an action based on the violation of a statute or ordinance.<sup>42</sup> In some jurisdictions, contributory negligence of an injured person is not a defense, where "gross" negligence on the part of the defendant is shown; but it is held that the mere violation of a speed statute is not "gross" negligence within the meaning of this rule.<sup>43</sup>

**Sec. 302. Effect of violation of statute or municipal ordinance — necessity of pleading ordinance.**

In those jurisdictions where the violation of an ordinance is merely evidence of negligence, it is held that it may be received in evidence without being specially set out in the pleadings, for it is the general rule that matters of evidence need not, and in fact should not, be pleaded.<sup>44</sup> But, when it is

42. *Davis v. Breuner Co.*, 167 Cal. 683, 140 Pac. 586; *Fenn v. Clark*, 11 Cal. App. 79, 104 Pac. 632; *Kessler v. Washburn*, 157 Ill. App. 532; *Fisher v. O'Brien*, 99 Kans. 621, 162 Pac. 317; *Hillstrom v. Mannheimer Bros.* (Minn.), 178 N. W. 881; *Ebling v. Nielson* (Wash.), 186 Pac. 887; *Zimmerman v. Mednikoff*, 165 Wis. 333, 162 N. W. 349.

43. *Ludke v. Buick*, 160 Wis. 440, 152 N. W. 190, L. R. A. 1915D 968; *Riggles v. Priest*, 163 Wis. 199, 157 N. W. 755.

44. *Meyers v. Barrett*, 167 N. Y. App. Div. 170, 152 N. Y. Supp. 921, wherein the court said: "The general rule is that when observance of an ordinance is a condition precedent to a right of action or where an action is based upon an ordinance it must be

alleged as well as proved. But the action at bar is not to enforce an ordinance or to recover a penalty for the violation thereof. It is an action in negligence for reckless and careless driving in the public streets. The allegation in the complaint is general and thereunder any evidence tending to show such negligence and careless driving was admissible. The ordinances and the breach thereof were offered and received not as conclusive evidence of negligence but as some evidence which the jury might take into consideration. Upon principle it would seem that as mere evidence it would have been improper to have pleaded the ordinances because ultimate facts and not evidence should be set forth in a complaint."

sought to charge a party with negligence *per se* because he has violated a municipal regulation, it may be said with considerable force that the regulation is a matter of fact which should be pleaded by the party relying thereon. This view is adopted in some jurisdictions.<sup>45</sup> It would seem to follow from such doctrine, that, if the ordinance was not pleaded, it could be shown, if at all, only as evidence of negligence. But the courts are not in agreement on this question, and it is sometimes held that negligence *per se* may be based on a violation of the ordinance, though it is not pleaded.<sup>46</sup> Also, in a State

**45. Pleading manner of violation.**—An allegation that a person was violating an ordinance, without alleging the particular respect in which he was violating it, is not ordinarily sufficient. *Brickell v. Williams*, 180 Mo. App. 572, 167 S. W. 607.

**46. *Seragg v. Sallee*.** 24 Cal. App. 133, 140 Pac. 706, wherein it was said: "We have not overlooked the cases arising in other jurisdictions . . . and to which attention has been directed by counsel for the defendant, wherein it is held that, to constitute the violation of a municipal speed ordinance negligence as a matter of law, such ordinance must be pleaded, and that, where in such case it is not pleaded, proof of the existence and of the violation of the ordinance amounts to no more than evidence of negligence, to be considered with other evidence received in the case upon that subject. The theory of that proposition is, obviously, that the plaintiff, not having pleaded the ordinance, does not rely upon it as the foundation of his right of action. The rule as so enunciated and applied, so far as we are advised, has never been recognized or applied in *California*. In practical effect the rule as thus enunciated would leave to the determination of the plaintiff, primarily, the question whether the violation of such an ordinance is negligence *per se* or only evidence of negligence.

Manifestly, the violation of a municipal ordinance fixing the limit beyond which vehicles may not be driven over the streets of a city is, no less than the violation of a general act of the legislature upon the same subject, negligence as a matter of law. The only distinction which can be discerned between an ordinance and a general statute of the State dealing with precisely the same subject, so far as is concerned the effect of the violation thereof, lies in the proposition that in the one case, as a general rule, the courts must acquire knowledge of the existence of the local regulation by means of affirmative proof thereof, while in the other the courts presumptively know and must take judicial cognizance of its existence. But *non constat* that the violation of the ordinance does not constitute negligence *per se* merely because the court in a case in which the question could arise has not acquired knowledge in a competent way of the existence of the ordinance. The result of the want of such knowledge by the court would only be to deprive it of the authority or right to announce to the jury that such violation is negligence as a matter of law. The rule adopted and followed in this State appears to be the more logical. It does not stop to make inquiry as to the particular nature of the negligence of which the defendant has been guilty,

where the view is taken that the violation of the ordinance is merely evidence of negligence, it has been held that the ordinance must be pleaded to be available.<sup>47</sup>

### Sec. 303. Speed of machine — in general.

In the following paragraphs are discussed the general propositions relating to the speed of motor vehicles on the public highways. In other chapters are treated such questions, as the power of States and municipalities to adopt speed regulations;<sup>48</sup> evidence of their speed,<sup>49</sup> criminal prosecution for violations of the prescribed limits,<sup>50</sup> and more in detail as to injuries received by different classes of travelers and under various circumstances.<sup>51</sup> The primary obligation of the driver of an automobile, so far as its speed is concerned, is to obey statutory and municipal regulations applicable thereto, and in any event to drive not faster than a reasonable rate of speed considering nature of the vehicle and the surrounding circumstances. The law requires the automobilist to have due regard for the rights of other travelers,

and which has directly caused the damage complained of, but authorizes the plaintiff, where he relies for a recovery upon an act constituting negligence as a matter of law, to prove the act under his general allegations of negligence. In other words, if the negligence which was the proximate cause of the injuries complained of consisted of the violation of a municipal ordinance prescribing a maximum limit at which vehicles may be driven upon the streets of a city, then the plaintiff must first invest the court with knowledge of the existence of such ordinance, which he may do without having specially pleaded it, and then he may make proof of its violation by the defendant in support of the general allegations of negligence contained in his complaint." See also *Santina v. Tomlinson* (Cal. App.), 171 Pac. 437; *Opitz v. Schenck* (Cal.), 174 Pac. 40;

*Yahnke v. Lange*, 168 Wis. 512, 170 N. W. 722.

**Violation admissible under general denial.**—In an action for damages on account of a collision of the defendant's taxicab with the plaintiff's carriage, it was held that evidence of a violation of a city ordinance relative to the driver on streets was admissible in behalf of the defendant under his general denial, for, though there was no pleading attempting to set up the ordinance, yet evidence thereof was admissible on the question of contributory negligence. *Wood Transfer Co. v. Shelton*, 180 Ind. 273, 101 N. E. 718.

<sup>47</sup> *Grenadier v. Detroit United Ry.*, 201 Mich. 367, 171 N. W. 362.

<sup>48</sup> Chapters V and VI.

<sup>49</sup> Sections 920-933.

<sup>50</sup> Sections 728-743.

<sup>51</sup> Sections 370, 441-445, 501, 528, 572, 603, 715.

and though it may be convenient and even fascinating to reach one's destination at the earliest possible moment, yet the safety of other travelers must not be sacrificed.<sup>52</sup>

### Sec. 304. Speed of machine — proximate cause.

It is a fundamental rule of the law of negligence that a wrongdoer is liable only for those injuries which proximately result from his wrongful acts.<sup>53</sup> Thus, the running of a motor vehicle at an excessive speed renders the wrongdoer liable only for those injuries which proximately result from the unlawful speed.<sup>54</sup> On the other hand, as a general proposition, if the injured person has not been guilty of negligence contributing to the accident, one running at an unreasonable speed is liable for the injuries which proximately result therefrom.<sup>55</sup> These general rules apply when the excessive speed is in violation of a statute or municipal ordinance.<sup>56</sup> And the fact that the driver of a car was exceeding the speed limit at the time of an injury at a railroad crossing or a collision with another vehicle, will not bar him from recovering for his injuries unless the excessive speed was a contributing cause of the injury.<sup>57</sup> It is not always necessary to constitute a link

<sup>52</sup>. *Gurney v. Piel*, 105 Me. 501, 74 Atl. 1131.

<sup>53</sup>. Sections 289-291.

<sup>54</sup>. *Georgia*.—*Jones v. Tanner* (Ga. App.), 105 S. E. 705.

*Illinois*.—*Hartje v. Moxley*, 235 Ill. 164, 85 N. E. 216; *Kessler v. Washburn*, 157 Ill. App. 532.

*Indiana*.—*Carter v. Caldwell*, 183 Ind. 434, 109 N. E. 355.

*Kansas*.—*Fisher v. O'Brien*, 99 Kans. 621, 162 Pac. 317; *Barshfield v. Vucklich*, 197 Pac. 205.

*Michigan*.—*Weber v. Beeson*, 197 Mich. 607, 164 N. W. 255.

*Montana*.—*Lewis v. Steel*, 52 Mont. 300, 157 Pac. 575.

*South Carolina*.—*Whaley v. Ostendorff*, 90 S. Car. 281, 73 S. E. 186.

*Washington*.—*Hartley v. Lasater*, 96 Wash. 407, 165 Pac. 106; *Singer v. Martin*, 96 Wash. 231, 164 Pac. 1105;

*Earlie v. Stephens*, 193 Pac. 684.

*Wisconsin*.—*Foster v. Bauer*, 180 N. W. 817.

<sup>55</sup>. *Weaver v. Carter*, 28 Cal. App. 241, 152 Pac. 323; *Newman v. Overholtzer* (Cal.), 190 Pac. 175; *Walterick v. Hamilton*, 179 Iowa, 607, 161 N. W. 684; *Fisher v. O'Brien*, 99 Kans. 621, 162 Pac. 317; *Solomon v. Braufman*, 175 N. Y. Suppl. 835; *Schell v. DuBois*, 94 Ohio, 93, 113 N. E. 664.

<sup>56</sup>. *Columbus R. Co. v. Waller*, 12 Ga. App. 674, 78 S. E. 52; *Fisher v. O'Brien*, 99 Kans. 621, 162 Pac. 317; *Whaley v. Ostendorff*, 90 S. Car. 281, 73 S. E. 186; *Schoelkopf Saddlery Co. v. Crawley* (Tex. Civ. App.), 203 S. W. 1172; *Barton v. Van Gesen*, 91 Wash. 94, 157 Pac. 215.

<sup>57</sup>. *Robinson v. Clemons* (Cal. App.), 190 Pac. 203; *Berges v. Guthrie* (Cal. App.), 197 Pac. 356; *Cross v.*

between the excessive speed and the injury that the unlawful speed be made at the particular time of the collision. Thus, where the driver of a machine raced a street car for a considerable distance and then tried to pass in front thereof, it was held that the unlawful speed contributed to the injury, although at the time of the collision the driver had slowed down to a lawful speed in order to make the turn.<sup>58</sup> The fact that a motorcyclist violates a speed regulation does not create a liability in favor of the owner of horses in an adjoining field which become frightened, for such a regulation is intended for the protection only of other travelers.<sup>59</sup>

### Sec. 305. Speed of machine — unreasonable speed prohibited.

The general rule relating to the speed with which a motor vehicle may be operated along the public highways, is that, in the absence of statute prescribing a slower rate, it shall not exceed a reasonable rate, considering the nature of the machine and all of the surrounding circumstances.<sup>60</sup> The

Rosencranz (Kans.). 195 Pac. 857; Shepard v. Norfolk & S. R. Co., 169 N. Car. 239. 84 S. E. 277; Hinton v. Southern Ry. Co., 172 N. Car. 587, 90 S. E. 756; Keevil v. Ponsford (Tex. Civ. App.), 173 S. W. 518.

58. Fair v. Union Tract. Co., 102 Kans. 611, 171 Pac. 649.

59. Walker v. Faelber, 102 Kans. 646, 171 Pac. 655.

60. *United States*.—New York Transp. Co. v. Garside, 157 Fed. 521. 85 C. C. A. 285.

*California*.—Cook v. Miller, 175 Cal. 497, 166 Pac. 316; Zarzana v. Neve Drug Co., 180 Cal. 32, 179 Pac. 203.

*Connecticut*.—Irwin v. Judge, 81 Conn. 492, 71 Atl. 572; Lynch v. Shearer, 83 Conn. 73, 75 Atl. 88; Radwick v. Goldstein, 90 Conn. 701, 98 Atl. 583.

*Delaware*.—Cecchi v. Lindsay, 1 Boyce (Del.) 185, 75 Atl. 376, reversed on other grounds, 80 Atl. 523; Grier v. Samuel, 4 Boyce (Del.) 106, 86 Atl. 209; Brown v. City of Wilmington, 4

Boyce (Del.) 492, 90 Atl. 44.

*Georgia*.—Strickland v. Whatley, 142 Ga. 802, 83 S. E. 856; Central of Ga. Ry. Co. v. Larsen, 19 Ga. App. 413, 91 S. E. 517.

*Illinois*.—Hartje v. Moxley, 235 Ill. 164, 85 N. E. 216; Kessler v. Washburn, 157 Ill. App. 532; People v. Lloyd, 178 Ill. App. 66; Hutson v. Flatt, 194 Ill. App. 29.

*Indiana*.—Brinkman v. Pacholke, 41 Ind. App. 662, 84 N. E. 762; East v. Amburn, 47 Ind. App. 530, 94 N. E. 895.

*Iowa*.—Delfs v. Dunshee, 143 Iowa, 381, 122 N. W. 236; Hanen v. Le-nander, 168 Iowa, 569, 160 N. W. 18; Lemke v. Ady, 159 N. W. 1011. See also, Needy v. Littlejohn, 137 Iowa, 704, 115 N. W. 483.

*Kansas*.—Arrington v. Horner, 88 Kans. 817, 129 Pac. 1159.

*Kentucky*.—Wade v. Brents, 161 Ky. 607, 171 S. W. 188; Weidner v. Otter, 171 Ky. 167, 188 S. W. 335; Moore v. Hart, 171 Ky. 725, 188 S. W. 861;

speed of the machine, while usually of great importance, is not the sole criterion of the care of the driver, for, though he is not driving at an excessive speed, he may be found negligent for a violation of the law of the road or of some positive regulation, or through incompetency, inattention, or a mistake in judgment.<sup>61</sup> What constitutes a "reasonable" rate is generally a question for the jury,<sup>62</sup> and depends on the surrounding circumstances,<sup>63</sup> such as the character of the highway,<sup>64</sup> the amount and nature of the traffic,<sup>65</sup> obstructions in and along the highway,<sup>66</sup> the nature of the machine, the dark-

*Major Taylor & Co. v. Harding*, 182 Ky. 236, 206 S. W. 285.

*Massachusetts*.—*Rasmussen v. Whipple*, 211 Mass. 456, 98 N. E. 592; *Clark v. Blair*, 217 Mass. 179, 104 N. E. 435.

*Michigan*.—*Wilson v. Johnson*, 195 Mich. 94, 161 N. W. 924.

*Missouri*.—*Ginter v. O'Donoghue* (Mo. App.), 179 S. W. 732; *Warrington v. Byrd* (Mo. App.), 181 S. W. 1079; *Mitchell v. Brown* (Mo. App.), 190 S. W. 354.

*New Jersey*.—*State v. Schutte*, 88 N. J. L. 396, 96 Atl. 659.

*New York*.—*De Carvalho v. Brunner*, 223 N. Y. 284, 119 N. E. 563; *Bohringer v. Campbell*, 154 App. Div. 879, 137 N. Y. Suppl. 241; *Fittin v. Sumner*, 176 App. Div. 617, 163 N. Y. Suppl. 443; *Jelson v. Crosstown St. Ry.*, 72 Misc. 103, 129 N. Y. Suppl. 233; *Dultz v. Fischowitz*, 104 N. Y. Suppl. 357; *Solomon v. Braufman*, 175 N. Y. Suppl. 835.

*Oregon*.—*Weygandt v. Bartle*, 88 Oreg. 310, 171 Pac. 587.

*Pennsylvania*.—*Freel v. Wanamaker*, 208 Pa. St. 279, 57 Atl. 563; *Walleigh v. Lean*, 248 Pa. St. 339, 3 Atl. 1069; *Kuehne v. Brown*, 257 Pa. 37, 101 Atl. 77.

*Texas*.—*Figueroa v. Madere* (Civ. App.), 201 S. W. 271.

*Utah*.—*Lochhead v. Jenson*, 42 Utah. 99, 129 Pac. 347.

*Washington*.—*Hartley v. Lasater*, 96 Wash. 407, 165 Pac. 106.

*Wisconsin*.—*Raymond v. Saux County*, 167 Wis. 125, 166 N. W. 29; *Haswell v. Reuter*, 177 N. W. 8.

*Canada*.—*B. & R. Co. v. McLeod*, 5 A. L. R. 176.

61. *Friecker v. Philadelphia Rapid Transit Co.*, 63 Pa. Super. Ct. 381.

62. Section 325.

63. *Banister v. H. Jevne Co.*, 28 Cal. App. 133, 151 Pac. 546; *Irwin v. Judge*, 81 Conn. 492, 71 Atl. 572; *Petty v. Maddox*, 190 Ill. App. 381; *Delfs v. Dunshe*, 143 Iowa, 381, 133 N. W. 236; *Wingert v. Clark* (Md.), 110 Atl. 857; *Rowe v. Hammond*, 172 Mo. App. 203, 157 S. W. 880; *Ginter v. O'Donoghue* (Mo. App.), 179 S. W. 732; *State v. Schutte*, 88 N. J. Law, 396, 96 Atl. 659.

64. *Lochhead v. Jenson*, 42 Utah. 99, 129 Pac. 347.

**Defects in highway.**—The speed of an automobile should not exceed a rate which will permit the driver to stop his machine so as to avoid injury from defective conditions in the highway. *Raymond v. Sauk County* (Wis.), 166 N. W. 29.

65. *Petty v. Maddox*, 190 Ill. App. 381; *Rowe v. Hammond*, 172 Mo. App. 203, 157 S. W. 880; *Elwes v. Hopkins* (1906), 2 K. B. (Eng.) 1.

66. *Hood & Wheeler Furniture Co. v. Royal* (Ala. App.), 76 So. 965.



ness or other atmospheric conditions,<sup>67</sup> and the noise or other warning given by the machine.<sup>68</sup> That is to say, the speed must be commensurate with the dangers to be anticipated.<sup>69</sup> A holding in a particular case that a given speed is or is not excessive, is of little value, for the circumstances of no two cases are identical; but speeds of fifty,<sup>70</sup> twenty,<sup>71</sup> fifteen,<sup>72</sup> twelve<sup>73</sup> and even eight miles<sup>74</sup> an hour, have been condemned.

### Sec. 306. Speed of machine — statute or ordinance regulating speed.

The obligation on the driver of a motor vehicle of exercising reasonable care for the safety of other travelers, is reinforced in every State with statutory and municipal regulations limiting the speed of such machines.<sup>75</sup> Some of them prescribe in great detail the limit of speed under particular circumstances. Their effect is, in the first place, to create a criminal offense for speeding, when otherwise there might exist only a civil responsibility for injuries entailed by another traveler by reason of the excessive speed.<sup>76</sup> Secondly, in a civil action for damages, the violation of a speed regulation has considerable probative force on the issue of negligence, the violation being generally considered as negligence *per se*.<sup>77</sup> In a few jurisdictions, the statutes do not expressly prohibit a speed under some circumstances in excess of the rate mentioned therein, but made an excessive speed *prima facie* evidence of negligence, thus leaving the driver an opportunity to show

67. See section 307.

68. New York Transp. Co. v. Gar-side, 157 Fed. 521, 85 C. C. A. 285; Lynch v. Shearer, 83 Conn. 73, 75 Atl. 88; Gross v. Foster, 134 N. Y. App. Div. 243, 118 N. Y. Suppl. 889; Signet v. Werner, 159 N. Y. Suppl. 894.

69. Section 278.

70. Jefson v. Crosstown St. Ry., 72 Misc. 103, 129 N. Y. Suppl. 233.

71. Wasser v. Northampton County, 249 Pa. St. 25, 94 Atl. 444.

72. Cook v. Miller, 175 Cal. 497, 166 Pac. 316.

73. Bannister v. H. Jevne Co., 28

Cal. App. 133, 151 Pac. 546.

74. Rasmussen v. Whipple, 211 Mass. 546, 98 N. E. 592; Adair v. McNeil, 95 Wash. 160, 163 Pac. 393.

75. Columbus R. Co. v. Waller, 12 Ga. App. 674, 78 S. E. 52; Ware v. Laman, 18 Ga. App. 673, 90 S. E. 364; Searey v. Golden, 172 Ky. 42, 188 S. W. 1098; Carradine v. Ford, 195 Mo. App. 684, 187 S. W. 285; Lauterbach v. State, 132 Tenn. 603, 179 S. W. 130; Franey v. Seattle Taxicab Co., 80 Wash. 396, 141 Pac. 890.

76. Sections 728-743.

77. Section 321.

that the speed was proper under the circumstances.<sup>78</sup> The general power of States and municipalities to enact speed regulations is undoubted.<sup>79</sup> A statute providing that no person shall drive an automobile outside a city, town or village at a greater average rate of speed than twenty miles an hour has been construed as meaning that the "average" rate shall not exceed that specified and not as at any particular time prohibiting a greater rate.<sup>80</sup> In the application of the general rule that penal statutes cannot be enlarged by implication or extended by inference, it has been decided that an ordinance making it a misdemeanor to ride or drive any horse, mule or other beast beyond a certain rate of speed or in such a manner as to endanger the safety of others, will not be construed as applying to automobiles, bicycles and other means or vehicles of conveyance.<sup>81</sup>

### Sec. 307. Speed of machine — speed at night.

Reasonable care requires in many cases that the driver of a motor vehicle drive at a slower speed at night than during the day.<sup>82</sup> It may be true that in a busy street in a large city, a greater speed would be justified at night, for then the other traffic would be lighter, but ordinarily a greater speed is allowed in the day time. One restriction on his speed is that he shall keep the machine under such control and operate it at such speed that he can stop the machine and avoid an obstruction or danger or another traveler within the distance that the highway is illuminated by his lights.<sup>83</sup> As was said

78. Section 322.

79. See chapters V and VI.

80. *Neidy v. Littlejohn*, 146 Iowa, 355, 125 N. W. 198.

81. *City of Shawnee v. Landon*, 3 Okla. Cr. 440, 106 Pac. 662.

82. *Misty night*.—It is negligence as a matter of law for a chauffeur to run an automobile at the rate of twelve miles an hour in Central Park in New York city, when he cannot see beyond the hood of his machine. *Albertson v. Ansbacker*, 102 Misc. (N. Y.) 527, 169 N. Y. Suppl. 188.

83. *California*.—*Ham v. Los Angeles*

*County* (Cal. App.), 189 Pac. 462. See also, *Haynes v. Doxie* (Cal. App.), 198 Pac. 39.

*Connecticut*.—*Currie v. Consolidated Ry. Co.*, 81 Conn. 383, 71 Atl. 356.

*Kansas*.—*Super v. Modell Twp.*, 88 Kans. 698, 129 Pac. 1162; *Fisher v. O'Brien*, 99 Kans. 621, 162 Pac. 317.

*Michigan*.—*Harnau v. Haight*, 189 Mich. 600, 155 N. W. 563.

*Tennessee*.—*West Constr. Co. v. White*, 130 Tenn. 520, 172 S. W. 301; *Knoxville Ry. & Light Co. v. Vangil-den*, 132 Tenn. 487, 178 S. W. 1117.

*Pennsylvania*.—See *Curran v. Lorch*,

in one case,<sup>84</sup> "It was negligence for the driver of the automobile to propel it in a dark place in which he had to rely on the lights of his machine at a rate faster than enabled him to stop or avoid any obstruction within the radius of his light, or within the distance to which his lights would disclose the existence of obstructions. . . . If the lights on the automobile would disclose obstructions only ten yards away it was the duty of the driver to so regulate the speed of his machine that he could at all times avoid obstructions within that distance. If the lights on the machine would disclose objects further away than ten yards, and the driver failed to see the object in time, then he would be conclusively presumed to be guilty of negligence, because it was his duty to see what could have been seen." This proposition applies when the driver is making a turn in the road;<sup>85</sup> and is applicable when the bright light from another machine is shining in the face of the driver.<sup>86</sup> It is a driver's duty to keep his machine under such control that, when the light brings a railroad crossing in view, he can stop before reaching it.<sup>87</sup> Moreover, the rule applies where the regular lights are not working and the driver is using a lantern hung in front of his radiator.<sup>88</sup> The same principle is involved when, on account of a blinding storm, the driver can see but a short distance ahead of his machine.<sup>89</sup> Darkness may be an "obstruction to the view" of the driver within the meaning of a regulation prescribing a certain speed when the view is obstructed.<sup>90</sup>

247 Pa. St. 429, 93 Atl. 492; *Serfas v. Lehigh, etc. R. Co.* (Pa.), 113 Atl. 370.

*Wisconsin*.—*Lauson v. Fond du Lac*. 141 Wis. 57, 123 N. W. 629, 25 L. R. A. (N. S.) 40, 135 Am. St. Rep. 30.

*Compare Owens v. Iowa County*, 186 Iowa, 408, 169 N. W. 388. See also, section 326.

**Obstructed view.**—The rule stated in the text is not pertinent where the driver's view was not obstructed by darkness or fog, but was obstructed by a street car. *Coughlin v. Layton* (Kans.), 180 Pac. 805.

**84.** *West Constr. Co. v. White*, 130 Tenn. 520, 172 S. W. 301.

**85.** *Knoxville Ry. & Light Co. v. Vangilden*, 132 Tenn. 487, 178 S. W. 1117. See also, section 308, as to speed at turns.

**86.** *Knoxville Ry. & Light Co. v. Vangilden*, 132 Tenn. 487, 178 S. W. 1117.

**87.** *Serfas v. Lehigh, etc. R. Co.* (Pa.), 113 Atl. 370.

**88.** *Fisher v. O'Brien*, 99 Kans. 621, 162 Pac. 317.

**89.** *Savage v. Public Service Ry. Co.*, 89 N. J. L. 555, 99 Atl. 383. See also, *Park v. Orbison* (Cal. App.), 184 Pac. 426.

**90.** *Ham v. Los Angeles County*

**Sec. 308. Speed of machine — at turns.**

Clearly a speed which would be proper along a straight road might be decidedly excessive when the driver is approaching a curve or turn in the road. Ordinary care requires that the driver of a motor vehicle have the machine at such control at a turn that he can make the curve safely and avoid other travelers at that place.<sup>91</sup> Whether or not the speed is excessive under the circumstances is generally a question for the jury.<sup>92</sup> In many jurisdictions, the speed around a curve is particularly prescribed by statute, and such regulations are to be obeyed. Six,<sup>93</sup> seven and one-half,<sup>94</sup> or eight<sup>95</sup> miles an hour is thought by the lawmakers to be the proper limit of speed around a curve. Especial care should be taken at a turn where the view around the corner is obstructed. In such a case, a regulation may properly forbid a speed greater than six miles an hour.<sup>96</sup> The fact that the headlights of a machine are shining, not on the road, but on the side thereof, gives the driver notice that he is approaching a curve.<sup>97</sup>

(Cal. App.), 189 Pac. 462.

**91.** *Arkansas*.—*Bona v. S. R. Thomas Auto Co.*, 137 Ark. 217, 208 S. W. 306.

*California*.—*Opitz v. Schenk*, 174 Pac. 40.

*Illinois*.—*Kuchler v. Stafford*, 185 Ill App. 199; *Conlon v. Trenkhorst*, 195 Ill. App. 335.

*Iowa*.—*Staley v. Forrest*, 157 Iowa, 188, 138 N. W. 441.

*Michigan*.—*Holden v. Hadley*, 180 Mich. 568, 147 N. W. 482.

*Minnesota*.—*Molin v. Wark*, 113 Minn. 190, 129 N. W. 383.

*Tennessee*.—*Knoxville Ry. & Light Co. v. Vaugilden*, 132 Tenn. 487, 178 S. W. 1117.

*Vermont*.—*Wentworth v. Waterbury*, 90 Vt. 60, 96 Atl. 334.

*Washington*.—*Bogdan v. Pappas*, 95 Wash. 579, 164 Pac. 208.

*Wisconsin*.—*Calahan v. Moll*, 160 Wis. 523, 152 N. W. 179.

**Defendant negligent.**—In an action to recover damages for injury to an

automobile received in a collision, and alleged to have been caused through the carelessness and improper management of defendant's respective automobiles, where there was evidence tending to show that the defendant found guilty, came into the street on which the accident occurred from a cross street at a high rate of speed, and the other defendant's automobile, in veering away to avoid such incoming automobile, collided with plaintiff's car. *Jackson v. Burns*, 203 Ill. App. 196.

**92.** Section 325.

**93.** *Central of Ga. Ry. Co. v. Lasen*, 19 Ga. App. 413, 91 S. E. 517.

**94.** *Molin v. Wark*, 113 Minn. 190, 129 N. W. 383.

**95.** *Searcy v. Golden*, 172 Ky. 42, 188 S. W. 1098; *Wade v. Brents*, 161 Ky. 607, 171 S. W. 188.

**96.** *Heartsell v. Billows*, 184 Mo. App. 420, 171 S. W. 7; *Carter v. Brown*, 136 Ark. 23, 206 S. W. 71.

**97.** *Wentworth v. Waterbury*, 90 Vt. 60, 96 Atl. 334.

**Sec. 309. Speed of machine — density of traffic.**

The speed of a motor vehicle must be commensurate with the dangers to be anticipated, and one of the most important circumstances in this connection is the amount of traffic along the highway.<sup>98</sup> The question whether the driver of a motor vehicle is running at an excessive speed, considering the traffic and other circumstances, is one which is generally left with the jury.<sup>99</sup> "With a clear track and plenty of room, the rate of twelve to fifteen miles an hour would, no doubt, be deemed very moderate. But in the thick of traffic, where the streets are crowded with vehicles and pedestrians, a jury might, with reason, conclude that a prudent person, having due regard for his own safety and that of others, would drive a heavy automobile much more slowly than the rate above indicated."<sup>1</sup> It is impracticable to enact regulations which shall prescribe the speed under the varying conditions of traffic, but provisions have been made limiting the speed of motor vehicles in "closely built up" or "business" sections to a prescribed rate.<sup>2</sup> Negligence may be based on the violation of such a speed limit.<sup>3</sup> And regulations have been adopted prescribing the speed of machines when meeting upon narrow roads.<sup>4</sup>

**Sec. 310. Speed of machine — passing street cars.**

The driver of a motor vehicle must anticipate that persons will be getting on and off street cars standing in the streets;<sup>5</sup> and it is his duty to have his car under such control and running at such a speed that he can avoid injury to such persons.<sup>6</sup>

98. *Delfs v. Dunshe*, 143 Iowa, 381, 133 N. W. 236; *Lorah v. Rinehart*, 243 Pa. St. 231, 89 Atl. 967.

**Evidence as to traffic** which might reasonably be expected on a certain highway held admissible on prosecution for driving at a speed dangerous to the public having regard to all the circumstances of the case. *Elwes v. Hopkins* (K. B. Div.), 94 Law T. R. (N. S.) 547.

99. Section 325.

1. *Lorah v. Rinehart*, 243 Pa. St. 231, 89 Atl. 967.

2. *Denison v. McNorton*, 228 Fed. 401, 142 C. C. A. 631; *Harker v. Gruhl*, 62 Ind. App. 177, 111 N. E. 457; *Caradine v. Ford*, 195 Mo. App. 684, 187 S. W. 285.

3. Sections 320-322.

4. *Christl v. Hawert*, 164 Wis. 624, 160 N. W. 1061.

5. Section 423.

6. *Bannister v. H. Jevne Co.*, 28 Cal.

Even in the absence of positive regulation, a speed of any considerable rate under such conditions may warrant the jury in charging actionable negligence against the driver of the machine.<sup>7</sup> Statutory and municipal regulation on the subject of passing street cars is very common.<sup>8</sup> Some prescribe a very low rate of speed under such circumstances, such as three<sup>9</sup> or four miles an hour. Others are so drastic as to require the driver of the machine to come to an absolute stop.<sup>10</sup> But, when not in violation of positive regulation, a speed of from five to eight miles an hour, is not necessarily excessive.<sup>11</sup> Regulations of this character are intended primarily for the safety of street railway passengers, and, in some cases may be held inapplicable to bicyclists and other travelers not in any way connected with the operation of the street car.<sup>12</sup>

### Sec. 311. Speed of machine — street intersections.

At street intersections a higher degree of care is required of the driver of an automobile than is required at places involving less danger to pedestrians and other vehicles.<sup>13</sup> In using the streets and highways an automobilist does so with knowledge that at street intersections other vehicles may approach to cross or turn into the one over which he is travel-

App. 133, 151 Pac. 546; *Gilbert v. Vanderwall*, 181 Iowa. 3, 165 N. W. 165; *Boedeher v. Frank*, 48 Utah. 363, 159 Pac. 634.

7. *Bannister v. H. Jevne Co.*, 28 Cal. App. 133, 151 Pac. 546; *Naylor v. Haviland*, 88 Conn. 256, 91 Atl. 186.

8. *Levyn v. Koppin*, 183 Mich. 232. 149 N. W. 993. See also, *Sorsby v. Benninghoven*, 82 Oreg. 345, 161 Pac. 251.

9. *Radwick v. Goldstein*, 90 Conn. 701, 98 Atl. 583.

10. *Schell v. Dubois*, 94 Ohio, 93, 113 N. E. 664; *Nieholls v. City of Cleveland (Ohio)*, 128 N. E. 164.

11. *Gilbert v. Vanderwall*, 181 Iowa. 685, 165 N. W. 165.

12. See section 423, *et seq.*

**Bicyclist.**—"The intestate was a traveler on the highway, entirely in-

dependent of the car, and it entered in no way into the situation out of which the accident arose. Its presence was an incident wholly unrelated to the tragedy enacted in its vicinity, and the rate of speed at which it was passed by the defendant possessed no more significance than would the same rate of speed had the car not chanced to be there. Of whatever violation of law the defendant may have been guilty in going by the car, it could not be said upon the evidence that it contributed to the collision which followed, or that such collision was in any way due to the car's presence." *Radwick v. Goldstone*, 90 Conn. 701, 98 Atl. 583.

**Another automobile.**—See *Christian-son v. Devine*, 210 Ill. App. 253.

13. Section 279.

ing, and that at such points crosswalks are ordinarily provided for the use of pedestrians. He should, therefore, operate his car with that degree of care which is consistent with the conditions thus existing, the rate of speed and his control of the machine varying according to the traffic at the particular place.<sup>14</sup> Whether the speed is excessive is generally a question for the jury,<sup>15</sup> and, if they find the speed unreasonable under the circumstances, the liability of the driver of the machine will be sustained as to all injuries which proximately result from the excessive speed.<sup>16</sup> Statutes and municipal ordinances frequently fix the speed with which a motor vehicle may be operated at a street intersection. Sometimes the rate is fixed as low as four,<sup>17</sup> six,<sup>18</sup> eight,<sup>19</sup> or ten<sup>20</sup> miles an hour. Or the regulation may require that the driver shall reduce his speed to not exceeding one-half of its "regular" speed, the term "regular" speed meaning the speed otherwise lawful.<sup>21</sup> Or a regulation may require one about to drive on to a boulevard to bring his vehicle to a stop.<sup>22</sup> Under a statute requiring a driver to reduce his speed when "approaching" an intersection, it may be a question for the jury as to the distance from the intersection when the speed should be reduced.<sup>23</sup> One

14. *Rowe v. Hammond*, 172 Mo. App. 203, 157 S. W. 880.

15. Section 325.

16. *Young v. Campbell*, 20 Ariz. 71, 177 Pac. 19; appeal dismissed on rehearing, 181 Pac. 171; *Cook v. Miller*, 175 Cal. 497, 166 Pac. 316; *Opitz v. Schenk* (Cal.), 174 Pac. 40; *Wright v. Young*, 160 Ky. 636, 170 S. W. 25; *Granger v. Farrant*, 179 Mich. 19, 146 N. W. 218; *Westover v. Grand Rapids R. Co.*, 180 Mich. 373, 147 N. W. 630; *Gross v. Foster*, 134 N. Y. App. Div. 243, 118 N. Y. Suppl. 889; *Chero-Cola Bottling Co. v. South Carolina Light, Power & Rys. Co.*, 104 S. C. 214, 88 S. E. 534; *Adair v. McNeil*, 95 Wash. 160, 163 Pac. 393.

17. *Ludwigs v. Dumas*, 72 Wash. 68, 129 Pac. 903; *Anderson v. Kinnear*, 80 Wash. 638, 141 Pac. 1151; *Barth v. Harris*, 95 Wash. 166, 163 Pac. 401.

18. *Hayes v. State*, 11 Ga. App. 371, 75 S. E. 523; *Ware v. Lamar*, 16 Ga. App. 560, 85 S. E. 824; *Moye v. Reddick*, 20 Ga. App. 649, 93 S. E. 256; *Sullivan v. Chauvenet* (Mo.), 222 S. W. 759; *Chero-Cola Bottling Co. v. South Carolina Light, Power & Rys. Co.*, 104 S. Car. 214, 88 S. E. 534.

19. *Newton v. McSweeney*, 225 Mass. 402, 114 N. E. 667.

20. *Dowdell v. Beasley* (Ala. App.), 82 So. 40; *Young v. Dunlap*, 195 Mo. App. 119, 190 S. W. 1041; *Schinogle v. Baughman* (Mo. App.), 228 S. W. 897; *Young v. Campbell* (Ariz.), 177 Pac. 19; *Mathes v. Aggeler & Musser Seed Co.*, 179 Cal. 697, 178 Pac. 713.

21. *Mayer v. Mellette*, 65 Ind. App. 54, 114 N. E. 241.

22. *Kilroy v. Justrite Mfg. Co.*, 209 Ill. App. 499.

23. *Lawrence v. Goodwill* (Cal.

proceeding in broad daylight toward an intersection cannot escape the effect of the regulation by claiming that he was not aware that he was approaching intersecting streets.<sup>24</sup> Regulations of this character will not generally apply to places where pedestrians are accustomed to cross the highway but which are not the intersections of highways.<sup>25</sup>

### Sec. 312. Speed of machine — at railroad or street railway crossings.

In some jurisdictions, when the driver of a vehicle approaches the crossing of a railroad, the law imposes on him the duty to "stop, look and listen" and charges him with contributory negligence as a matter of law if he fails to do so.<sup>26</sup> While the rule in other jurisdictions is not so strict, and a failure to stop the machine before crossing the track may not constitute negligence as a matter of law,<sup>27</sup> yet a high degree of care must be exercised by a driver when crossing such a place of danger. He must have his machine under such control and must run at such a rate that he can stop the machine if necessary to avoid a collision.<sup>28</sup> Similarly, one approaching the crossing of a street railroad, though the rule may not be so strict as in the case of steam railroads, is required to exercise considerable care to avoid street cars.<sup>29</sup> In some jurisdictions statutes have prescribed the rate of speed which cannot be exceeded by an automobilist crossing a railroad track, or have required the driver to come to a full stop.<sup>30</sup> Regulations prohibiting a rate exceeding six<sup>31</sup> or seven<sup>32</sup> miles an hour, are proper. In case of the violation of such a statute, the driver, as a general proposition, will be unable to

App.), 186 Pac. 781; Blackburn v. Marple (Cal. App.), 184 Pac. 875. See also, Blackburn v. Marple (Cal. App.), 184 Pac. 873.

24. Newton v. McSweeney, 225 Mass. 402, 114 N. E. 667.

25. Muther v. Capps, 38 Cal. App. 721, 177 Pac. 882.

26. Section 568.

27. Section 567.

28. Walker v. Rodriguez, 139 La. 251, 71 So. 499; Serfas v. Lehigh, etc.

R. Co. (Pa.), 113 Atl. 370. See also, section 572.

29. Section 591.

30. Carter v. Redmond, 142 Tenn. 258, 218 S. W. 217.

31. Central of Ga. Ry. Co. v. Larsen, 19 Ga. App. 413, 91 S. E. 517; Texas, etc. Co. v. Harrington (Tex. Civ. App.), 209 S. W. 685; Schaff v. Bear-den (Tex. Civ. App.), 211 S. W. 503.

32. Hinton v. Southern Ry. Co., 172 N. Car. 587, 90 S. E. 756.



recover for personal injuries or damage to the machine sustained in a collision with a train. The question whether the unlawful speed was a proximate cause of the injury may, of course, remain for determination though the violation is shown.<sup>33</sup> Such a statute has no application to a passenger in the machine having no control over the driver.<sup>34</sup> A regulation as to the speed at a "highway" crossing may be deemed applicable in case of a highway crossing a steam railroad track, for a railroad is for many purposes deemed a highway.<sup>35</sup> A statute forbidding a speed exceeding six miles an hour by one "approaching" an intersecting railroad has received a strict construction so as to forbid such speed when "approaching" but not forbidding the speed when close to the railroad and about to pass over the crossing.<sup>36</sup> And a statute prescribing a speed limit when the view of the crossing is obscured does not apply to one injured at a crossing where the view of

33. *Hinton v. Southern Ry. Co.*, 172 N. Car. 587, 90 S. E. 756. See also, section 300.

34. *Baker v. Streater* (Tex. Civ. App.), 221 S. W. 1039; *Chicago, etc. R. Co. v. Johnson* (Tex. Civ. App.), 224 S. W. 277.

35. *Hinton v. Southern Ry. Co.*, 172 N. Car. 587, 90 S. E. 756.

36. *Central of Ga. Ry. Co. v. Larsen*, 19 Ga. App. 413, 91 S. E. 517, wherein it was said: "Coming now to the third division of section 3, we find it provided, among other requirements, that the driver of an automobile, in approaching a descent or railroad crossing, shall have his machine under control, and operate it at a rate of speed not greater than 6 miles per hour. The statute being penal, a strict construction is required. See *Renfro v. Colquitt*, 74 Ga. 618; *Atlanta v. White & Kreis*, 33 Ga. 229. It will be observed that the statute provides that on *approaching* a descent in the road, or a railway crossing, the rules provided must be observed. The statute does not in fact require that a speed of 6 miles per hour shall be main-

tained while the machine is making the descent of a hill or incline; and we think this construction is based upon good reason, the object of the statute, in this respect, being to require the traveler, on approaching the crest of a hill, and before commencing the descent, to slow down his car in order to ascertain whether some other person, whom he could not theretofore discern, might be using the highway on its incline. If, however, this requirement of the law be complied with, there is nothing therein contained necessitating the traveler to maintain such a reduced speed down the incline, in the absence of some special cause therefor. We therefore do not think that as a matter of law the fact that the decedent might have descended the incline just prior to the accident at a greater speed than 6 miles per hour could be adjudged negligence *per se*. The statute, however, further requires that, in approaching a railway crossing, such reduced speed shall be maintained, and that the driver of the machine must in such case have his car under control."

the approaching train was obstructed.<sup>37</sup> An ordinance prescribing the speed at a railroad crossing has no bearing on a collision occurring 125 feet from a crossing.<sup>38</sup>

### Sec. 313. Speed of machine — approaching embankment or descent.

In some States, speed statutes prescribe with considerable detail the rate which is permissible under varying circumstances. For example, in *Georgia*, a statute has been enacted limiting the speed of a motor vehicle to six miles an hour when approaching a high "embankment."<sup>39</sup> And the same statute makes a similar regulation for an automobilist approaching a "descent" in the highway. The word "descent" is construed to mean a declivity in the highway over which, from ordinary experience and observation, it would be deemed more dangerous to operate an automobile at an excessive speed than upon level ground.<sup>40</sup>

37. *Schaff v. Bearden* (Tex. Civ. App.), 211 S. W. 503.

38. *Vithoven v. Snyder* (Mich.), 182 N. W. 80.

39. *Strickland v. Whatley*, 142 Ga. 802, 83 S. E. 856.

40. *Elsbery v. State*, 12 Ga. App. 86, 76 S. E. 779, wherein the court said: "The maxim, '*Noscitur a sociis*,' is applicable, and the word 'descent,' as used in section 5 of the act, will be held to mean a declivity in the highway over which from ordinary human experience and observation it would be deemed to be more dangerous to operate an automobile at an excessive rate of speed than upon level ground. The General Assembly could not have intended to make it a crime to operate an automobile at a greater rate of speed than six miles an hour at every point along the highway where there was a slight incline, and where it would be no more dangerous to operate a machine at twenty miles an hour than it would be upon level ground. It would be impossible, of course, to designate the exact degree of incline

that the General Assembly had in mind in using this word. But upon the application of common knowledge with reference to the highways of this State the courts and juries may well be left to say whether or not a machine was operated upon a declivity where it would be more dangerous to run at an excessive rate of speed than it would upon level ground. The only fair test, it seems to us, which can be applied in determining whether a crime has been committed, would be to submit to the jury in each case the question whether or not the operation of the machine upon the particular descent in question would likely be more dangerous to human life and limb or the safety of property than if the machine were being operated upon ordinary level ground. What the General Assembly evidently had in mind was such an incline on the highway as is commonly denominated a hill; that is, a descent of such degree as that ordinarily prudent persons, in approaching it in an automobile, would check the speed of the machine."

**Sec. 314. Speed of machine — over bridges.**

Obviously, it is expedient to fix the speed limit for motor vehicles over or approaching bridges, and frequently specific regulations are made applying to traffic at bridges;<sup>41</sup> but it is not necessary that the regulation specify a particular rate for such structures. A bridge is a part of the highway, so that a regulation applicable to highways in general will apply to bridges.<sup>42</sup>

**Sec. 315. Speed of machine — past children in street.**

When passing a place where children are playing in the street, an automobilist should have his machine under control and be running at a speed which will enable him to avoid the children if they do not discover his approach.<sup>43</sup> And, when passing a schoolhouse, a lower rate of speed is required of the driver of a motor vehicle than is permissible at some places where the danger of injury to children is not so great.<sup>44</sup> It has been held to be gross negligence for the operator of an automobile to drive his machine at the rate of five or six miles an hour through a crowd of children who are playing in the street.<sup>45</sup>

**Sec. 316. Speed of machine — frightening horses.**

Both motor vehicles and horse-drawn conveyances have the right to the use of the highways, each class being bound to the exercise of reasonable care for the avoidance of injuries to the other class.<sup>46</sup> Experience, however, has shown that, when an automobile and a horse-drawn vehicle are using the same highway, there is greater danger of injury to the occupant of the carriage than to one riding in the automobile. Therefore statutes have generally placed certain duties on the driver of the machine, such as requiring that warning of his approach be given, or that he does not exceed a given rate of speed. A

41. *Ham v. Los Angeles County* (Cal. App.), 189 Pac. 462.

42. *City of Baraboo v. Dwyer*, 166 Wis. 372, 165 N. W. 297.

43. *Bohringer v. Campbell*, 154 N. Y. App. Div. 879, 137 N. Y. Suppl. 241.

And see section 418.

44. *Tripp v. Taft*, 219 Mass. 81, 106 N. E. 578.

45. *Haacke v. Davis*, 166 Mo. App. 249, 148 S. W. 450.

46. Section 518.

speed greater than six miles an hour has been prohibited when the auto driver is passing a horse.<sup>47</sup> Indeed, one very common form of regulation requires that the driver of the motor vehicle shall bring his machine to a stop when he is signaled so to do by the driver of a horse or team.<sup>48</sup> But independent of statute, the driver of a motor vehicle may be guilty of negligence where he drives his machine at such an unreasonable speed that he frightens a horse on the highway.<sup>49</sup>

**Sec. 317. Speed of machine — regulation prohibiting “unreasonable” speed.**

In some States statutes have been enacted prohibiting the operation of motor vehicles at unreasonable speeds. This is precisely what the common law prohibits in the absence of statute. Nevertheless the statutes have some effect other than a mere codification of the common law principle. For example, their infraction might be held to constitute a criminal offense when the same speed in the absence of statute would not justify a criminal prosecution.<sup>50</sup> But in one jurisdiction,

47. *Carter v. Caldwell*, 183 Ind. 434, 109 N. E. 355.

48. Sections 536-539.

49. *Brinkman v. Pacholke*, 41 Ind. App. 662, 84 N. E. 762; *Delis v. Dunshee*, 143 Iowa, 381, 133 N. W. 236.

50. *State v. Goldstone* (Minn.), 175 N. W. 892; *State v. Schaeffer*, 96 Ohio, 215, 117 N. E. 220; *People v. Falkovitch*, 280 Ill. 321, 117 N. E. 398. “The legislature, however, in this instance, saw fit to fix no definite rate of speed for the car, except to require that the car should not be operated at a speed ‘greater than is reasonable or proper, having regard for width, traffic, use and the general and usual rules of such road or highway, or so as to endanger the property, life or limb of any person. In short, the legislature wrote into the statute what has become known as the ‘rule of reason’ ever since the Standard Oil case (221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann.

(as. 1912 D, 734) and Tobacco Trust Case ((221 U. S. 107, 31 Sup. Ct. 632, 55 L. Ed. 663) were decided by the Supreme Court of the United States. In those cases the Supreme Court of the United States read into the statute the so-called ‘rule of reason,’ holding that the Anti-Trust Act really was not a denial of all restraint of trade, but only a denial of unreasonable restraint of trade. It would hardly be suggested that the Supreme Court of the United States read into the statute something that made the statute unconstitutional, or read into the statute something that made it so indefinite and uncertain that it was incapable of advising the public as to what was or was not an offense under it, or that made the statute practically unenforceable. And yet, by parity of reason, it is claimed in this case that the legislature, which wrote into the statute the same ‘rule of reason,’ thereby in effect nullified such statute, because of the indefinite-

it has been held that the part of a statute which merely prohibits the operation of an automobile at a rate of speed greater than is reasonable and proper is too indefinite and uncertain in its terms to be capable of enforcement in a criminal prosecution, but nevertheless furnishes a measure of care as a rule for civil conduct.<sup>51</sup> In other States such statutes are sustained.<sup>52</sup> A common form of regulation is one which prohibits an unreasonable rate of speed and then expressly forbids speed in excess of a certain limit in all cases or under particular circumstances.<sup>53</sup> Under such a regulation it is generally a question for the jury whether a speed lower than maximum rate is unreasonable,<sup>54</sup> but in some States a speed exceeding the limit may constitute negligence *per se*.<sup>55</sup> In other States, a speed greater than the maximum limit creates

ness and uncertainty of its terms. The contention is not sound. The suggestion that juries on the same state of facts may hold one way in one county, and another way in another county, indeed, that in the same county, upon the same state of facts, one jury may hold one way and another hold another way, is no argument against this contention. That is inevitable under any system of jurisprudence on any set of facts involved in a criminal transaction. Courts differ in their judgment; juries differ in their judgment; but that is no reason for the abolition of either, or for denying them jurisdiction sufficient to enforce the administration of statutes like the one in question. In our whole criminal procedure, even in capital and the most atrocious cases, where a man's life and liberty for life are involved, it is made the special province and duty of juries to determine what is 'reasonable,' and whether or not there is a 'reasonable' doubt of the defendant's guilt. Of course, that is a conclusion—almost incapable of precise and specific definition. What one jury might hold to be a reasonable doubt, another jury would hold the contrary; and still there is

no way other than to leave the question to the jury to determine what is and what is not a 'reasonable doubt.'" State v. Schaeffer, 96 Ohio, 215, 117 N. E. 220.

51. Empire L. Ins. Co. v. Allen, 141 Ga. 413, 81 S. E. 120; Strickland v. Whatley, 142 Ga. 802, 83 S. E. 856; Hayes v. State, 11 Ga. App. 371, 75 S. E. 523; Elsbury v. State, 12 Ga. App. 86, 76 S. E. 779; Quarles v. Gem Plumbing Co., 18 Ga. App. 592, 90 S. E. 92. See also, Solan & Billings v. Pasche (Tex. Civ. App.), 153 S. W. 672.

52. See sections 66, 732.

53. Hood & Wheeler Furniture Co. v. Royal (Ala. App.), 76 So. 965; Randolph v. Hunt (Cal. App.), 183 Pac. 385; Elsbury v. State, 12 Ga. App. 86, 76 S. E. 779; Hutson v. Flatt, 194 Ill. App. 29; Brinkman v. Pacholke, 41 Ind. App. 662, 84 N. E. 762; Arrington v. Horner, 88 Kans. 817, 129 Pac. 1159; Weygandt v. Bartle, 88 Ore. 310, 171 Pac. 587. See also, Tripp v. Taft, 219 Mass. 81, 106 N. E. 578.

54. Arrington v. Horner, 88 Kans. 817, 129 Pac. 1159. And see section 325.

55. Section 321.

a *prima facie* case of negligence, and the driver of the machine is given an opportunity of rebutting the *prima facie* case by showing that in the particular case the speed was not unreasonable.<sup>56</sup> Under a statute forbidding the driving of a motor car at any speed greater than is reasonable and proper, having regard to the traffic on the highways, a finding that a speed of eighteen miles an hour was excessive, has been sustained, although there was no direct evidence that any traffic was interrupted, interfered with, incommoded, or affected; for the phrase "having regard to the traffic on the highway" meant having regard to the traffic on the road, not to the traffic in the immediate vicinity of the motor.<sup>57</sup>

### Sec. 318. Speed of machine — fire and police vehicles.

It has been said that it is the general and, perhaps, universal rule that regulations governing the rate of speed upon public streets and highways do not apply to fire apparatus on the way to a fire.<sup>58</sup> And it has been held that the fire apparatus of a city while on its way to a fire is excepted from the speed regulations imposed by a statute, although the fire on the particular occasion may be outside of the city limits.<sup>59</sup>

56. *People v. Falkovitch*, 280 Ill. 321, 117 N. E. 398; *People v. Kelly*, 204 Ill. App. 201; *Young v. Dunlap*, 195 Mo. App. 119, 190 S. W. 1041; *Nafziger v. Mahan* (Mo. App.), 191 S. W. 1080. And see section 322.

57. *Smith v. Boon*, 84 L. T. 593, construing *The Light Locomotives on Highways Order*, art. 4. See also, *Mayhew v. Sutton*, 86 L. T. 18. Other cases under this act are *Rex v. Wells*, 91 L. T. 98; *Thoughton v. Manning*, 92 L. T. 855. See article "Prohibiting Reckless Motoring," *Canadian L. Rev.*, February, 1906.

58. *Hubert v. Granzow*, 131 Minn. 361, 155 N. W. 204; citing *State v. Sheppard*, 64 Minn. 287, 67 N. W. 62, 36 L. R. A. 305; *Warren v. Mendenhall*, 77 Minn. 145, 79 N. W. 661; *Farley v. New York*, 152 N. Y. 222, 46 N. E. 506, 57 Am. St. Rep. 511; *Kansas*

*City v. McDonald*, 60 Kans. 481, 57 Pac. 123, 45 L. R. A. 429.

59. *Hubert v. Granzow*, 131 Minn. 361, 155 N. W. 204, wherein it was said: "It is probably true that no legal duty is imposed upon a city fire department to assist in extinguishing fires outside the city; but it is a matter of common knowledge that such departments almost invariably respond when called upon in such cases. Actuated by motives of humanity rather than by the mandate of strict legal duty, they seldom refuse to give their services to their neighbors in case of need. While the law may not impose a legal duty upon them to assist in extinguishing fires outside the city, it certainly does not forbid them from doing so. If they respond to a call without the city, the same need for haste exists as when they respond to a

In this particular case, the statute in question expressly excepted from its operation "fire wagons and engines." Clearly a regulation, either by statute or ordinance, should except vehicles operated by the police and fire departments. An ordinance adopting speed regulations is not invalid because it excepts such vehicles from its operation.<sup>60</sup> But, when a statute prescribes a certain limit of speed for motor vehicles, and no exceptions are made, the courts in one jurisdiction have held that they cannot graft an exception to the plain provisions of the law.<sup>61</sup> But a contrary holding has been made in another jurisdiction.<sup>62</sup> The question is one of the intent of the Legislature, and a holding either way may perhaps be based on sound rules for the construction of statutes. On the one hand, it may be said that the Legislature would not intend to make a speed regulation applicable to such emergency vehicles and that a statute would not be applicable thereto unless it expressly included them within its operation. On the other hand, it may be said that the intent of the law makers is to be found only in their language, and, unless the language contains an exception to the general application of the statute, the courts will not make one. If the statute in question specifically exempts certain vehicles, but does not exempt police vehicles, sound construction requires the application of the statute to them.<sup>63</sup> Of course, though the vehicle is not within the prohibitions of speed regulations, it must nevertheless be operated at such speed and with such care, as

call within the city; and for the same reasons they should not be required to observe the speed regulations in the one case more than in the other, unless the law expressly so provides. The statute in question contains no such provision. On the contrary, it expressly excepts 'fire wagons and engines' from the vehicles to which it applies; and this exception is absolute and unconditional."

60. *Ex parte* Snowden, 12 Cal. App. 521, 107 Pac. 724.

61. *Keovil v. Ponsford* (Tex. Civ. App.), 173 S. W. 518, wherein it was

said: "Peace officers are not excepted from the operation of the laws limiting the speed of vehicles upon public highways. Certainly, an exception should be made in favor of those whose special duty it is to detect and arrest parties running in excess of the legal limit, while discharging such duty. The courts, however, cannot grant this exception."

62. *State v. Gorham* (Wash.), 188 Pac. 457.

63. *Desmond v. Basch & Greenfield* (N. J.), 108 Atl. 362.

is reasonable considering the circumstances.<sup>64</sup> Thus, a police officer operating a motorcycle at a speed of thirty-five miles an hour at a crowded street junction is guilty of contributory negligence which will bar an action by him for his injuries, irrespective of whether speed statutes apply to him.<sup>65</sup>

### **Sec. 319. Speed of machine — military or mail vehicle.**

Speed statutes enacted by a State are not applicable to a motorcycle or motor vehicle driven by a member of the United States army or navy, when the speed is a matter of military necessity.<sup>66</sup> But when it is not necessary to one operating a truck carrying mail to exceed the State statute in order to comply with his schedule, he may be prosecuted for speeding.<sup>67</sup>

### **Sec. 320. Speed of machine — violation of speed regulation as evidence of negligence.**

While it is generally held that the violation of a speed regulation is negligence as a matter of law,<sup>68</sup> in a few jurisdictions, the violation is not given so great probative force, and it is held that the violation is merely evidence of negligence, to be considered by the jury in connection with the other circum-

64. *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44; *Edberg v. Johnson* (Minn.), 184 N. W. 12; *Farrell v. Fire Ins. Salvage Corps*, 189 N. Y. App. Div. 795, 179 N. Y. Suppl. 477; *Clark v. Wilson*, 108 Wash. 127, 183 Pac. 103.

65. *Miner v. Rembt*, 178 N. Y. App. Div. 173, 164 N. Y. Suppl. 945. Compare *Clark v. Wilson*, 108 Wash. 127, 183 Pac. 103, holding a speed of 35 miles an hour not necessarily negligent at a place where there was no other traffic.

66. *State v. Burton*, 41 R. I. 303, 103 Atl. 962, wherein it was said: "In essence this question is: Are the rules established by the general assembly regulating the use of the highways of the State subordinate to the exigencies of military operations by the federal government in time of war? In our

opinion they are. Under the Constitution of the United States, the conduct of the war now existing between this country and Germany vests wholly in the federal government. Any State law, the operation of which will hinder that government in carrying out such constitutional power, is, during the exercise of the power, suspended as regards the national government and its officers, who are charged with the duty of prosecuting the war. The principle is well established that in respect to the powers and duties exclusively conferred and imposed upon the federal government by the Constitution of the United States the several States have subordinated their sovereignty to that of the nation."

67. *Hall v. Commonwealth* (Va.), 105 S. E. 551.

68. Section 321.



stances in the case.<sup>69</sup> In a comparatively few States, the view is taken that the violation of a statute relating to speed is negligence as a matter of law, but that the violation of a municipal ordinance on the subject is merely evidence of negligence.<sup>70</sup>

**Sec. 321. Speed of machine — violation of speed regulation as negligence per se.**

The weight of authority supports the view that the violation of a statute or municipal ordinance is negligence *per se* which renders the wrongdoer liable for injuries proximately resulting to those intended to be within the protection of the regulation.<sup>71</sup> Thus, the violation of a regulation relative to the speed with which motor vehicles may be operated on the streets and highways, is generally held to be negligence as a matter of law.<sup>72</sup> It is negligence *per se* to drive an automo-

69. *Rule v. Claar Transfer & Storage Co.* (Neb.), 165 N. W. 883; *Stevens v. Luther* (Neb.), 180 N. W. 87; *Dorrance v. Omaha, etc. Ry. Co.* (Neb.), 180 N. W. 90; *Lady v. Douglass* (Neb.), 181 N. W. 173; *Record v. Penn.* R. R. Co., 75 N. J. L. 311, 67 Atl. 1040; *State v. Schutte*, 88 N. J. Law, 396, 96 Atl. 659; *People v. Seaton*, 132 N. Y. App. Div. 528, 117 N. Y. Suppl. 57; *Bears v. Central Garage Co.*, 3 Dom. L. Rep. (Canada) 387; *Stewart v. Steele*, 6 Dom. L. Rep. (Canada) 1; *Campbell v. Pugsley*, 7 Dom. L. Rep. (Canada) 177. See also, *Denison v. McNorton*, 228 Fed. 401, 142 C. C. A. 631. "The fact that the automobile was exceeding the speed limit prescribed by the Motor Vehicle Act is not the controlling factor, but is only a circumstance to be considered in deciding whether or not the defendant was running his automobile at a rate of speed which, under the existing conditions, was obviously dangerous to pedestrians or others using the highway. A man who deliberately drives his car into a mass of people standing

in the street looking at a baseball score board is guilty of assault and battery for running over some of them, although his automobile is traveling far below the speed limit; whereas, one driving on a lonely country road with no pedestrians on it in sight might be entirely guiltless of the crime of assault and battery for running over a child which suddenly darted from a concealed position by the highway, although the automobile at the time was exceeding the speed limit." *State v. Schutte*, 88 N. J. L. 396, 96 Atl. 659.

70. *Granger v. Farrant*, 179 Mich. 19, 146 N. W. 218; *Westover v. Grand Rapids R. Co.*, 180 Mich. 373, 147 N. W. 630; *Weber v. Beeson*, 197 Mich. 607, 164 N. W. 255. See also, *Levin v. Koppin*, 183 Mich. 232, 149 N. W. 993.

71. Section 297.

72. *California*.—*Lawrence v. Goodwill* (Cal. App.), 186 Pac. 781; *Ham v. Los Angeles County* (Cal. App.), 189 Pac. 462; *Berges v. Guthrie* (Cal. App.), 197 Pac. 356; *Spring v. McCabe* (Cal. App.), 200 Pac. 41.

bile in excess of the prescribed limit, whether the excess is large or small.<sup>73</sup> The fact that the police officers of a municipality have resolved not to enforce a speed ordinance, does not affect the evidentiary value of its violation.<sup>74</sup>

### Sec. 322. Speed of machine — excessive speed as *prima facie* evidence of negligence.

In several States, the law is expressly stated by statute to the effect that the violation of the limit fixed by the statute is *prima facie* evidence that the speed in question was excessive.<sup>75</sup> Such a statute creates a presumption of the plaintiff's contributory negligence, if violated by him, equally as it shows

*Colorado*.—Denver Omnibus & Cab Co. v. Mills, 21 Colo. App. 582, 122 Pac. 798.

*Delaware*.—Travers v. Hartman, 5 Boyce, 302, 92 Atl. 855; Lemmon v. Broadwater, 30 Del. (7 Boyce) 472, 108 Atl. 273.

*Georgia*.—Columbus R. Co. v. Wal-ler, 12 Ga. App. 674, 78 S. E. 52; O'Dowd v. Newnham, 13 Ga. App. 220, 80 S. E. 36; Central of Ga. Ry. Co. v. Larsen, 19 Ga. App. 413, 91 S. E. 517; Ware v. Lamar, 18 Ga. App. 673, 90 S. E. 364.

*Indiana*.—Fox v. Barekman, 178 Ind. 572, 99 N. E. 989; Carter v. Caldwell, 183 Ind. 434, 109 N. E. 355.

*Iowa*.—Hubbard v. Bartholomew, 163 Iowa, 58, 144 N. W. 13. See O'Neil v. Redfield, 158 Iowa, 246, 139 N. W. 555.

*Kansas*.—Fisher v. O'Brien, 99 Kans. 621, 162 Pac. 317; Barsfield v. Vuck-lich, 197 Pac. 205.

*Minnesota*.—Riser v. Smith, 136 Minn. 417, 162 N. W. 520.

*Mississippi*.—Ulmer v. Pistole, 115 Miss. 485, 76 So. 522.

*Missouri*.—Roper v. Greenspon, 272 Mo. 288, 198 S. W. 1107; Barton v. Faeth, 193 Mo. App. 402, 186 S. W. 52; Carradine v. Ford, 195 Mo. App. 684, 187 S. W. 285.

*Ohio*.—Schell v. Dubois, 94 Ohio, 93

113 N. E. 664; Weimer v. Rosen, 100 Ohio, 361, 126 N. E. 307.

*South Carolina*.—Whaley v. Ostenderff, 90 S. C. 281, 73 S. E. 186; Mc-Geon v. Muldrow, 91 S. C. 523, 74 S. E. 386.

*Tennessee*.—Lauterbach v. State, 132 Tenn. 603, 179 S. W. 130.

*Texas*.—Keevil v. Ponsford (Civ. App.), 173 S. W. 518; Solon v. Pasche (Civ. App.), 153 S. W. 672; Schoellkopf Saddlery Co. v. Crawley (Civ. App.), 203 S. W. 1172; Carvel v. Kusel (Civ. App.), 205 S. W. 941; Southern Traction Co. v. Jones (Civ. App.), 209 S. W. 457; Flores v. Garcia (Civ. App.), 226 S. W. 743.

*Wisconsin*.—Ludke v. Burck, 160 Wis. 440, 152 N. W. 190, L. R. A. 1915 D. 968; Riggles v. Priest, 163 Wis. 199, 157 N. W. 755; Foster v. Bauer, 180 N. W. 817.

73. Carter v. Caldwell, 183 Ind. 434, 109 N. E. 355.

74. Riser v. Smith, 136 Minn. 417, 162 N. W. 520.

75. *Alabama*.—Gilbert v. Southern Bell Telep. & Teleg. Co., 200 Ala. 3, 75 So. 315; Hood & Wheeler Furniture Co. v. Royal (Ala. App.), 76 So. 965.

*Connecticut*.—Radwick v. Goldstein, 90 Conn. 701, 98 Atl. 583.

*Illinois*.—Hartje v. Moxley, 235 Ill. 164, 85 N. E. 216; People v. Falko-

the negligence of the defendant if violated by the defendant.<sup>76</sup> Under such a statute, one exceeding a speed limit is *prima facie* guilty of negligence, yet he is allowed, by reason of the terms of the statute, an opportunity to show that the speed in the particular case was reasonable and proper under the surrounding circumstances.<sup>77</sup> The law does not regard a greater speed as negligence, but as *prima facie* evidence of negligence; and when such speed is shown, it is not necessary to show further conditions that make that rate unreasonable.<sup>78</sup> Under some statutes, the *prima facie* case of negligence arises only when the excessive speed has been maintained for a certain distance, such as an eighth or a quarter of a mile.<sup>79</sup> It

vitch, 280 Ill. 321, 117 N. E. 398; Kessler v. Washburn, 157 Ill. App. 532; People v. Lloyd, 178 Ill. App. 66; Bruhl v. Anderson, 189 Ill. App. 461; Petty v. Maddox, 190 Ill. App. 381; Berg v. Michell, 196 Ill. App. 509; People v. Kelly, 204 Ill. App. 201; Link v. Skeeles, 207 Ill. App. 48; Brantigan v. Union Overall Laundry Co., 211 Ill. App. 354; Masten v. Cousins, 216 Ill. App. 268. See also, Fippinger v. Glos, 190 Ill. App. 238.

*Iowa*.—Schultz v. Starr, 180 Iowa, 1319, 164 N. W. 163; Larsh v. Strassen, 183 Iowa, 1360, 168 N. W. 142; Shaffer v. Miller, 185 Iowa, 472, 170 N. W. 787; Diee v. Johnson, 175 N. W. 38; McSpadden v. Axmear (Iowa), 181 N. W. 4.

*Kentucky*.—Wade v. Brents, 161 Ky. 607, 171 Ky. 188; Forgry v. Rutledge, 167 Ky. 182, 180 S. W. 90; Moore v. Hart, 171 Ky. 725, 188 S. W. 861.

*Missouri*.—Nafgiezer v. Mahan (Mo. App.), 191 S. W. 1080; City of Windsor v. Bast (Mo. App.), 199 S. W. 722.

**Instructions.**—Under the *Illinois* law, which provides that in an action to recover damages caused by running an automobile at a greater speed than fifteen miles per hour a *prima facie* case shall be made by showing the injury and excessive speed, it was held, in an action for injuries to the plain-

tiff, whose horse was frightened by the defendant's automobile, that an instruction in the language of the statute as to the facts sufficient to make out a *prima facie* case in an action for injuries caused by excessive speed was not erroneous on the theory that it ignored the question as to whether the injuries were occasioned by running the automobile at an excessive speed. Ward v. Meredith, 220 Ill. 66, 77 N. E. 119.

**Burden of evidence.**—Such a statute does not necessarily change the burden of proof, but may merely shift the burden of evidence. Duprat v. Chismore (Vt.), 110 Atl. 305.

76. McSpodden v. Axmear (Iowa), 181 N. W. 4.

77. Radwick v. Goldstein, 90 Conn. 701, 98 Atl. 583; Hartje v. Moxley, 235 Ill. 164, 85 N. E. 216; Berg v. Michell, 196 Ill. App. 509; Moore v. Hart, 171 Ky. 725, 188 S. W. 861; Holland v. Yellow Cab Co., 144 Minn. 475, 175 N. W. 536; Flowerree v. Thornberry (Mo. App.), 183 S. W. 359; People v. Mellen, 104 Misc. (N. Y.) 355.

78. Berg v. Mitchell, 196 Ill. App. 509; People v. Fitzgerald, 101 Misc. (N. Y.) 695, 168 N. Y. Suppl. 930.

79. Flowerree v. Thornberry (Mo. App.), 183 S. W. 359.

is generally a question for the jury whether the speed under consideration is excessive under the circumstances of the particular case.<sup>80</sup> The driver may succeed in showing circumstances which will relieve him from criminal liability, though he was running the machine at as high a rate as forty-two miles an hour.<sup>81</sup> Where in an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant in driving his motor car at too rapid a speed and hitting the plaintiff as he was crossing the street, the trial court instructed the jury that a failure to comply with the requirements of the statute respecting the operation of such vehicle on the highway, from which an injury resulted, gave to the injured person a cause of action if his own negligence did not materially contribute to the injury, but omitted to say in so many words, that the burden rested upon the plaintiff to prove the negligence charged, as well as his own exercise of due care, and no request was made to so instruct them, it was held that under these circumstances the omission to charge more specifically respecting the burden of proof as to negligence and contributory negligence was not a sufficient ground for granting a new trial.<sup>82</sup>

### **Sec. 323. Speed of machine — excuse for violation of speed regulation.**

Many and various are the excuses that are offered by drivers accused of speeding, the following being a few of those most commonly given: There was a sick person in the car; a physician was speeding to the bedside of a patient; it was raining hard; the car was speeding up temporarily to get out of the dust of the car ahead. In some instances magistrates and judges have discharged motorists for one of the above reasons, while in other cases they have utterly refused to listen to excuses of this nature. May there not be circumstances under which the operation of an automobile at excessive speed is excusable morally and legally, and which is the

80. *People v. Lloyd*, 178 Ill. App. 66; *Schaffer v. Miller*, 185 Iowa, 472. 170 N. W. 787.

81. *People v. Mellen*, 104 Misc. (N.

Y.) 355.

82. *Wolfe v. Ives*, 83 Conn. 174, 76 Atl. 526. 19 Ann. Cas. 752.

proper course for a judge to pursue? The various State automobile laws say that motor vehicles shall not be driven faster than certain rates of speed. Generally, there are no exceptions or provisos in these laws permitting the speed limits to be exceeded, and consequently there exists no judicial discretion to discharge arrested automobilists on any of the grounds mentioned. However, since all laws must be enforced by means of human agency, "humanity" must necessarily enter into the execution of any particular statute. It should not be forgotten that "intention" has no place in violations of the speed law. Whether the arrested automobilist "knew" that he was exceeding the speed limit makes no difference in regard to his innocence or guilt. The law says that he who operates an automobile drives it at his peril if he exceeds the speed limit. But there is certainly an unfairness in "trapping" an automobilist who does not intentionally speed for the sake of creating a race or showing off. Just what to do to prevent oppression by officers of the law on the one hand and to curb reckless automobiling on the other is the great question.<sup>83</sup>

**Sec. 324. Speed of machine — negligence though not exceeding speed limit.**

The fact that a regulation has established a rate of speed beyond which an automobilist cannot drive his machine does not under all circumstances justify him in running at such speed.<sup>84</sup> He should not operate his vehicle at a rate which is

**83. Emergency Calls.**—Motor vehicle laws in a few States make an exception in cases when the driver is answering an "emergency call." *Fair v. Union Tract. Co.*, 102 Kans. 611, 171 Pac. 649; *Opocensky v. City of South Omaha*, 101 Neb. 336, 163 N. W. 325.

**84. Arkansas.**—*Bona v. S. R. Thomas Auto Co.*, 137 Ark. 217, 208 S. W. 306.

*California.*—*Cook v. Miller*, 175 Cal. 497, 166 Pac. 316; *Opitz v. Senecy*, 174 Pac. 40; *Gross v. Burnside*, 199 Pac. 780.

*Connecticut.*—*Irwin v. Judge*, 81 Conn. 492, 71 Atl. 572.

*Illinois.*—*Kessler v. Washburn*, 157 Ill. App. 532; *Bohm v. Dalton*, 206 Ill. App. 374.

*Indiana.*—*Brinkman v. Pacholke*, 41 Ind. App. 662, 84 N. E. 762.

*Iowa.*—*Delis v. Dunshee*, 143 Iowa, 381, 133 N. W. 236; *Lenke v. Ady*, 159 N. W. 1011; *Shaffer v. Miller*, 185 Iowa, 472, 170 N. W. 787.

*Kentucky.*—*Forgy v. Rutledge*, 167 Ky. 182, 180 S. W. 90; *Moore v. Hart*,

unreasonable under the circumstances,<sup>85</sup> and it is self evident that under the particular circumstances of many cases the rate allowed by statute or ordinance would be excessive.<sup>86</sup> As was said in one case,<sup>87</sup> "No owner or operator of an automobile is necessarily exempt from liability for collision in a pub-

171 Ky. 725, 188 S. W. 861. "It will not to say that the provisions of the statute as to the effects and consequences of a violation of the speed limits therein mentioned is evidentiary only, so as to justify the submission of the case to the jury when those limits are exceeded, because it is the law everywhere so far as we are aware, that such provisions may be strictly complied with and yet the party sought to be charged may be guilty of actionable negligence. In other words, in this particular case the speed may not have exceeded 20 miles per hour, still this would not be an absolute defense, as other facts and circumstances may have justified the submission of the case to the jury. On the contrary, defendant may have been traveling at a rate of speed greater than 20 miles an hour, and under the facts and circumstances, not be guilty of negligence. When the plaintiff shows that the rate of speed at which the defendant was traveling was greater than that prescribed by the statute for that place, the burden then shifts to the defendant to show that the speed at which he was traveling did not produce the injury." Moore v. Hart, 171 Ky. 725, 188 S. W. 861.

*Massachusetts*.—Rasmussen v. Whipple, 211 Mass. 546, 98 N. E. 592.

*Michigan*.—Patterson v. Wagner, 204 Mich. 593, 171 N. W. 356; Hawkins v. Ermatinger, 179 N. W. 249.

*Minnesota*.—Hinkel v. Stemper, 180 N. W. 918.

*Missouri*.—Ginter v. O'Donoghue (Mo. App.), 179 S. W. 732; Denny v. Randall (Mo. App.). 202 S. W. 602.

*North Dakota*.—Vannett v. Cole, 170 N. W. 663.

*Pennsylvania*.—Flanigan v. McLean (Pa.), 110 Atl. 370.

*South Dakota*.—Chrestenson v. Harms, 38 S. D. 360, 161 N. W. 343.

*Tennessee*.—West Constr. Co. v. White, 130 Tenn. 520, 172 S. W. 301.

*Texas*.—Figuerora v. Madero (Civ. App.), 201 S. W. 271.

*Utah*.—Lochhead v. Jensen, 42 Utah, 99, 129 Pac. 347; Fowlkes v. J. I. Case Threshing Mach. Co., 46 Utah, 502, 151 Pac. 53.

*Washington*.—Adair v. McNeil, 95 Wash. 160, 163 Pac. 393.

*Compare* Weimer v. Rosen. 100 Ohio, 361, 126 N. E. 307.

#### 85. Section 305.

86. "The rule—speed limitation by ordinance or no speed limitation—is the general and well-established one applying to motor vehicles as to all other vehicles, and is that their operators must use all the care and caution in operating them which careful and prudent men should exercise, having due regard for the safety of the public and the rights of others to the use of the streets. The operator of a vehicle may not escape liability for a collision by simply saying that he was not exceeding the speed limit established by statute or ordinance when it happened. It may appear (the other party being without fault) that though a defendant was not exceeding the limit of speed prescribed by the ordinance, yet that he was operating his vehicle under the particular circumstances as a careful and prudent man in the exercise of due care and caution would have had." Opitz v. Schenek (Cal.), 174 Pac. 40.

87. Kessler v. Washburn. 157 Ill. App. 532.

lie street by simply showing that at the time of the accident he did not run at a rate of speed exceeding the limit allowed by the law or the ordinances. On the contrary, he still remains bound to anticipate that he may meet persons at any point in the public street and he must keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person, using proper care and caution; and if necessary, he must slow up and even stop. No blowing of a horn or of a whistle or ringing of a bell or gong, without an attempt to slacken the speed, is sufficient, if the circumstances at a given point demand that the speed be slackened or the machine be stopped, and such a course is reasonably practicable."<sup>88</sup> But one claiming that a speed less than the prescribed limit is negligent under the circumstances has the burden of proof to show the circumstances requiring a slower rate.<sup>89</sup>

**Sec. 325. Speed of machine — province of jury.**

Speaking in general terms, whether a person has been guilty of negligence is a question for the jury.<sup>90</sup> And, whether one operated a motor vehicle at a speed faster than a reasonable and proper rate, is peculiarly a question within the province of the jury.<sup>91</sup> It is true that in some jurisdictions, when it is

88. And see to the same effect: *Thies v. Thomas*, 77 N. Y. Suppl. 276.

89. *Lochhead v. Jensen*, 42 Utah, 99, 129 Pac. 347.

90. See section 359.

91. *Arizona*.—*Warren Co. v. Whitt*, 103 Wash. 284, 165 Pac. 1097.

*California*.—*Bannister v. H. Jevne Co.*, 28 Cal. App. 133, 151 Pac. 546.

*Colorado*.—*Martin v. Carruthers*, 195 Pac. 105.

*Connecticut*.—*Griffen v. Wood*, 93 Conn. 99, 105 Atl. 354.

*Georgia*.—*Central of Ga. Ry. Co. v. Larsen*, 19 Ga. App. 413, 91 S. E. 517.

*Illinois*.—*People v. Lloyd*, 178 Ill. App. 66; *Hartwig v. Knapwurst*, 178 Ill. App. 409; *Ferry v. City of Waukegan*, 196 Ill. App. 81.

*Iowa*.—*Topper v. Maple*, 181 Iowa, 786, 165 N. W. 28. See also, *McSpadden v. Axmear* (Iowa), 181 N. W. 4.

*Kansas*.—*Arrington v. Horner*, 88 Kans. 817, 129 Pac. 1159; *Barshfield v. Vucklich* (Kans.), 197 Pac. 205.

*Michigan*.—*Hawkins v. Ermatinger*, 179 N. W. 249.

*Missouri*.—*Priebe v. Crandall* (Mo. App.), 187 S. W. 605; *Schinogle v. Baughman* (Mo. App.), 228 S. W. 897.

*Nebraska*.—*Rule v. Claar Transfer & Storage Co.*, 102 Neb. 4, 165 N. W. 883.

*New Jersey*.—*Merkel v. Jersey City H. & P. St. Ry. Co.*, 75 N. J. Law, 654, 68 Atl. 74.

*New York*.—*Brewster v. Barker*, 129 N. Y. App. Div. 724, 113 N. Y. Suppl.

clearly shown that the driver of a motor vehicle violated a speed regulation upon a particular occasion, the negligence of the driver may be found as a matter of law, but, in other cases, as a general proposition, the negligence of the driver is a question for the jury. And more especially is a question for the jury presented, when the evidence is conflicting as to the rate which was maintained upon the occasion under consideration.<sup>92</sup>

### Sec. 326. Control.

The driver of a motor vehicle must at all times have the machine under reasonable control, so that with due diligence he can stop in time to avoid injury to other travelers who are exercising reasonable care for their safety.<sup>93</sup> This general

1026; *Ackerman v. Stacey*, 157 N. Y. App. Div. 835, 143 N. Y. Suppl. 227.

*Ohio*.—*Schell v. DuBois*, 94 Ohio, 93, 113 N. E. 664.

*Pennsylvania*.—*Lorah v. Rinehart*, 243 Pa. St. 231, 89 Atl. 967; *Joyce v. Smith* (Pa.), 112 Atl. 549; *Wolf v. Sweeney* (Pa.), 112 Atl. 869.

*South Dakota*.—*Cameron v. Miller*, 180 N. W. 71.

*Utah*.—*Boeddcher v. Frank*, 48 Utah, 363, 159 Pac. 634.

*Washington*.—*Bruner v. Little*, 97 Wash. 319, 166 Pac. 1166; *Locke v. Greene*, 100 Wash. 397, 171 Pac. 245.

92. *Brown v. New Haven Taxicab Co.* (Conn.), 105 Atl. 706; *Osberg v. Cudahy Packing Co.*, 198 Ill. App. 551; *Roper v. Greenspon*, 272 Mo. 288, 198 S. W. 1107, L. R. A. 1918D 126.

93. *Illinois*.—*Kessler v. Washburn*, 157 Ill. App. 532; *Crandall v. Krause*, 165 Ill. App. 15; *Kuchler v. Stafford*, 185 Ill. App. 199.

*Iowa*.—*Brown v. Des Moines Steam Bottling Works*, 174 Iowa, 715, 156 N. W. 829; *Gilbert v. Vanderwall*, 181 Iowa, 685, 165 N. W. 165. "It is a matter of common knowledge that the movements of these heavy, fast-moving vehicles upon the street are required to

be kept under reasonable control, to avoid having their course diverted by the intervention of obstacles upon the street, and if not held under control, a slight obstacle will so divert them, and imperil the safety of those upon the street; that, when diverted, they became a menace to those in the vicinity of their course, a menace from which it is difficult sometimes to escape. Therefore it becomes the duty of one upon a public highway in a thickly populated part of the large city to exercise reasonable care to see that he has the instrumentality under control, and to so manage it that it will not unreasonably or unnecessarily imperil the safety of others upon the public highway. Whether the defendant did this in this particular case was clearly a question for the jury. The jury might well have found, that if the defendant had his automobile under such perfect control as he should have had on a public street, and was giving reasonable attention to it, he might have avoided the collision with the flange at the switching point, or, having collided with it, might have stopped the same in time to have avoided the injury complained of." *Brown v. Des Moines Steam Bot-*



principle is, for practical purposes, the same as the rule requiring the driver to operate the machine not faster than a reasonable and proper rate of speed.<sup>94</sup> Not only must he have the car under reasonable control, so as to avoid a collision with other vehicles,<sup>95</sup> beasts of burden, and pedestrians,<sup>96</sup> but, for his own safety, he must have the car under such control

ting Works, 174 Iowa, 715, 156 N. W. 829.

*Kentucky*.—Weidner v. Otter, 171 Ky. 167, 188 S. W. 335.

*Louisiana*.—Walker v. Rodriguez, 139 La. 251, 71 So. 499.

*Michigan*.—Granger v. Farrant, 179 Mich. 19, 146 N. W. 218; Westover v. Grand Rapids R. Co., 180 Mich. 373, 147 N. W. 630.

*Minnesota*.—Molin v. Wark, 113 Minn. 190, 129 N. W. 383; Johnson v. Johnson, 137 Minn. 198, 163 N. W. 160.

*Mississippi*.—Ulmer v. Pistole, 115 Miss. 485, 76 So. 522.

*Missouri*.—Rowe v. Hammond, 172 Mo. App. 203, 157 S. W. 880; Priebe v. Crandall (Mo. App.), 187 S. W. 605; Mitchell v. Brown (Mo. App.), 190 S. W. 354; Roper v. Greenspon (Mo. App.), 192 S. W. 149.

*New Jersey*.—Pool v. Brown, 89 N. J. Law, 314, 98 Atl. 262.

*New York*.—Thies v. Thomas, 77 N. Y. Suppl. 276.

*North Carolina*.—Manly v. Abernathy, 167 N. Car. 220, 83 S. E. 343.

*Oregon*.—Weygandt v. Bartle, 88 Oreg. 310, 171 Pac. 587.

*Pennsylvania*.—Lorah v. Rinehart, 243 Pa. St. 231, 89 Atl. 967; Virgilic v. Walker, 254 Pa. St. 241, 98 Atl. 815; Anderson v. Wood, 264 Pa. St. 98, 107 Atl. 658. "Vehicles have the right of way on the portion of the highway set apart for them, but at crossings all drivers, particularly of motor vehicles, must be highly vigilant and maintain such control that, on the shortest possible notice, they can stop their cars so

as to prevent danger to pedestrians." Virgilic v. Walker, 254 Pa. St. 241, 98 Atl. 815.

*Virginia*.—Core v. Wilhelm, 98 S. E. 27.

*Washington*.—Locke v. Greene, 100 Wash. 397, 171 Pac. 245.

"The test of control is the ability to stop quickly and easily. When this result is not accomplished, the inference is obvious that the car was running too fast, or that proper effort to control it was not made. If dangerous and powerful machines, such as automobiles, whose weight, when in motion, gives them great momentum, are to be permitted to use the public highways, prudence requires that they be kept under good control so that they may promptly be brought to a halt, if need be." Lorah v. Rinehart, 243 Pa. St. 231, 89 Atl. 967.

**Hands on steering wheel**.—It has been held gross negligence for a driver to take his hands off the steering wheel while the machine was moving at a high rate of speed.<sup>9</sup> Borys v. Christowski, 9 Sasn. (Canada) 181.

<sup>94</sup>. See section 305. "In a crowded city street, the dictates of common prudence clearly require that a heavy vehicle, such as an automobile, shall be kept under control so as to avoid, or at least minimize, the dangers of a collision. Common experience and observation shows that the only adequate method of control is to run the machines slowly." Lorah v. Rinehart, 243 Pa. St. 231, 89 Atl. 967.

<sup>95</sup>. Section 370.

<sup>96</sup>. Sections 441-445.

that he can avoid a collision with an approaching street car<sup>97</sup> or railroad train.<sup>98</sup> It is sufficient, however, if the driver keeps the machine under reasonable control, it not being necessary that it be kept under absolute control.<sup>99</sup> Except under unusual circumstances, he is not required to have the machine under such control that he can stop *instantly*.<sup>1</sup> When proceeding along the wrong side of the highway, greater control is required of the driver than when he is proceeding in accord with the law of the road,<sup>2</sup> for a greater degree of diligence is generally required of a driver under such circumstances.<sup>3</sup> When driving at night, the control of the machine should, to a certain extent, be commensurate with the distance illuminated with the lights; that is, the control of the car should be such that the driver can avoid persons or obstructions in his course within the scope of the lights.<sup>4</sup> And, when traveling in the day time, reasonable care requires that the machine be under such control that it can be stopped so as to avoid injury from an obstruction or a defect in the highway.<sup>5</sup> In some jurisdictions, statutes prescribe the rate of speed for motor vehicles and further provide that under some circumstances the machines shall be under "perfect" control.<sup>6</sup>

### Sec. 327. Duty to stop.

The general duty of the driver of a motor vehicle is to exercise reasonable care under the circumstances.<sup>7</sup> Obviously, the circumstances may frequently be such, especially on a crowded thoroughfare, that an ordinarily prudent driver would stop his machine to avoid an injury to another traveler. In such a case, negligence may be charged against a driver

97. Sections 603-606.

98. Section 572.

99. Baldwin's Adm'r v. Maggard, 162 Ky. 424, 172 S. W. 674; Goff v. Clarksburg Dairy Co. (W. Va.), 103 S. E. 58.

1. Twinn v. Noble (Pa.), 113 Atl. 686.

2. Bradley v. Jaeckel, 65 Misc. (N. Y.) 509, 119 N. Y. Suppl. 1071.

3. Section 280.

4. Kendall v. City of Des Moines (Iowa), 167 N. W. 684; Harnau v. Haight, 189 Mich. 60, 155 N. W. 563; Healy v. Shedaker, 264 Pa. St. 512, 107 Atl. 842.

5. Raymond v. Sauk County, 167 Wis. 125, 166 N. W. 29.

6. Molin v. Wark, 113 Minn. 190, 129 N. W. 383; Wentworth v. Waterbury, 90 Vt. 60, 96 Atl. 334.

7. Section 277.

who fails to stop.<sup>8</sup> And, though the driver has stopped his machine, negligence may be found in starting again before the danger has ceased.<sup>9</sup> While in many cases the driver may be required to stop as a protection to other travelers, such as pedestrians,<sup>10</sup> and persons riding in other vehicles, there is a similar duty for his own protection as against railroad engines,<sup>11</sup> and street cars.<sup>12</sup> At intersecting streets, while both travelers should exercise reasonable care for their safety the machine first at the crossing is generally allowed the right of way, and the latter machine should stop or delay his passage.<sup>13</sup> In addition to the general principles of law requiring a stopping of the machine when necessary, a positive duty in that respect is sometimes imposed by statute. Thus, it is enacted in many jurisdictions that the driver of a motor vehicle shall stop on the signal of the driver of a horse-drawn conveyance.<sup>14</sup> So, too, statutes or municipal ordinances sometimes require

8. *California*.—Bannister v. H. Jevne Co., 28 Cal. App. 133, 151 Pac. 546.

*Delaware*.—Cecchi v. Lindsay, 1 Boyce, 185, 75 Atl. 376, reversed on other grounds, 80 Atl. 523; Grier v. Samuel, 4 Boyce, 106, 86 Atl. 209; Brown v. City of Wilmington, 4 Boyce, 492, 90 Atl. 44.

*Illinois*.—Christy v. Elliott, 216 Ill. 31, 1 L. R. A. (N. S.) 215, 74 N. E. 1035, 108 Am. St. Rep. 196, 3 Ann. Cas. 487.

*Indiana*.—Mayer v. Mellette, 65 Ind. App. 54, 114 N. E. 241.

*Iowa*.—Crawford v. McElhinney, 171 Iowa, 606, 154 N. W. 310.

*Kentucky*.—Shinkle v. McCullough, 116 Ky. 960, 77 S. W. 196.

*Louisiana*.—Kelly v. Schmidt, 142 La. 91, 76 So. 250.

*Maine*.—Meserve v. Libby, 115 Me. 282, 98 Atl. 754.

*Massachusetts*.—Dudley v. Kingsbury, 199 Mass. 258, 85 N. E. 76.

*Missouri*.—Roper v. Greenspon (Mo. App.), 192 S. W. 149; Heryford v. Spiteansky (Mo. App.), 200 S. W.

123; Edwards v. Yarbrough (Mo. App.), 201 S. W. 972.

*New York*.—Knight v. Lanier, 69 N. Y. App. Div. 454, 74 N. Y. Suppl. 999.

*Pennsylvania*.—Reese v. France, 62 Pa. Super. Ct. 128.

*Washington*.—Morrison v. Conley Taxicab Co., 94 Wash. 436, 162 Pac. 365.

9. Meserve v. Libby, 115 Me. 282, 98 Atl. 754.

10. Section 442.

11. Sections 567, 568.

12. Section 604.

13. Section 393.

14. Stout v. Taylor, 168 Ill. App. 410; McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 8 Ann. Cas. 1087; State v. Goodwin, 169 Ind. 265, 82 N. E. 459; Searcy v. Golden, 172 Ky. 42, 188 S. W. 1098; Beggs v. Clayton, 40 Utah, 389, 121 Pac. 7; Cohen v. Meader, 119 Va. 429, 89 S. E. 876; Brown v. Thorne, 61 Wash. 18, 111 Pac. 1047; McCummins v. State, 132 Wis. 236, 112 N. W. 25. And see sections 536-539, 774.

the operators of motor vehicles to stop their machines when approaching a street car receiving or discharging passengers.<sup>15</sup> And it is also provided by statute in many States that after a collision with another vehicle or injury to another traveler, the driver shall stop his machine and make his identity known to the injured person.<sup>16</sup> But, independently of statute, it is a general rule that the driver of an automobile shall stop the machine when necessary to avoid injury to other travelers having equal rights in the street. For example, if the operator of a machine is blinded by the light from another vehicle or from a street car, so that he is unable to distinguish an object in front, reasonable care requires that he bring his vehicle to a stop, and a failure so to do may justify a charge of negligence.<sup>17</sup> This situation is the same as when the chauffeur is suddenly blinded by a reflection of the rays of the sun.<sup>18</sup> So, too, when the steering apparatus becomes out of order so that a car persists in making a circle, it is the duty of the driver to stop the machine and not to continue to describe circles in the street until he is struck by a street car.<sup>19</sup> And, in general, when one approaches a crowded street crossing, if it is imprudent or dangerous to pass the crossing at the time, ordinary care requires that the driver stop his machine.<sup>20</sup> Similarly, where a person on horseback apparently does not hear the approach of an automobile from the rear, the person in charge of the car cannot proceed regardless of the fact that the former does not turn out, but should slacken the speed of his machine, even bringing it to a stop if necessary to avoid

15. *Frankel v. Hudson*, 271 Mo. 495, 196 S. W. 1121; *Meenach v. Crawford* (Mo.), 187 S. W. 879; *Horowitz v. Gottwalt* (N. J.), 102 Atl. 930; *Kolaniewicz v. Burke*, 91 N. J. L. 567, 103 Atl. 249; *Crombie v. O'Brien*, 178 N. Y. App. Div. 807, 165 N. Y. Suppl. 858; *Zimmerman v. Mednikoff*, 165 Wis. 333, 162 N. W. 349. And see sections 423-427.

16. Sections 775-779.

17. *Buzich v. Todman*, 179 Iowa, 1019, 162 N. W. 259; *Jolman v. Al-*

*berts*, 192 Mich. 25, 158 N. W. 170; *Hammond v. Morrison*, 90 N. J. L. 815, 100 Atl. 154; *Jacquith v. Worden*, 73 Wash. 349, 132 Pac. 33, 48 L. R. A. (N. S.) 827.

18. *O'Beirne v. Stafford*, 87 Conn. 354, 87 Atl. 743, 46 L. R. A. (N. S.) 1183.

19. *Kneeshaw v. Detroit United Ry.*, 169 Mich. 697, 135 N. W. 903.

20. *Crawford v. McElhinney*, 171 Iowa, 606, 154 N. W. 310.

a collision.<sup>21</sup> But the driver of a motor vehicle proceeding along the proper side of a highway of sufficient width to enable an easy passage is not necessarily guilty of negligence in failing to stop when he sees a traveler approaching on the wrong side of the highway, for he is entitled to assume that the traveler will cross to the proper side before a collision.<sup>22</sup>

### Sec. 328. Negligence in stopping.

The duty of exercising reasonable care under the circumstances may in some cases forbid an abrupt stop. For example, when another car is following closely behind, the driver of the forward car may be guilty of negligence if he suddenly slows up or stops so that the driver of the rear vehicle is unable to avoid a collision.<sup>23</sup> Or one may be found negligent in stopping the machine near the center of the road instead of at the side, when it is desired to light the lights or to make repairs.<sup>24</sup>

### Sec. 329. Warning of approach — in general.

Reasonable care requires that, at street crossings and other places where travelers may naturally be anticipated, a warning of the approach of a motor vehicle shall be given by its driver.<sup>25</sup> One intending to back his machine in a street should

21. *Furtado v. Bird*, 26 Cal. App. 153, 146 Pac. 58.

22. *Clarke v. Woop*, 159 N. Y. App. Div. 437, 144 N. Y. Suppl. 595.

23. *Strever v. Woodard*, 178 Iowa, 30, 158 N. W. 504; *Strapp v. Jerabek* (Minn.), 175 N. W. 1003.

**Negligence in stopping.**—Negligence may be based on the act of stopping an automobile, as well as a failure to stop. Should an automobilist suddenly stop his machine while running along the highway and as a result thereof another car should run into the rear of it, it is clear that negligence on the part of the driver of the forward car could be sustained. And, if an automobilist after passing a frightened horse should stop in front of it and

thereby add to its fright, he may be liable for the damages which would arise from the fright of the animal. *Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236.

24. *Haynes v. Dowie* (Cal. App.), 198 Pac. 39.

25. *Arkansas*.—*Texas Motor Co. v. Buffington*, 134 Ark. 320, 203 S. W. 1013.

*California*.—*Gross v. Burnside* (Cal.), 199 Pac. 780.

*Connecticut*.—*Lynch v. Shearer*, 83 Conn. 73, 75 Atl. 88.

*Georgia*.—*O'Dowd v. Newnham*, 13 Ga. App. 220, 80 S. E. 36.

*Illinois*.—*Coppock v. Schlatter*, 193 Ill. App. 255; *Noonan v. Maus*, 197 Ill. App. 103.

give a warning.<sup>26</sup> If the operator of such a vehicle fails to give a proper warning and injury is thereby occasioned to a pedestrian or other traveler, negligence may be charged against the driver. In the absence of positive regulation requiring the warning, its absence is not necessarily negligence but presents a question for the jury.<sup>27</sup> Other travelers, to a certain extent, are entitled to rely on the belief that the drivers of motor vehicles will give them a proper warning.<sup>28</sup>

The question of warning in a given case is generally complicated with additional facts of excessive speed and lack of proper control of the machine. To run an automobile at an

*Indiana*.—*J. F. Darmondy Co. v. Reed*, 111 N. E. 317.

*Kentucky*.—*Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335; *Collett v. Standard Oil Co.*, 186 Ky. 142, 216 S. W. 356; *Adams v. Parrish*, 225 S. W. 467.

*Louisiana*.—*Kelly v. Schmidt*, 142 La. 91, 76 So. 250.

*Massachusetts*.—*Gifford v. Jennings*, 190 Mass. 54, 76 N. E. 233.

*Michigan*.—*Wright v. Crane*, 142 Mich. 508, 106 N. W. 71, 12 Det. Leg. N. 794; *Levyn v. Koppin*, 183 Mich. 232, 149 N. W. 993.

*Minnesota*.—*Johnson v. Quinn*, 130 Minn. 134, 153 N. W. 267; *Johnson v. Johnson*, 137 Minn. 198, 163 N. W. 160; *Dunkelbeck v. Meyer*, 140 Minn. 283, 167 N. W. 1034.

*Missouri*.—*Young v. Bacon* (Mo. App.), 183 S. W. 1079; *Brooks v. Harris* (Mo. App.), 207 S. W. 293.

*New Hampshire*.—*Hamel v. Peabody*, 78 N. H. 585, 97 Atl. 220.

*New Jersey*.—*Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262; *Heckman v. Cohen*, 90 N. J. L. 322, 100 Atl. 695.

*New York*.—*Wolcott v. Renault Selling Branch*, 223 N. Y. 288, 119 N. E. 536, reversing 175 App. Div. 858; *Gross v. Foster*, 134 N. Y. App. Div. 243, 118 N. Y. Suppl. 889; *Bohringer v. Campbell*, 154 N. Y. App. Div. 879, 137 N. Y. Suppl. 241; *Hood v. Stowe*, 191 N.

Y. App. Div. 614, 181 N. Y. Suppl. 734; *Bradley v. Jaeckel*, 65 Misc. (N. Y.) 509, 119 N. Y. Suppl. 1071; *Dultz v. Fischowitz*, 104 N. Y. Suppl. 357; *Signet v. Werner*, 159 N. Y. Suppl. 894.

*North Carolina*.—*Manly v. Abernathy*, 167 N. Car. 220, 83 S. E. 343.

*Washington*.—*Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876; *Franey v. Seattle Taxicab Co.*, 80 Wash. 396, 141 Pac. 890; *Moy Quon v. M. Furiya Co.*, 81 Wash. 526, 143 Pac. 99.

*Vermont*.—*Dervin v. Frenier*, 91 Vt. 398, 100 Atl. 760.

*Canada*.—*Nugent v. Gunn*, 160 W. N. 145, affirmed, 17 O. W. N. 53.

**Negligence in sounding horn.**—Negligence may be charged against the driver of a motor vehicle who unnecessarily sounds his horn when he is in such proximity to a horse that it becomes frightened. *Conrad v. Shuford* (N. C.), 94 S. E. 424.

<sup>26</sup> *Lee v. Donnelly* (Vt.), 113 Atl. 542.

<sup>27</sup> *Anderson v. Voeltz* (Mo. App.), 206 S. W. 584; *Thompson v. Fischer*, 188 N. Y. App. Div. 878, 177 N. Y. Suppl. 491.

<sup>28</sup> *Toronto General Trusts Corp. v. Dunn*, 15 West. L. Rep. (Canada) 314, 20 Man. L. R. 412. And see section 352.

excessive speed without warning to other travelers, is clearly a negligent act. In fact, the excessive speed alone is sufficient to carry the case to the jury on the issue of the driver's negligence.<sup>29</sup> And, moreover, the failure to give the proper warning may of itself, under some circumstances, constitute negligent conduct.<sup>30</sup> The automobilist cannot proceed along a public highway by giving a warning of his approach, but not slacking his speed or taking other steps to avoid collisions with other travelers.<sup>31</sup>

The requirement of due warning is intended for the protection of other travelers who might pass in front of the machine in the absence of some signal or knowledge of the approach of the vehicle. When a pedestrian suddenly darts in front of an automobile from a place where pedestrians would not naturally be expected and is so near the machine that the driver is unable with due diligence to avoid a collision, the injury is deemed the result of an unavoidable accident,<sup>32</sup> and liability is not imposed merely because the driver failed to blow his horn or give notice of his approach.<sup>33</sup> But at street crossings, the driver is bound to anticipate that pedestrians may be attempting to cross the street, and he must be prepared at such places to give reasonable warning of danger.<sup>34</sup> After passing over a crossing and while proceeding along a street, if there are no vehicles in the street or pedestrians who are apparently coming in a place of danger,

29. Section 325.

30. "The uncontradicted fact in the case is that the driver of the automobile gave no audible signal or warning of his approach to the obscured part of the crosswalk. From that fact alone a jury might properly have found that the driver's failure to sound a warning of the approach of his automobile to the crossing was negligent conduct." *Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262.

31. *Kessler v. Washburn*, 157 Ill. App. 532; *Thies v. Thomas*, 77 N. Y. Suppl. 276. See also, *Troughton v.*

*Manning*, 92 L. T. R. (Eng.) 855.

32. Sections 284, 419.

33. *Bishard v. Engelbeck*, 180 Iowa, 1132, 164 N. W. 203; *Levesque v. Dumont*, 116 Me. 25, 99 Atl. 719; *Winter v. Van Blarcom*, 258 Mo. 418, 167 S. W. 498; *Chiappone v. Greenebaum*, 189 N. Y. App. Div. 579, 178 N. Y. Suppl. 854; *Feyrer v. Durhrow* (Wis.), 178 N. W. 306.

34. *Coppock v. Schlatter*, 193 Ill. App. 255; *Johnson v. Quinn*, 130 Minn. 134, 153 N. W. 267. And see section 279.

the driver of an automobile is under no duty to sound his horn.<sup>35</sup>

In proving a negative fact, such as the absence of a proper warning, negative evidence to the effect that witnesses did not hear a warning is proper and may constitute sufficient evidence to present a question for the jury.<sup>36</sup> The weight of the negative evidence may be a question for the jury.<sup>37</sup>

### Sec. 330. Warning of approach — statutes or ordinances.

Statutes in many jurisdictions prescribe different circumstances under which the drivers of motor vehicles shall give a warning of their approach.<sup>38</sup> And municipal corporations pursuant to their power of regulating the use of highways may pass ordinances requiring the blowing of horns.<sup>39</sup> As a general rule, the violation of such regulations is negligence *per se*, and renders the driver liable for all injuries proximately resulting therefrom to persons exercising proper care for their own safety;<sup>40</sup> but under particular statutes or under

35. *Elmendorf v. Clark*, 143 La. 971, 79 So. 557; *Barton v. Van Gesen*, 91 Wash. 94, 157 Pac. 215.

36. *Noonan v. Maus*, 197 Ill. App. 103; *Bohringer v. Campbell*, 154 N. Y. App. Div. 879, 137 N. Y. Suppl. 241; *Kuehne v. Brown*, 257 Pa. 37, 101 Atl. 77; *Flanigan v. McLean* (Pa.), 110 Atl. 370.

37. *Collett v. Standard Oil Co.* (Ky.), 276 S. W. 356; *Kuehne v. Brown*, 257 Pa. 37, 101 Atl. 77.

38. *Wine v. Jones*, 183 Iowa, 1166, 162 N. W. 196, 168 N. W. 318; *Collett v. Standard Oil Co.*, 186 Ky. 142, 216 S. W. 356; *Creedon v. Galvin*, 226 Mass. 140, 115 N. E. 307; *Levyn v. Koppin*, 183 Mich. 232, 149 N. W. 993; *Darish v. Scott* (Mich.), 180 N. W. 435; *Sullivan v. Chauvenet* (Mo.), 222 S. W. 759; *Raymen v. Galvin* (Mo.), 229 S. W. 747; *Dignum v. Weaver* (Mo. App.), 204 S. W. 566; *Moffatt v. Link* (Mo. App.), 229 S. W. 836; *Aiken v. Metcalf*, 92 Vt. 57, 102 Atl. 330.

Duty to sound horn considered in view of Ont. Stat. 6 Edw. VII, ch. 46, amended by 8 Edw. VII, ch. 53. *Marshall v. Gowan's*, 20 Ont. W. R. 37, 39, *et seq.*, 3 Ont. W. N. 69.

Intersection of highways. When a statute requires that a warning be given at the "intersection of highways," a question of construction may arise as to what constitutes such an intersection. See section 27.

39. *Rolfs v. Mullins*, 180 Iowa, 472, 163 N. W. 232.

40. *Fisher v. Ellston*, 174 Iowa, 864, 156 N. W. 422; *Collett v. Standard Oil Co.* (Ky.), 216 S. W. 356; *Benson v. Larson*, 133 Minn. 346, 158 N. W. 426; *Staten v. Monroe* (Tex. Civ. App.), 150 S. W. 222; *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892; *Franey v. Seattle Taxicab Co.*, 80 Wash. 396, 141 Pac. 890; *Moy Quon v. M. Furuya Co.*, 81 Wash. 526, 143 Pac. 99; *Coe v. Mayberry*, 11 Sask. (Canada) 425. And see section 297.



the circumstances of a special case, the failure to give the warning may not constitute negligence as a matter of law.<sup>41</sup> A statute relative to the giving of warning should be construed in accordance with its terms and not given an extended construction beyond its plain meaning.<sup>42</sup> But, where a statute requires motor vehicles to be equipped with horns or other signals, it is thought that a duty is thereby imposed on automobilists to use such warning devices when reasonably necessary.<sup>43</sup> A statute which requires the sounding of a horn on "approaching" a horse-drawn conveyance, may apply when the automobile is approaching either from the front or rear of the carriage.<sup>44</sup> In the case of two vehicles colliding at a street intersection, if the law required that both should give warning of their approach and neither driver sounded his horn, both may be held to be equally negligent so that there can be no recovery by either.<sup>45</sup>

41. *Texas Motor Co. v. Buffington*, 134 Ark. 320, 203 S. W. 1013; *Griffen v. Wood*, 93 Conn. 99, 105 Atl. 354.

42. *Shaw v. Covington*, 171 Ill. App. 232.

43. *Forgy v. Rutledge*, 167 Ky. 182, 180 S. W. 90, wherein the court said: "We see no force in appellants' further complaint of instruction No. 3, advising the jury that it was appellants' duty to give appellee warning of the approach of the automobile by signal with a horn, bell or other device. In support of this contention it is argued that the act of 1910 contains no provision requiring the giving of such signals. It is true that the act contains no express requirement that such signals shall be given, but it is provided in § 8 thereof that: 'Every motor vehicle, while in use on a public highway, shall be provided with good and sufficient brakes and also with a suitable bell, horn or other signal device. . . .' We can imagine no use to which a bell, horn, or other signal device attached to an automobile could be put, except to give suitable signals

of the approach of the machine where such signals would be necessary for the safety of persons traveling upon the public highway, and manifestly the necessity for their use on the streets of a city or town is greater than in the country. The necessity for their use is implied from the provision requiring motor vehicles to be supplied with them. This proposition is too plain for argument." See also, *Vannett v. Cole* (N. Dak.), 170 N. W. 663.

44. *Gifford v. Jennings*, 190 Mass. 54, 76 N. E. 233, wherein it was said: "The jury might find that a horn should be sounded on overtaking a horse not only to warn the driver of the horse to keep to his side of the road, but also to give timely warning of the approach of this machine which, in the kind of noise made by it, as well as in other respects, is novel and therefore may be dangerous."

45. *Corning v. Maynard*, 179 Iowa, 1065, 162 N. W. 564; *Larsh v. Strasser*, 183 Iowa, 1360, 168 N. W. 142; *Newton v. McSweeney*, 225 Mass. 402, 114 N. E. 667.

Actual knowledge of the approach of an automobile may excuse the failure of the driver of the machine to give a statutory warning, for in such a case the alleged violation may not be deemed a proximate cause of the injury.<sup>46</sup> But this question depends to some extent upon the distance of the machine when seen; if close, no signal need, perhaps, be given as to the particular person; but, if a considerable distance away, a signal should be given when the car has approached closer.<sup>47</sup> And if the driver intends to divert from the usual course of travel, a warning should be given, although there may be actual knowledge of the approach of the car.<sup>48</sup> One approaching an intersecting street is not necessarily negligent in failing to give a signal, where he stops his machine before reaching the intersection, and especially is this true where the driver does not have time both to stop and to give the signal and it appears wiser to him to stop.<sup>49</sup> But one is not relieved from giving a warning because he believes that he can proceed without injury to another traveler.<sup>50</sup> The fact that a statute prescribes certain cases when a warning shall be sounded, does not necessarily excuse a failure in other cases; in other cases the common law duty to exercise reasonable care under the circumstances may require a warning.<sup>51</sup>

**46.** *Zechiel v. Los Angeles Gas & Elec. Corp.* (Cal.), 192 Pac. 720; *Schultz v. Starr*, 180 Iowa, 1319, 164 N. W. 163; *Zechiel v. Los Angeles Gas & Elec. Corp.* (Cal.), 192 Pac. 720; *Bruce's Adm'r v. Callahan*, 185 Ky. 1, 213 S. W. 557; *Priebe v. Crandall* (Mo. App.), 187 S. W. 605; *Herzig v. Sandberg* (Mont.), 172 Pac. 132; *Van Dyke v. Johnson*, 82 Wash. 377, 144 Pac. 540.

**Guest.**—Actual knowledge of the driver does not necessarily excuse the failure to sound the horn, when the action is brought by a guest, not by the driver. *Carlisle v. Hargreaves* (Wash.), 192 Pac. 894.

**Shouting** by bystanders may give

such warning that the failure to blow the horn may be deemed not a proximate cause of the accident. *Brianzi v. Crane Co.*, 196 App. Div. 58.

**47.** *Walmer-Roberts v. Hennessy* (Iowa), 181 N. W. 798; *Dignum v. Weaver* (Mo. App.), 204 S. W. 566.

**48.** *Woodhead v. Wilkinson* (Cal.), 185 Pac. 851, 10 A. L. R. 291.

**49.** *Bew v. John Daley, Inc.*, 260 Pa. 418, 103 Atl. 832.

**50.** *Wine v. Jones*, 183 Iowa 1166, 162 N. W. 196, 168 N. W. 318.

**51.** *Moore v. Hart*, 171 Ky. 725, 188 S. W. 861; *Vannett v. Cole* (N. Dak.), 170 N. W. 663; *Piper v. Adams Express Co.* (Pa.), 113 Atl. 562.

**Sec. 331. Warning of approach — sufficiency of warning.**

The sufficiency of the warning in a particular case may be a question within the province of the jury. Thus, it has been held that whether a chime of small bells attached to an automobile is sufficient as a warning to pedestrians is a question for the jury.<sup>52</sup> Though the opening of a "cut out" may be prohibited by municipal ordinance, it may be sufficient as a warning signal, and the fact that the ordinance was violated is not necessarily conclusive on the issue of negligence.<sup>53</sup> When traveling at night, the lights on the automobile will not be considered a sufficient warning under some statutes, but the driver of the machine must also sound his horn as a signal to other travelers.<sup>54</sup> One approaching a busy street corner, who gives a signal when passing a vehicle a hundred feet or so from the corner, but gives no subsequent warning, may be said to be negligent.<sup>55</sup> Under a regulation requiring the giving of warning when approaching and when traversing a crossing, an auto driver is not required to sound his signal when actually upon the crossing, but it is sufficient if the warning is given when about to enter the crossing.<sup>56</sup>

**Sec. 332. Lookout — in general.**

It is the duty of the driver of a motor vehicle to keep a reasonably careful lookout for other travelers so that they may be able to avoid a collision.<sup>57</sup> Whether the driver has

52. *Coppock v. Schlatter*, 193 Ill. App. 255.

53. *Linneball v. Levy Dairy Co.*, 173 N. Y. App. Div. 861, 160 N. Y. Suppl. 114.

54. *Johnston v. Cornelius*, 200 Mich. 209, 166 N. W. 983, L. R. A. 1918D 380.

55. *Mitchell v. Brown* (Mo. App.), 190 S. W. 354.

56. *Rolfs v. Mullins*, 180 Iowa, 472, 163 N. W. 232.

57. *United States*.—*Denison v. Mc-Morton*, 228 Fed. 401, 142 C. C. A. 631.

*Colorado*.—*Hannan v. St. Clair*, 44

*Colo.* 134, 96 Pac. 822.

*Illinois*.—*Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337, affirming 189 Ill. App. 631; *Kessler v. Washburn*, 157 Ill. App. 532; *Coppock v. Schlatter*, 193 Ill. App. 255; *Koenig v. Semran*, 197 Ill. App. 624; *Arkin v. Page*, 212 Ill. App. 282.

*Indiana*.—*Martin v. Lilley*, 188 Ind. 139, 121 N. E. 443.

*Iowa*.—*Livingstone v. Dole*, 167 Iowa, 639, 167 N. W. 639.

*Kentucky*.—*Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335.

fulfilled his duty in regard to watching for pedestrians and other persons, is generally a question for the jury.<sup>58</sup> Particularly at street crossings and other places where many pedestrians and other travelers are to be anticipated, considerable care in this respect should be exercised.<sup>59</sup> A charge of negligence may be based on the failure of the driver of a motor vehicle to see another traveler as soon as he should.<sup>60</sup> There is also a duty of looking for other conveyances so that injury will not result to himself, as, for example, when he is about to drive across a railroad<sup>61</sup> or street railway track.<sup>62</sup> So,

*Louisiana*.—*Kelly v. Schmidt*, 142 La. 91, 76 So. 250.

*Massachusetts*.—*Rogers v. Phillips*, 217 Mass. 52, 104 N. E. 466; *Bire v. Athol*, etc., Ry. Co., 198 Mass. 257, 84 N. E. 310; *Booth v. Meagher*, 224 Mass. 472, 113 N. E. 367.

*Minnesota*.—*Noltmeir v. Rosenberger*, 131 Minn. 369, 155 N. W. 618; *Kennedy v. Webster*, 137 Minn. 335, 163 N. W. 519.

*Mississippi*.—*Ulmer v. Pistole*, 115 Miss. 485, 76 So. 522; *Flynt v. Fondern* (Miss.), 84 So. 188.

*Missouri*.—*McFern v. Gardner*, 121 Mo. App. 1, 97 S. W. 972; *Wallower v. Webb City*, 171 Mo. App. 214, 156 S. W. 48; *Rowe v. Hammond*, 172 Mo. 203, 157 S. W. 880; *Eisenman v. Griffith*, 181 Mo. App. 183, 167 S. W. 1142; *Meenach v. Crawford*, 187 S. W. 879.

*New Hampshire*.—*Hamel v. Pea body*, 78 N. H. 585, 97 Atl. 220.

*New Jersey*.—*Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262.

*New York*.—*Bradley v. Jaeckel*, 65 Misc. 509, 119 N. Y. Suppl. 1071; *Thies v. Thomas*, 77 N. Y. Suppl. 276.

*Oregon*.—*White v. East Side Mill & Lumber Co.*, 84 Oreg. 224, 161 Pac. 969, 164 Pac. 736.

*Pennsylvania*.—*Virgilio v. Walker*, 254 Pa. St. 241, 98 Atl. 815; *Kuehne v. Brown*, 257 Pa. 37, 101 Atl. 77.

*Tennessee*.—*Coca Cola Bottling Works v. Brown*, 139 Tenn. 640, 202

S. W. 926.

*Utah*.—*Barker v. Savas*, 52 Utah. 262, 172 Pac. 672; *Richards v. Palace Laundry Co. (Utah)*, 186 Pac. 439.

*Washington*.—*Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892; *Adair v. McNeil*, 95 Wash. 160, 163 Pac. 393.

And see sections 438, 500, 714.

A sharp and diligent lookout on the part of the driver of a machine is required. *Bongner v. Zeigenheim*, 165 Mo. App. 328, 147 S. W. 182.

*Duties of driver*.—"The driver of the automobile was under a legal duty to use reasonable care to avoid colliding with other vehicles or persons in the public highway. His duty was to be on the alert to observe persons who were in the street or about to cross the street and to use reasonable care to avoid colliding with them. He was under an obligation to take notice of the conditions existing in the public street and to propel his car in a manner suitable to those conditions." *Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262.

58. *Vannett v. Cole* (N. Dak.), 170 N. W. 663; *Boeddecher v. Frank*, 48 Utah, 363, 159 Pac. 634.

59. *Ulmer v. Pistole*, 115 Miss. 485, 76 So. 522; *Core v. Wilhelm*, 124 Va. 150, 98 S. E. 27.

60. *Booth v. Meagher*, 224 Mass. 472, 113 N. E. 367.

61. Section 557, *et seq.*

62. Section 592, *et seq.*

too, a lookout must be kept for defects in the highway.<sup>63</sup> If the circumstances are such, by reason of weather conditions, lights, or obstructions, that an automobilist is unable to see ahead of him, he should stop his machine.<sup>64</sup> Circumstances may exist which will require the driver to look around the end of the wind shield.<sup>65</sup> But, where there are no facilities for stopping for the night, a driver is not negligent as a matter of law because he proceeds through a fog.<sup>66</sup> It has been held that the fact that one is entitled under the law of the road to the right of way over vehicles approaching from a certain direction does not necessarily absolve him from the duty of keeping a lookout for the avoidance of such vehicles, though the fact is to be considered with the other circumstances on the question of his negligence.<sup>67</sup> But, when one is traveling along a broad street, he is not required to give much attention to vehicles approaching on the other side.<sup>68</sup>

### Sec. 333. Lookout — toward the rear.

The general duty of the driver is to look in front of his machine, and he is not under as strict an obligation to look

63. *Kendall v. City of Des Moines*, 183 Iowa, 866, 167 N. W. 684; *Roper v. Greenspon* (Mo. App.), 192 S. W. 149.

64. Section 327.

65. *Woodhead v. Wilkinson* (Cal.), 185 Pac. 851.

66. *Johnson v. State of New York*, 104 Misc. (N. Y.) 395.

67. *Erwin v. Traud*, 90 N. J. L. 289, 100 Atl. 184.

68. *Richards v. Palace Laundry Co.* (Utah), 186 Pac. 439, wherein it was said: "While the law imposes the duty on every person who operates a vehicle on the streets, and especially on one who operates a motor vehicle or automobile, to keep a proper lookout ahead, yet where one who is operating his vehicle on the right-hand side of the street makes a survey of the conditions of the street ahead of him, and in

doing so he observes no one coming on his side of the street, but sees one or more coming towards him on the opposite side of the street, he has the right to assume that such person or persons will continue onward on the opposite side of the street, and not encroach upon his side. Until the contrary is made to appear, it may also be presumed that the driver of any vehicle will perform his duty in maintaining a proper lookout ahead, and that in doing so, if there is no one on his or the right-hand side of the street, but there is a traveler coming on the opposite side of the street at a place where there is no probability whatever that the vehicle of the driver and the vehicle of such traveler will meet, much less collide, the driver may act accordingly."

toward the rear to see if a street car,<sup>69</sup> or other vehicle, is approaching, or whether children are climbing on the rear of his machine.<sup>70</sup> That the peculiarity of his vehicle excites the desire of children to climb upon it, does not alter the case.<sup>71</sup> Nevertheless, if statute or municipal ordinance requires the use of a mirror on certain motor vehicles in order that the driver thereof may be able to see vehicles approaching from the rear, the failure to equip a machine with such a mirror may constitute negligence.<sup>72</sup> One backing his machine should keep a lookout where he is going.<sup>73</sup>

### Sec. 334. Lookout — toward the side.

Although not required to look toward the rear, the driver of a motor vehicle should use his faculties to see travelers approaching from the side. This duty is particularly applicable at street intersections, where travelers may be expected to come from a right angle direction,<sup>74</sup> but may be relaxed between crossings to some extent.<sup>75</sup> The driver should not have side curtains which cut off his view except in front.<sup>76</sup>

### Sec. 335. Lookout — intensiveness of looking.

Although it is the duty of the driver of an automobile to look where he is going, yet it cannot be laid down as an inflex-

69. *Baldie v. Tacoma Ry. & Power Co.*, 52 Wash. 75, 100 Pac. 162. And see section 598.

**Hub of wheel extending over sidewalk.**—Where the driver of the defendant's truck, having left it by the curbstone, so that the hub of the wheel extended two inches over the curb, returned to the vehicle by crossing the street and started the team without looking to the sidewalk, with the result that the hub struck and injured a child of tender years, who with companions, was "playing tag," and it appeared that the child ran toward the truck at the moment the driver started, there is no actionable negligence which justifies a recovery. And especially so where the driver, had he looked to the side of the truck next to the curb,

would not have seen the plaintiff in a dangerous position. *Cantanno v. James A. Stevenson Co.*, 172 N. Y. App. Div. App. 203, 157 S. W. 880; *Eisenman v. 232*, 158 N. Y. Suppl. 335.

70. *Hebard v. Mabie*, 98 Ill. App. 543.

71. *Hebard v. Mabie*, 98 Ill. App. 543.

72. *El Paso Elec. Ry. Co. v. Terrazas* (Tex. Civ. App.), 208 S. W. 387.

73. *Lee v. Donnelly* (Vt.), 113 Atl. 542.

74. *Ulmer v. Pistole*, 115 Mass. 485, 76 So. 522.

75. *Richards v. Palace Laundry Co.* (Utah), 186 Pac. 439.

76. *Thomas v. Burdick* (R. I.), 100 Atl. 398.

ible and unvaried rule of law that he must keep his eyes constantly fixed on the roadbed. Nor is he charged with notice of every defect therein, great or small, which could be detected by such a scrutiny.<sup>77</sup> But the duty of looking implies the duty to see what is in plain view, unless some reasonable explanation is presented for the failure.<sup>78</sup> While one is required to look ahead when approaching a bridge, he fulfills his duty if he looks in a reasonably careful manner, and he is not required as a matter of law to acquaint himself with the condition of the bridge, when there is no indication that would cause a reasonably careful driver to take such a precaution.<sup>79</sup>

**Sec. 336. Lookout — charged with notice of what should have been seen.**

It may be stated as a general rule that the driver of an automobile is charged with notice of such conditions in and along the road as he should have seen.<sup>80</sup> In other words, he is conclusively presumed to have seen such surrounding circumstances as he would have seen had he properly exercised his faculty of vision.<sup>81</sup> Where there is nothing to obstruct the vision of a driver, it is negligence not to see what is clearly visible.<sup>82</sup> One is not, as a matter of law, excused from liability for injuries to a traveler merely because he did not see him until the accident.<sup>83</sup> Negligence on the part of an automobilist may be found on evidence that, while driving his machine along a street, he came up behind another traveler going in the same direction and ran into him.<sup>84</sup> In such a case the party operat-

77. *Kendall v. City of Des Moines*, 183 Iowa 866, 167 N. W. 684; *Smith v. Jackson Tp.*, 26 Pa. Super. Ct. 234.

78. *Holderman v. Witmer*, 166 Iowa, 406, 147 N. W. 926; *Roper v. Greenspon* (Mo. App.), 192 S. W. 149. And see section 336.

79. *Super v. Modell Twp.*, 88 Kans. 698, 129 Pac. 1162.

80. *Koenig v. Semrau*, 197 Ill. App. 624; *Bire v. Athol, etc., Ry. Co.*, 198 Mass. 257, 84 N. E. 310; *Roper v. Greenspon* (Mo. App.), 192 S. W. 149; *Boeddcher v. Frank*, 48 Utah, 363, 159

Pac. 634.

81. *McDonald v. Yoder*, 80 Kan. 25, 101 Pac. 468; *Kelly v. Schmidt*, 142 La. 91, 76 So. 250.

82. *Koenig v. Semrau*, 197 Ill. App. 624; *Birch v. Athol, etc., Ry. Co.*, 198 Mass. 257, 84 N. E. 310; *Ulmer v. Pistole*, 115 Mass. 485, 76 So. 522.

83. *Holderman v. Witmer*, 166 Iowa, 406, 147 N. W. 926; *Kennedy v. Webster*, 137 Minn. 335, 163 N. W. 519.

84. *Heath v. Cook* (R. I.), 68 Atl. 427.

ing a motor car in the rear of another vehicle is in the better position to avoid danger and where the one in front is exercising reasonable care, a collision would seem to at least, *prima facie*, indicate negligence on the part of the former.

### Sec. 337. Noise.

The question whether a charge of negligence may be based on the noise made by a motor vehicle, generally arises in cases where horses have been frightened and an injury is thereby occasioned; and the question is therefore discussed in connection with the chapter on "Frightening Horses." The right to operate an automobile along the public highways, necessarily carries the right to make the usual noises incident thereto,<sup>85</sup> but it is apparent that this right must be harmonized with the rights of those driving horses. Thus, the driver of the machine must exercise reasonable care to avoid frightening horses, even to the extent of stopping the machine if necessary; and the driver of animals must also exercise due precaution to avoid injury from the motor vehicle.<sup>86</sup> But the operator of a motorcycle is under no obligation as to a team working in a field adjoining the highway, except to refrain from wilful or wanton conduct which would cause fright.<sup>87</sup> It is very seldom that a foot traveler can be said to have been

85. *Gipe v. Lynch*, 155 Iowa, 627, 136 N. W. 714; *Browne v. Thorne*, 61 Wash. 18, 111 Pac. 1047. See also *Day v. Kelly*, 50 Mont. 306, 146 Pac. 930.

86. Section 518.

87. *Walker v. Faelber*, 102 Kans. 646, 171 Pac. 605, wherein it was said: "We think it is obvious that the trial court's construction of the statute is the correct one. The legislative purpose was to protect a distinct class of persons; that is, users of public highways. The safety of a person in a field adjoining a public highway was not within the contemplation of the legislature. The requirement of a bell or horn and the use of signals and of lamps in front and in the rear, and the giving of signals from the direction

towards which such vehicle is proceeding, and a different signal visible from the rear, could only have been intended for the protection of persons traveling on the highway. The duties imposed by law upon the driver of a motorcycle require him to keep his eyes upon the road and to look ahead for the purpose of protecting other persons using the public highway from probable injury resulting from fast driving or other negligence. Since the statute imposed upon defendant no duty to the plaintiff, the evidence failed to show negligence. It is only where the defendant wrongfully fails to perform some duty owed to the plaintiff that a cause of action based upon negligence can exist."



injured by the noise of an automobile. In fact, the duty of the driver is to sound a warning so that pedestrians may escape injury.<sup>88</sup> In one case to recover for the death of the plaintiff's intestate, claimed to have been caused by the negligence of defendant's chauffeur, it appeared that the deceased, a man fifty-nine years of age, started to cross the street at a point of intersection with another street, and after reaching a space between surface railway tracks, upon hearing the horn from defendant's automobile, which was then between twenty and forty feet from him, threw up his hands, took one or two steps back in front of the automobile and was instantly hit. He had looked in the direction in which the automobile was coming just before he started, and looked again in that direction while stepping back. The automobile was running at a speed of between eleven and twelve miles an hour, with lamps lighted, and there were no vehicles obstructing the street. It was held that a verdict that the decedent was free from contributory negligence, and that the accident was caused solely by the negligence of the defendant's chauffeur, was against the weight of the evidence.<sup>89</sup>

88. Sections 329-331.

89. *Wall v. Merkert*, 166 N. Y. App. Div. 608, 152 N. Y. Supp. 293, wherein it was said: "The learned counsel for the respondent in his brief states, 'We have been unable to find any cases in this State holding that the blowing of a horn under such circumstances is a negligent act.' It is provided in chapter 374 of the Laws of 1910, entitled 'An Act to amend the Highway Law, by repealing article eleven thereof and inserting a new article eleven, in relation to motor vehicles,' in subdivision 1 of section 286 of such Highway Law, that every motor vehicle shall be provided with 'a suitable and adequate bell, horn or other device for signaling,' and subdivision 2 provides: '. . . Upon approaching a pedestrian who is upon the traveled part of any highway

and not upon a sidewalk, and upon approaching an intersecting highway or a curve or a corner in a highway where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn or other device for signaling.' It has been held in innumerable cases that a failure to observe an ordinance or a statute is evidence of negligence. This is the first case that has been brought to our attention where obedience to an ordinance or statute is made the ground of a recovery for negligence. I think the verdict that the plaintiff's decedent was free from contributory negligence and that the accident was caused solely by the negligence of the defendant's servant is flatly against the evidence."

**Sec. 338. Skidding.**

In an action to recover for injuries caused by an automobile which skidded and struck the plaintiff while standing upon the sidewalk, it was held that there must be a finding justified by the evidence, either that the chauffeur was negligent in the operation of the machine, that he did some act which a prudent person would not have done, or omitted some act which a prudent person would have done in the operation of the vehicle, or that in some other respects the defendant or his agents were negligent.<sup>90</sup> The mere fact of the skidding of a car is not of itself such evidence of negligence as to render the owner liable for an injury in consequence thereof,<sup>91</sup> and whether the driver was negligent in his management of the

90. *Philpot v. Fifth Ave. Coach Co.*, 142 App. Div. (N. Y.) 811, 128 N. Y. Suppl. 35.

Skidding not evidence that vehicle a nuisance.—The skidding of a motor omnibus upon a greasy road, where there is no negligence on the part of the driver, and the skidding is due to the precautions taken by the driver to bring the vehicle to a sudden stop in order to avoid an accident, is held in an English case to be no evidence that the particular vehicle is a nuisance for the placing of which on the highway the owners are liable if damage ensues. *Parker v. London General Omnibus Company Limited* (K. B. Div.), 100 Law T. R. (N. S.) 409. So in another case an accident to a passenger on a motor car omnibus resulting from the tendency of such vehicles to skid on slippery roads is held in an English case not to be evidence of negligence or of nuisance. And the knowledge or want of knowledge of the passenger of such tendency is held not to affect the event of the action. *Wing v. London General Omnibus Company Limited* (C. A.), 161 Law T. R. (N. S.) 411, reversing 100 Law T. R. (N. S.) 301.

91. *Williams v. Holbrook*, 216 Mass. 239, 103 N. E. 633; *Loftus v. Pelle-*

*tier*, 223 Mass. 63, 111 N. E. 712; *Linden v. Miller* (Wis.), 177 N. W. 909. See also, *Kelleher v. City of Newburyport*, 227 Mass. 462, 116 N. E. 807; *Tooker v. Fowler & Sellars Co.*, 147 N. Y. App. Div. 164, 132 N. Y. Suppl. 213; *Parker v. London General Omnibus Co.*, 101 L. T. (Eng.) 623; *Wing v. London General Omnibus Co.*, (1909), 2 K. B. (Eng.) 652. See also, *Hennekes v. Beetz* (Mo. App.), 217 S. W. 533. "Skidding may occur without fault, and when it does occur it may likewise continue without fault for a considerable space and time. It means partial or complete loss of control of the car under circumstances not necessarily implying negligence. Hence plaintiff's claim that the doctrine of *res ipsa loquitur* applies to the present situation is not well founded. In order to make the doctrine of *res ipsa loquitur* apply, it must be held that skidding itself implies negligence. This it does not do. It is a well-known physical fact that cars may skid on greasy or slippery roads without fault either on account of the manner of handling the car or on account of its being there." *Linden v. Miller* (Wis.), 177 N. W. 909.

machine is ordinarily a question for the jury.<sup>92</sup> So, a chauffeur cannot be held negligent in applying the brakes of an automobile while going at an excessive rate of speed in order to reduce the speed, even though skidding occurred from the application of the brakes, owing to the slippery condition of the pavement, if there be nothing to show that he did not do all that he could have done to avoid the accident.<sup>93</sup> Thus, where a person operating an automobile at a street crossing in a proper manner and at a slow rate of speed, applied the brakes suddenly to avoid striking a pedestrian who ran in front of the car and the act caused the car to skid slightly and to come in contact with another car standing at the curb, injuring a portion of the top of such car, it was held that the injury was the result of an accident for which the person operating the automobile could not be held liable to respond in damages.<sup>94</sup> In another case it was held that the mere fact that a motor omnibus damaged a street lamp because it skidded is sufficient to allow the case to go to the jury on the question of the driver's negligence.<sup>95</sup> Where the skidding is caused by some object striking the automobile and the driver is exercising due care at the time, a recovery, for any injury sustained by the car, may be had, on the ground that the proximate cause of such injury was the object which came in contact with the machine.<sup>96</sup> The skidding of an automobile may, however, clearly be the result of the driver's negligence, as where the pavement is slippery and he endeavors to make a quick turn, not called for by any sudden emergency confronting him. Where a traveler, in the exercise of reasonable care, is injured by such conduct on the part of the driver, he may ordinarily recover.<sup>97</sup> Indeed, there may be cases where the

92. *Williams v. Holbrook*, 216 Mass. 239, 103 N. E. 633; *Schepp v. Gerety*, 263 Pa. St. 538, 107 Atl. 317.

93. *Philpot v. Fifth Ave. Coach Co.*, 142 App. Div. (N. Y.) 811, 128 N. Y. Suppl. 35; *Anderson v. Schorn*, 189 N. Y. App. Div. 495, 178 N. Y. Suppl. 603.

94. *Moir v. Hart*, 189 Ill. App. 566.

95. *Walton & Co. v. The Vanguard*

*Motorbus Co.*, T. L. Rep. vol. XXV, No. 2, p. 13, Oct. 27, 1908.

96. *Williams v. Brennan*, 213 Mass. 28, 99 N. E. 516, so holding where the skidding was due to the automobile being struck by the body of a dog.

97. *Loftus v. Pelletier*, 223 Mass. 63, 111 N. E. 712; *Van Winckler v. Morris*, 46 Pa. Super. Ct. 142.

skidding calls into operation the doctrine of *res ipsa loquitur*.<sup>98</sup> And a finding of negligence may be based on the failure to equip the machine with chains,<sup>99</sup> though the absence of chains does not show negligence as a matter of law.<sup>1</sup> The speed at which the skidding machine was moving is a material element in determining whether the operator was negligent.<sup>2</sup>

### Sec. 339. Condition of vehicle.

It is the duty of one traveling in a vehicle to have his conveyance in reasonably good condition, so that he may avoid, so far as possible, the danger of injury to other travelers.<sup>3</sup> The mere fact that some of the gearing gives way, or that some part of the vehicle breaks down, and injury results, is not negligence *per se*.<sup>4</sup> "If damages are inflicted by reason of the breaking of the carriage or tackle of the traveler on the highway the traveler or owner of the tackle is liable only on the principle of want of ordinary care."<sup>5</sup> The fact that gearing or tackle acted wrongly on a previous occasion is evidence of negligence on the part of the owner, and may be sufficient to render him liable for damages caused thereby.<sup>6</sup> So, too, the fact that a chain on one of the wheels broke and wound around the axle and blocked the car, does not show negligence.<sup>7</sup> Where the equipment of a motor vehicle is adjusted so that it makes a loud noise and a horse is thereby

98. Mackenzie v. Oakley (N. J.), 103 Atl. 771.

99. Gross v. Burnside (Cal.), 199 Pac. 780.

1. Livingston v. Chambers (Iowa), 183 N. W. 429.

2. Gilbert v. Southern Bell Telep. & Teleg. Co., 200 Ala. 3, 75 So. 315.

3. Johnson v. Small, 5 B. Mon. (Ky.) 25; Smith v. Smith, 2 Pick (Mass.) 621; Murdock v. Warwick, 4 Gray (Mass.) 178; Welch v. Lawrence, 2 Chitty (Eng.) 262.

**Blowout.**—The negligence of the driver of an automobile may be a question for the jury, where as the result of the blowing-out of a tire the car turns over, although there is no di-

rect evidence as to what caused the blow-out. Barnett v. Levy, 213 Ill. App. 129.

**Defective crank** causing injury to one asked to crank the machine may create a question for the jury. Parker v. Drake (Mo. App.), 220 S. W. 1000.

4. Doyle v. Wragg, 1 F. & F. 7; The European, 10 L. R. Prob. Div. 99.

5. 1 Thompson Negligence, p. 81. See also Elliott, Roads and Streets. See also Ivins v. Jacob, 245 Fed. 892; Hutchins v. Maunder (1920, K. B.), 37 T. L. R. (Eng.) 72.

6. The European, 10 L. R. Prob. Div. 99.

7. Albertson v. Ansbacher, 102 Misc. (N. Y.) 527, 169 N. Y. Suppl. 188.

frightened, the owner may be liable for the injuries sustained by the driver of the horse.<sup>8</sup> An automobilist is under the duty of equipping his machine with proper brakes. This duty, not only exists under common law principles, but is generally affirmed by statutory enactments.<sup>9</sup> Evidence of defective brakes on a machine is admissible as bearing on the care to be exercised by the driver, for; if the brakes are defective, he should take greater precautions.<sup>10</sup> And it is the duty of the driver to use the brakes when necessary.<sup>11</sup> If the brakes do not work, the driver should use such other means as are at hand for the avoidance of a threatened injury.<sup>12</sup> Negligence may also be found in the failure to equip a machine with a proper horn.<sup>13</sup> An expert witness may be permitted to testify

8. *LaBrash v. Wall*, 134 Minn. 130. 158 N. W. 723, wherein it was said: "The plaintiff was going south on a street in Minneapolis with a wagon load of household furniture. The auto van of the defendant came from the east on an intersecting street and turned towards the plaintiff from the south and at first was on the westerly side of the street on which the plaintiff was driving. The auto van had curtains which were flapping and making some noise. The plaintiff's team became frightened and ran away and the plaintiff's furniture was damaged. The evidence was sufficient to justify a finding of negligence."

9. *Bennett v. Snyder* (Ark.). 227 S. W. 402; *Garrett v. Peoples R. Co.*, 6 Penn. (Del.) 29, 64 Atl. 254; *Fox v. Barekman*, 178 Ind. 572, 99 N. E. 989; *Corning v. Maynard*, 179 Iowa, 1065, 162 N. W. 564; *Owens v. Iowa County*, 186 Iowa 408, 169 N. W. 388; *Bigelow v. Town of St. Johnsbury*, 92 Vt. 423, 105 Atl. 34; *Allen v. Schultz*, 107 Wash. 393, 181 Pac. 916, 6 A. L. R. 676n. See also *Bruner v. Little*, 97 Wash. 319, 166 Pac. 1166. "One who operates on the streets of a city such a dangerous instrumentality as an automobile is bound to take notice that he

may be called upon to make emergency stops, and it is negligence on his part not to keep the automobile in such condition that such stops are possible." *Allen v. Schultz*, 107 Wash. 393, 181 Pac. 916.

**Engine not a brake.**—Most of the State automobile laws require that each motor vehicle must be equipped with good and efficient brakes. In one or two of the laws it is provided that there shall be more than one brake. In *England* the question has arisen if the engine, which is frequently used as a brake, complies with the law, provided only one real brake is on the automobile. It has been held that the engine, under such circumstances, does not constitute a "brake" within the meaning of the requirements. *Wilmott v. Southwell*, 25 L. T. 22.

10. *Siegeler v. Neuweiler*, 91 N. J. L. 273, 102 Atl. 349.

11. *Gross v. Burnside* (Cal.), 199 Pac. 780.

12. *Russell v. Electric Garage Co.*, 90 Neb. 719, 134 N. W. 253.

13. *Dussault v. Chartrand*, Que. S. C. (Canada) 488; *Provincial Motor Co. v. Dunning* (1909), 2 K. B. (Eng.) 599. And see sections 329-331.

as to whether an automobile was defective.<sup>14</sup> And evidence of the condition of a machine after an accident may in some cases be received as bearing on its condition at the time of the accident.<sup>15</sup> Negligence may be inferred from leaving mowing machine section knives so as to extend over the side of the vehicle.<sup>16</sup> The liability of the manufacturer of a machine for injuries sustained by a purchaser through defects in its manufacture, is treated in another chapter.<sup>17</sup>

### **Sec. 340. Leaving car in street unattended — in general.**

Under many circumstances the owners of vehicles have the right to let them stand on the highway for a reasonable time and in such a place as will not unduly interfere with travel on the road. When, therefore, a motor car is lawfully standing on the side of the street and there is ample room to pass without colliding with it, it is negligent to drive into it.<sup>18</sup> Thus, where a motor vehicle, liable to frighten horses, broke down on the public highway, and was left at the place of the breakdown, it was held that the owner of the vehicle was not liable because a horse became frightened at the vehicle, unless there was unreasonable delay in repairing and removing it.<sup>19</sup> But one leaving a motor vehicle unattended by the side of a highway is bound to exercise such care as a reasonably prudent man would under the same circumstances;<sup>20</sup> and whether he was negligent may be a question for the jury.<sup>21</sup> Thus, the owner of an automobile may be guilty of negligence in leaving

14. *E. M. F. Co. v. Davis*, 146 Ky. 231, 142 S. W. 391. And see section 914.

15. *Owens v. Iowa County*, 186 Iowa, 408, 169 N. W. 388.

16. *Judy v. Doyle* (Va.), 108 S. E. 6.

17. Section 800.

18. *Odom v. Schmidt*, 52 La. Ann. 219, 28 So. 350. And see section 395

**Standing taxicab as a nuisance.**— If a taxicab company unreasonably and unlawfully obstructs a public highway, it is guilty of a public nuisance, but no action to abate it exists in favor of a private suitor in the absence of some

showing of injury or damage peculiar to him. *Hefferon v. New York Taxicab Co.*, 146 N. Y. App. Div. 311, 130 N. Y. Suppl. 710.

19. *Davis & Son v. Thornburg*, 149 N. C. 233, 62 S. E. 1088.

20. *American Express Co. v. Terry*, 126 Md. 254, 94 Atl. 1026; *Berman v. Schultz*, 84 N. Y. Suppl. 292. See also *Keber v. Central Brewing Co. of New York*, 150 N. Y. Suppl. 986.

21. *American Express Co. v. Terry*, 126 Md. 254, 94 Atl. 1026. See also *Harris v. Burns*, 133 N. Y. Suppl. 418.

it unlighted and unattended in the night time.<sup>22</sup> So, too, where it appeared that the defendant had left a bright red automobile, with brass trimmings, standing at the side of the road and that the plaintiff's horse took fright thereat and upset the carriage, injuring both the plaintiff, the horse and carriage, it was held that, the jury having found that it was not a reasonable user of the highway to leave the automobile thereon for a long time, but was an unauthorized obstruction thereof, such finding would not be disturbed on appeal.<sup>23</sup> Where one driving in a wagon on a dark night, in the middle of a highway having a traveled track eighteen feet wide with a ditch on each side, turned to the right as soon as he saw the lights of an approaching automobile and stopped, leaving plenty of room for it to pass without danger, and about a minute after he saw the lights his wagon was struck by the automobile, it was held that he was not necessarily guilty of contributory negligence even if his wagon, when struck, was slightly over the center line of the highway, but that the question was one for the jury.<sup>24</sup> But, where a plaintiff's automobile, lawfully standing at rest on the side of a street, was struck by a truck belonging to one of the defendants, which, while being driven slowly and carefully, was struck by a street railway car and as a result of the collision the automobile was damaged, it was held that the plaintiff, in an action to recover for such damage, had the burden of showing by a fair preponderance of evidence that the accident was due to the negligence of the owner of the truck. And it was also declared that in such a case the rule of *res ipsa loquitur* was not applicable, but that assuming that it was, it would not operate to shift the burden of proof upon the truck owner to show that the proximate cause of the accident was the negligence of the defendant's operating the railway, as the owner of the truck was only bound to overcome any presumption of negligence on his part which, in the absence of explanation, might be

22. *Jaquith v. Worden*, 73 Wash. (Canada) 9.  
 349, 132 Pac. 33, 48 L. R. A. (N. S.)

24. *Anderson v. Sparks*, 142 Wis.  
 398, 125 N. W. 925.

23. *McIntyre v. Coote*, 19 Ont. L. R.

inferred from the happening of the accident.<sup>25</sup> If a machine is negligently left in the road so that it is struck by a street car and thrown against one working at the curb, the negligence of the driver of the machine may be held to be the proximate cause of the injuries sustained by the workman.<sup>26</sup>

### **Sec. 341. Leaving car in street unattended — at night.**

Where a vehicle is left standing in the street with no lights to warn other travelers of the danger, a charge of negligence may be sustained under modern statutes requiring the lighting of such vehicles.<sup>27</sup> But where a plaintiff's vehicle ran into the defendant's carriage standing in the dark without a light, signal or other indication of danger, it was decided by the Supreme Court of Errors of *Connecticut*, that the lower court properly refused to decide that the defendant's act in leaving his carriage in such a manner so as to obstruct more than half the highway was negligence as a matter of law.<sup>28</sup>

### **Sec. 342. Leaving car in street unattended — vehicle started by act of third person.**

The leaving of an automobile by the side of the highway for a reasonable time, where the operator has taken precautions to guard against an automatic start thereof, is not negligence.<sup>29</sup> If a third person thereupon unlawfully meddles with the machine and starts it so that it causes injury to another person in the highway, the owner is not liable.<sup>30</sup> Thus, the owner or driver is not liable for injuries caused by a motor

25. *O'Donohue v. Duparquet, Huot & Moneuse Co.*, 67 Misc. (N. Y.) 435, 123 N. Y. Suppl. 193.

26. *Keiper v. Pacific Gas & Elec. Co.* (Cal. App.), 172 Pac. 180.

27. Section 344.

28. *Nesbit v. Crosby*, 74 Conn. 554, 51 Atl. 550.

29. *Vincent v. Crandall & Godley Co.*, 131 N. Y. App. Div. 200, 115 N. Y. Suppl. 600, *distinguished*, *Lee v. Van Buren, etc., Co.*, 190 N. Y. App. Div. 742, 180 N. Y. Suppl. 295. See also, *Lazarowitz v. Levy*, 194 N. Y. App.

Div. 400, 185 N. Y. Suppl. 359.

30. *Vincent v. Crandall & Godley Co.*, 131 N. Y. App. Div. 200, 115 N. Y. Suppl. 600; *Berman v. Schultz*, 84 N. Y. Suppl. 292; *Frashella v. Taylor*, 157 N. Y. Suppl. 881; *Rhad v. Duquesne Light Co.*, 255 Pa. St. 409, 100 Atl. 262; *Oberg v. Berg*, 90 Wash. 435, 156 Pac. 391; *Ruoff v. Long & Co.*, 1916 L. R. 1 K. B. (Eng.) 148. See also, *Lee v. Van Buren, etc., Co.*, 190 N. Y. App. Div. 742, 180 N. Y. Suppl. 295; *Austin v. Buffalo Electric Vehicle Co.*, 158 N. Y. Suppl. 148.



vehicle which is left temporarily by the side of the highway and in the absence of the driver is started by the unlawful acts of children or other trespassers.<sup>31</sup> While it is the duty of the person having charge of the machine to use reasonable care that no injury will result from the car while it is unattended, it is not his duty to chain it to a post or use some other method of fastening it so that it will be impossible for third persons to start it.<sup>32</sup>

**Sec. 343. Leaving car in street unattended — statute or ordinances.**

A statute or a municipal ordinance may affect the right of an automobilist to leave his machine standing by the side of the highway. Thus, a municipal ordinance may prohibit the "parking" of cars on certain streets, or it may require them to be left only on a certain side thereof.<sup>33</sup> The violation of regulation enacted by a State legislature or a municipal body may be negligence,<sup>34</sup> but, to enable a third person to recover for injuries on the ground that the defendant violated a regulation, it is essential that it appear that the injuries are the proximate result of the violation. It has been held that the violation of an ordinance forbidding the leaving of automobiles unlocked and unattended in a city street, is not the proximate cause of an injury occasioned by the wrongful appropriation of the car by one who drove it at a reckless and unlawful speed and inflicted the injury in question.<sup>35</sup>

**Sec. 344. Lights on machine — statutory requirements.**

It is generally required by statute that motor vehicles shall carry lights which shall be lighted at certain hours when the machine is operated.<sup>36</sup> Municipal regulations of similar in-

31. *Vincent v. Crandall & Godley Co.*, 131 N. Y. App. Div. 200, 115 N. Y. Suppl. 600; *Berman v. Schultz*, 84 N. Y. Suppl. 292; *Sorrusea v. Hobson*, 155 N. Y. Suppl. 364; *Frashella v. Taylor*, 157 N. Y. Suppl. 881; *Rhad v. Duquesne Light Co.*, 255 Pa. St. 409, 100 Atl. 262.

32. *Berman v. Schultz*, 84 N. Y. Suppl. 292.

33. *Beek v. Cox*, 77 W. Va. 442, 37 S. E. 492.

34. Section 297.

35. *Squires v. Brooks*, 44 App. D. C. 320.

36. *Stewart Taxi-Service Co. v. Roy*,

port have been passed in various municipalities. The general requirements refer to illumination in front of the machine, but a light is also frequently required at the rear, either as a protection from other vehicles approaching from behind or as a means of identifying the rear number plate.<sup>37</sup> Statutes

127 Md. 70, 95 Atl. 1057; *Harnau v. Haight*, 189 Mich. 600, 155 N. W. 563; *Martin v. Herzog*, 176 N. Y. App. Div. 614, 163 N. Y. Suppl. 189; affirmed, 228 N. Y. 164, 126 N. E. 814; *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876. See also, *Fittin v. Sumner*, 176 App. Div. 617, 163 N. Y. Suppl. 443.

**Common law.**—Generally speaking, at common law, the driver of a wagon upon a highway at night is under no duty to carry a light to warn others of the presence of his vehicle or its load. If he stops in the highway, the circumstances may doubtless be such as to make it negligence to fail to warn other travelers of the obstruction thus occasioned. But whether such failure can be said to be negligence must, of necessity, depend upon the circumstances." *Roper v. Greenspon* (Mo. App.). 192 S. W. 149. See also, *Walden v. Stone* (Mo. App.), 223 S. W. 136.

If a statute requires a light to be carried on the front of the vehicle it need not be carried on the extreme front; if on the dashboard it is sufficient. *State v. Reed*, 162 Iowa, 572, 144 N. W. 310.

**Private road.**—A statute requiring lights on motor vehicles is applicable to travel on public highways only, and does not apply in case of a collision on a private road. *Stewart v. Smith*, 16 Ala. App. 461, 78 So. 724.

37. *Luckie v. Diamond Coal Co.* (Cal. App.), 183 Pac. 178; *Hollowell v. Cameron* (Cal.), 199 Pac. 803; *City of Hays v. Schueler*, 107 Kans. 635, 193 Pac. 311, 11 A. L. R. 1433; *Ebling v.*

*Nielson* (Wash.), 186 Pac. 887.

**Certainty of statute.**—A statute providing that "every motor vehicle while in use on the public highways . . . shall . . . display on the rear of said vehicle a lamp so placed that it shall show a red light from the rear and a white light at the side and so arranged as to illuminate the rear number or marker," is not void for uncertainty in that it does not designate the person who shall be liable for a violation thereof. In construing such a statute it is said that as motor vehicles cannot equip themselves automatically, human agency is presumed. The intention of the legislature is clearly to prohibit the use upon the public highways during certain hours of the day of motor vehicles not lighted in the manner required, and by implication it designates the person who shall be liable for a violation thereof, and such person is the one who is in control of the vehicle at the time of the commission of the offense. *State v. Myette*, 30 R. I. 556, 76 Atl. 664.

**Train of vehicles pulled by tractor.** Red light should be exhibited at the rear of the rear vehicle. *Western Indemnity Co. v. Wasco Land & Stock Co.* (Cal. App.), 197 Pac. 390.

**Identification plate not kept sufficiently lighted** so as to render easily distinguishable the letters and figures thereon, and conviction of motor cab company for aiding and abetting one of its drivers. See *Provincial Motor Cab Company, Limited v. Dunning* (1909), 2 K. B. (Eng.) 599, 101 Law T. R. (N. S.) 231.

**Conviction for offense of failing to**

requiring motor vehicles to carry lights are intended for the benefit of the entire traveling public,<sup>38</sup> and compliance therewith is essential.<sup>39</sup> A regulation requiring the lighting of vehicles is not generally extended beyond the clear meaning of its terms. Thus, an ordinance providing that automobiles operated at night should be equipped with lights, has been construed as not covering such vehicles when standing.<sup>40</sup> So, too, a statute requiring that motor vehicles, "while in use on a public highway," shall be equipped with lights has been held inapplicable to a "dead" car which is towed by another properly equipped with lights.<sup>41</sup> But the owner of an automobile nevertheless may be held guilty of negligence in leaving it, with no lights upon it, unattended in a city street.<sup>42</sup> An automobilist may not be required to light his lamps before the time specified in such a requirement, though it may be dark before such time.<sup>43</sup> So, too, lights need not be carried after daybreak where an ordinance requires the carrying of them until that time.<sup>44</sup> Whether it is negligence for the owner of

have back plate illuminated may be indorsed on license. *Brown v. Crossley* (K. B. Div.), 80 L. J. R. (Eng.) 478.

**Driving along street car track.**—When an automobile is driven along a street car track with a red rear light, such light is a warning to approaching vehicles in the rear upon which the auto driver to some extent is entitled to rely for protection against such vehicles, and he need not look to the rear for danger with the same diligence as he is required to look ahead. *Baldie v. Tacoma Ry. & Power Co.*, 52 Wash. 75, 100 Pac. 162.

38. *Giles v. Ternes*, 93 Kan. 140, 143 Pac. 491, 144 Pac. 1014; *Thomas v. Stevenson* (Minn.), 178 N. W. 1021.

39. *Thomas v. Stevenson* (Minn.), 178 N. W. 1021; *Jaquith v. Worden*, 73 Wash. 349, 132 Pac. 33, 48 L. R. A. (N. S.) 827.

A motorcyclist not having the required lights on his machine may not be able to recover for injuries received

in a collision with another vehicle. *Willie v. Luezka*, 193 N. Y. App. Div. 826, 184 N. Y. Suppl. 751.

40. *City of Harlan v. Kraschel*, 164 Iowa, 667, 146 N. W. 463. But see *Bailey v. Freeman*, 7 O. W. N. (Canada) 24, *on appeal*, 7 O. W. N. 159.

41. *Musgrave v. Studebaker Bros. Co. of Utah*, 48 Utah, 410, 160 Pac. 117.

42. *Jaquith v. Worden*, 73 Wash. 349, 132 Pac. 33, 48 L. R. A. (N. S.) 827. See also, *Hanser v. Youngs* (Mich.), 180 N. W. 409.

43. *Turner v. Bennett*, 161 Iowa, 379, 142 N. W. 999.

**Question for jury.**—whether an accident happened within the time when lights are required, is a matter for the jury, where there is a substantial dispute as to the time. *Tupper v. Maple*, 181 Iowa, 786, 165 N. W. 28.

44. *Sullivan v. Chicago City Ry. Co.*, 167 Ill. App. 152.

an automobile to run it in the dark without the warning to one approaching from the opposite direction which a head-light gives, may be a question for the jury.<sup>45</sup>

### Sec. 345. Lights on machine — probative force of violation.

Under the rule which is generally applied, to the effect that the violation of a positive regulation is negligence,<sup>46</sup> it is the general rule that the violation of a regulation relative to lights on automobiles is negligence *per se* and the operator is liable for all damages which proximately result from the failure to have the machine properly equipped.<sup>47</sup> But, in those jurisdictions where it is thought that the violation of a regulation is only evidence of negligence, the rule is not so strict.<sup>48</sup> If the law requires two lights, and the vehicle has but one, negligence may be found which will have a material bearing on all accidents which arise from the failure to have both lights.<sup>49</sup>

### Sec. 346. Lights on machine — sufficiency of lights.

The statutes in some States prescribe with considerable detail as to the particular nature of the light to be used, the result sought being a lamp which will afford sufficient illumination and yet not give such a "glare" as to blind or confuse

45. *Wright v. Crane*, 142 Mich. 508, 106 N. W. 71, 12 Det. Leg. N. 794.

46. Section 297.

47. *Stewart v. Smith*, 16 Ala. App. 425, 78 So. 724; *Fenn v. Clark*, 11 Cal. App. 79, 104 Pac. 632; *Sheppard v. Johnson*, 11 Ga. App. 280, 75 S. E. 348; *Thomas v. Stevenson* (Minn.), 178 N. W. 1021; *Chesrown v. Bevier* (Ohio), 128 N. E. 94; *Ballard v. Collins*, 63 Wash. 493, 115 Pac. 1050; *Kramer v. Chicago, etc. Ry. Co.* (Wis.), 177 N. W. 874.

**Instructions to jury.**—It has been held proper to instruct the jury that a failure to comply with a municipal ordinance requiring an automobile to carry lights after dark was negligence

in itself and that if the jury believe from the evidence that the said accident was caused by and through the negligence of the defendant and that there was no negligence on the part of the plaintiff which contributed thereto, then the jury must find for the plaintiff, but that the plaintiff could not recover if guilty of contributory negligence. *Fenn v. Clark*, 11 Cal. App. 79, 104 Pac. 632.

48. See *Lounsbury v. McCormick* (Mass.), 129 N. E. 598; *Zoltoviski v. Gzella*, 159 Mich. 620, 124 N. W. 527, 26 L. R. A. (N. S.) 435.

49. *Martin v. Carruthers* (Colo.), 195 Pac. 105.

other travelers.<sup>50</sup> In any event the light should be sufficient so as to enable the driver to keep a reasonably careful lookout for other travelers as well as defects in the highway.<sup>51</sup> But in the absence of detailed requirements in the statute or ordinance on the subject, an automobilist is not necessarily required to equip his machine with any particular kind of light.<sup>52</sup> The degree of illumination and the speed of the machine are, to a certain extent, inter-related. That is, the speed should be such that the operator can stop within the scope of the lights.<sup>53</sup> Whether in fact the lights are lighted, and whether they are sufficient, may be questions for the jury.<sup>54</sup>

### Sec. 347. Lights on machine — proximate cause.

A failure to have the machine properly equipped with lamps will render the operator liable for only those injuries which are the proximate cause of the omission. And, when the occupant of the improperly lighted machine is bringing an action for his injuries, the failure to have the lamps lighted will not bar his action unless the failure is a proximate cause of the injury he has sustained.<sup>55</sup> Proximate cause, under such circumstances, frequently is a question for the jury.<sup>56</sup> In an

50. See *Ex parte*, Hinkelman (Cal.), 191 Pac. 682; *State v. Claiborne*, 185 Iowa, 172, 170 N. W. 417, 3 A. L. R. 392; *Thomas v. Stevenson* (Minn.), 178 N. W. 1021.

**Search lights in city prohibited.** — The New York Board of Aldermen amended section 458 of the Code of Ordinances of the city of New York, relating to vehicle lighting, by adding the following: "No operator of any automobile or other motor vehicle, while operating the same upon the public highway, within the city, shall use any acetylene, electric or other head-light, unless properly shaded so as not to blind or dazzle other users of the highway, or make it difficult or unsafe for them to ride, drive, or walk thereon."

51. *Toronto General Trusts Corp. v.*

*Dunn*, 15 West. L. R. (Canada) 314, 20 Man. L. R. 412. See also, *Robinson v. Campbell*, 8 O. W. N. (Canada) 538.

52. *Currie v. Consolidated Ry. Co.*, 81 Conn. 383, 71 Atl. 356.

**Evidence as to lights on other machines** at the hour of the accident is admissible as bearing on the negligence of the defendant. *Schock v. Cooling*, 175 Mich. 313, 141 N. W. 675.

53. Section 307.

54. *Daggy v. Miller*, 180 Iowa, 1146, 162 N. W. 851; *Johnson v. Quinn*, 130 Minn. 134, 153 N. W. 267.

55. *Culver v. Harris*, 211 Ill. App. 474; *Hanser v. Youngs* (Mich.), 180 N. W. 409; *Hardie v. Barrett*, 257 Pa. 42, 101 Atl. 75; *Kramer v. Chicago, etc., Ry. Co.* (Wis.), 177 N. W. 874.

56. *Western Indemnity Co. v. Waseo Land & Stock Co.* (Cal. App.), 197

action against a municipality for injuries received when a defective bridge collapsed under an automobile, the fact that there was not a rear light on the machine at the time of the accident, does not bar a recovery against the municipality.<sup>57</sup> And the fact that there were no numbers on the front lamps of an automobile has been held inadmissible, as it could not have contributed to the injury.<sup>58</sup> And where the chauffeur testified that there were four lamps on the machine all lighted, and on cross-examination stated that he understood that the law required that any two of the lamps in front should have the number of the machine, the refusal to permit the plaintiff to go into the matter whether there were any numbers on either light was not erroneous, no claim being made that a violation of the law contributed to the accident.<sup>59</sup>

#### **Sec. 348. Lights on machine — animal-drawn vehicles.**

In recent years, the duty of carrying lights on vehicles at night has been extended from motor vehicles to those which are drawn by horses or other beasts of burden.<sup>60</sup> Such statutes are deemed to be for the protection of the driver of the animal against motor vehicles which may be approaching.<sup>61</sup> But an automobilist who receives injuries from a collision with an unlighted wagon may be entitled to the benefit of the

Pac. 390; *Ferry v. City of Waukegan*, 196 Ill. App. 81. See also, *Sweet v. Salt Lake City*, 43 Utah, 306, 134 Pac. 1167.

57. *Lawrence v. Channahon*, 157 Ill. App. 560.

58. *Belleveau v. S. C. Lowe Supply Co.*, 200 Mass. 237, 86 N. E. 301.

59. *Belleveau v. S. C. Lowe Supply Co.*, 200 Mass. 237, 86 N. E. 301.

60. *Topper v. Maple*, 181 Iowa, 786, 165 N. W. 28; *Hallett v. Crowell*, 230 Mass. 244, 122 N. E. 264; *Roper v. Greenspon*, 272 Mo. 288, 198 S. W. 1107, L. R. A. 1918D 126; *Chesrown v. Bevier* (Ohio), 128 N. E. 94; *J. Samuels & Bro. v. Rhode Island Co.*, 40 R. I. 232, 100 Atl. 402. See also *Harding v. Cavanaugh*, 91 Misc. (N. Y.) 511,

155 N. Y. Suppl. 374. And see section 406.

A wheelbarrow pushed through the streets does not require a light. *Saper v. Baker*, 91 N. J. L. 713, 104 Atl. 26.

**Transportation of hay.**—An exception in such a statute as to vehicles designed for the transportation of hay, is in force only when such a vehicle is actually used for such purpose. *Hale v. Resnikoff* (Conn.), 111 Atl. 907.

**Sleigh.**—Such a statute may apply only to vehicles on "wheels." *Vadney v. United Traction Co.*, 193 N. Y. App. Div. 329.

61. *Martin v. Herzog*, 176 N. Y. App. Div. 614, 163 N. Y. Suppl. 189, affirmed, 228 N. Y. 164, 126 N. E. 814.

regulation.<sup>62</sup> The absence of lights on a wagon may, under some circumstances, constitute contributory negligence which will bar a recovery by an occupant for injuries received from a collision with a motor vehicle.<sup>63</sup> But, where a motor vehicle comes up behind a carriage and runs into it, the omission of lights on the carriage does not necessarily bar a remedy for injuries, for the driver of a motor vehicle is not justified in running down an unlighted vehicle.<sup>64</sup> The violation of the law, to have the effect of barring the remedy of the driver of a horse, must be a proximate cause of the accident;<sup>65</sup> and, if the driver of an approaching motor vehicle sees the unlighted wagon soon enough to avoid a collision, but fails to avoid it, the absence of the lights is not a proximate cause of the injury.<sup>66</sup> Or if the collision occurs on a street so well lighted that the unlighted carriage could easily have been seen, the violation of the regulation is not generally important.<sup>67</sup> So, too, if the automobilist sues the driver of the unlighted wagon

62. *Roper v. Greenspon*, 272 Mo. 288, 198 S. W. 1107; *Roper v. Greenspon* (Mo. App.), 210 S. W. 922; *Columbia Taxicab Co. v. Stroh* (Mo. App.), 215 S. W. 748.

63. *Martin v. Herzog*, 176 N. Y. App. Div. 614, 163 N. Y. Suppl. 189; affirmed, 228 N. Y. 164, 126 N. E. 814; *Chesrown v. Bevier* (Ohio), 128 N. E. 94; *Yahnke v. Lange*, 168 Wis. 512, 170 N. W. 722.

**Prima facie evidence of negligence.**—Where, in an action for negligence, it appears that the defendant's automobile, properly lighted, collided with decedent's horse-drawn wagon which carried no light, as required by statute, as they were passing at a turn in the road, due to the defendant's being too far toward the left side, it was error for the court to refuse to charge "that the failure to have a light on the plaintiff's vehicle is *prima facie* evidence of contributory negligence on the part of the plaintiff." The absence of the light on the wagon was under the circumstances a contributory cause, for

the statute intended that such a light should be a signal to aid a person operating a motor vehicle to "turn the same to the right of the center of such highway so as to pass without interference." *Martin v. Herzog*, 176 N. Y. App. Div. 614, 163 N. Y. Suppl. 189, affirmed, 228 N. Y. 164, 126 N. E. 814.

64. *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337, affirming 189 Ill. App. 631; *Decou v. Dexheimer* (N. J.), 73 Atl. 49; *Ireson v. Cunningham*, 90 N. J. L. 690, 101 Atl. 49; *Koppeer v. Bernhardt*, 91 N. J. L. 697, 103 Atl. 186.

65. *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337, affirming 189 Ill. App. 631.

66. *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337, affirming 189 Ill. App. 631; *Ireson v. Cunningham*, 90 N. J. L. 690, 101 Atl. 49; *Kopper v. Bernhardt* (N. J.), 103 Atl. 186.

67. *Surmeian v. Simons* (R. I.), 107 Atl. 229.

for his injuries, the burden is on the plaintiff to show that the absence of lights contributed to the injury.<sup>68</sup>

### **Sec. 349. Towing disabled vehicle.**

When an automobile becomes disabled and it is necessary to tow it along the public highways, reasonable care should be exercised to avoid injury to pedestrians and other travelers.<sup>69</sup> It is not negligence for one machine to tow another through the streets with a rope or cable as a connecting link, provided reasonable care is exercised by the persons having charge of the machines.<sup>70</sup> And the fact that a safer method could have been devised than was used in a particular case is not conclusive on the question of negligence, for the criterion is whether the driver used the care that an ordinarily prudent man would have exercised.<sup>71</sup> If the cable connecting the two vehicles is not readily visible, it may be the duty of one of the drivers to give pedestrians a warning of the situation so that

68. *Roper v. Greenspon* (Mo. App.), 192 S. W. 149; *Hardie v. Barrett*, 257 Pa. 42, 101 Atl. 75.

69. *Musgrave v. Studebaker Bros. Co.* of New York, 48 Utah, 410, 160 Pac. 117. See also *Jerome v. Hawley*, 147 N. Y. App. Div. 475, 131 N. Y. Suppl. 897. And see section 449.

**Trailer running on walk.**—Where a trailer has become partially unfastened so that it pursues an irregular course and runs on the walk to the injury of an adjoining structure, the driver may be liable. *Lambert v. American Box Co.*, 144 La. 604, 81 So. 95, 3 A. L. R. 612.

70. *Steinberger v. California Elec. Garage Co.*, 176 Cal. 386, 168 Pac. 570; *Canfield v. New York Transp. Co.*, 128 App. Div. (N. Y.) 450, 112 N. Y. Suppl. 854; *Wolcott v. Renault Selling Branch*, 175 N. Y. App. Div. 858, 162 N. Y. Suppl. 496, reversed 223 N. Y. 288, 119 N. E. 556.

**Two wagons.**—A person who connects two vehicles by a rope in order

to draw them through a city street is bound to observe due care and to warn other users of the street of the obstruction, and when a pedestrian walks against such rope and is thrown and injured it is for the jury to say whether the owner was negligent in failing to use due care and to warn the plaintiff of the obstruction. When such vehicles, connected by a rope, are drawn through a city street amid other traffic, it cannot be said as matter of law that the obstruction itself is a sufficient warning to travelers. When the plaintiff testifies that he did not see the rope connecting the wagons, and that he was ignorant thereof, and that the accident happened about dusk, the question of his contributory negligence is properly left to the jury. *Young v. Herrmann*, 119 N. Y. App. Div. 445, 104 N. Y. Suppl. 72, affirmed without opinion, 192 N. Y. 554.

71. *Musgrave v. Studebaker Bros. Co.* of New York, 48 Utah, 410, 160 Pac. 117.



they will not attempt to pass between the cars and trip over the cable.<sup>72</sup> Whether it is necessary to give a warning to others depends upon the surrounding circumstances, such as the presence or absence of sufficient light, the size and color of the connection, and other pertinent facts relative to the accident in question.<sup>73</sup> And, it is not necessary as a matter of law that the two drivers should adopt a code of signals for the management of the cars.<sup>74</sup> Whether sufficient precautions have been adopted for the protection of other travelers, is generally a jury question.<sup>75</sup> It may be negligent to tow a truck backward down grade on a slippery street if the brakes on the truck are defective.<sup>76</sup> Statutes relating to the lighting of automobiles may not apply to the rear machine.<sup>77</sup> Decisions involving negligence in the towing of automobiles generally arise out of injuries to pedestrians tripping over the tow line,<sup>78</sup> but may sometimes follow an injury to a cyclist.<sup>79</sup>

### Sec. 350. Sufficiency of compliance with statute.

It is a well established rule in the law of negligence that the precautions required by statute are not the only ones to be observed in order that the conduct of a person fulfills his duty of exercising reasonable care. Thus, the fact that an automobilist has complied with all the requirements of the statutes regulating his conduct, will not be conclusive on the issue of his negligence.<sup>80</sup> The principle is well illustrated in cases where the negligence alleged is the operation of a vehicle at an excessive speed. The circumstance that the speed in

72. *Wolcott v. Renault Selling Branch*, 223 N. Y. 288, 119 N. E. 556, reversing 175 N. Y. App. Div. 858; *Rapetti v. Peugeot Auto Import Co.*, 97 Misc. 610, 162 N. Y. Suppl. 133; *Labarge v. LaCompagnie de Tramways*, 24 Rev. Leg. (Canada) 133.

73. *Steinberger v. California Elec. Garage Co.*, 176 Cal. 386, 168 Pac. 570.

74. *Musgrave v. Studebaker Bros. Co. of Utah*, 48 Utah, 410, 160 Pac. 117.

75. *Wolcott v. Renault Selling*

*Branch*, 223 N. Y. 288, 119 N. E. 556, reversing 175 App. Div. 858.

76. *Glasgow v. Dorn* (Mo. App.), 220 S. W. 509.

77. *Musgrave v. Studebaker Bros. Co. of Utah*, 48 Utah, 410, 160 Pac. 117.

78. See section 449.

79. See *Jerome v. Hawley*, 147 N. Y. App. Div. 475, 131 N. Y. Suppl. 897.

80. *Moore v. Hart*, 171 Ky. 725, 188 S. W. 861; *Ahonen v. Hryszke*, 90 Oreg. 451, 175 Pac. 616.

question was not greater than that allowed by statute is not necessarily determinative of the issue, but the question is left to be decided by the jury whether it was greater than was reasonable and proper under the circumstances.<sup>81</sup> And, too, the driver of an automobile may be guilty of negligence though he complies with the law of the road in all particulars.<sup>82</sup> The fundamental rule of action, is that the driver of a motor vehicle shall exercise reasonable care under the circumstances, considering all of the surrounding circumstances.<sup>83</sup>

### Sec. 351. Contributory negligence of injured person.

One of the fundamental rules in the law of negligence is that the person complaining of an injury occasioned by the negligence of another must himself be free from negligence.<sup>84</sup> Hence, it is clear that, if a traveler is guilty of negligence which contributes to an injury received from a motor vehicle, he cannot recover for his injuries.<sup>85</sup> Thus, in the case of the

81. Section 324.

82. Section 275.

83. Section 277.

84. Under concurrent negligence act it has been held that a plaintiff may recover in Mississippi, though guilty of contributory negligence. *Pascagoula St. Ry. & Power Co. v. McEachern* (Miss.), 69 So. 185.

85. *United States*.—New York Transp. Co. v. Garside, 157 Fed. 521, 85 C. C. A. 285.

*Alabama*.—Birmingham Ry. L. & P. Co. v. Aetna Accident & Liability Co., 151 Ala. 136, 44 So. 44.

*Arkansas*.—Russ v. Strickland, 130 Ark. 406, 197 S. W. 709.

*California*.—Tonsley v. Pacific Electric Ry. Co., 166 Cal. 457, 137 Pac. 31.

*Connecticut*.—New Haven Taxicab Co. v. Connecticut Co., 87 Conn. 709, 89 Atl. 92.

*Delaware*.—Travers v. Hartman, 5 Boyce, 302, 92 Atl. 855; McLane v. Sharpe, 2 Harr. 481.

*Illinois*.—Green v. Streitmatter, 183 Ill. App. 25.

*Indiana*.—Wood Transfer Co. v. Shelton, 180 Ind. 273, 101 N. E. 718.

*Kentucky*.—Louisville Ry. Co. v. Wehner, 153 Ky. 190, 154 S. W. 1087.

*Louisiana*.—Reems v. Chavigny, 139 La. 539, 71 So. 798.

*Maine*.—Larrabee v. Sewell, 66 Me. 376.

*Massachusetts*.—Parker v. Adams, 12 Metc. 415.

*Michigan*.—Ude v. Fuller, 187 Mich. 483, 153 N. W. 769; Patterson v. Detroit United Ry. Co., 153 N. W. 670, 187 Mich. 567; Grogitzki v. Detroit Ambulance Co., 186 Mich. 374, 152 N. W. 923.

*Minnesota*.—Batroot v. St. Paul, 125 Minn. 308, 146 N. W. 1107.

*Missouri*.—Lewis v. Metropolitan St. Ry. Co., 181 Mo. App. 421, 168 S. W. 833.

*New Hampshire*.—Brooks v. Hart, 14 N. H. 307.

*New York*.—Ward v. International Ry. Co., 206 N. Y. 83, 99 N. E. 262, Ann. Cas. 1914A 1170; Simpson v. Whitman, 147 App. Div. 642, 132 N.

collision of two automobiles, if the driver of each is equally negligent and such negligence contributes equally to the collision, neither can recover of the other.<sup>86</sup> Generally, according to the common law rule, the burden of showing absence of contributory negligence is on the person injured. But modern statutes have been enacted in some jurisdictions which place upon the defendant the burden of showing the contributory negligence of the plaintiff. But negligence of the plaintiff in order to bar his right of action must be such as contributes to the injury.<sup>87</sup> The contributory negligence of the injured person under varying circumstances is treated in different chapters of this work.<sup>88</sup>

### Sec. 352. Assumption that other travelers will exercise due care.

A traveler on a public street or highway has the right to assume that other travelers will observe the law of the road, obey all regulations relative to the use of the highway, and in

Y. Suppl. 801; *Barnett v. Anheuser-Busch Agency*, 80 Misc. R. 151, 140 N. Y. Suppl. 1029; *Gautier v. Lange*, 89 Misc. 372, 151 N. Y. Suppl. 902; *Guecco v. Pedersen*, 165 App. Div. 235, 151 N. Y. Suppl. 105; *Tremaine v. Johne*, 145 N. Y. Suppl. 46; *Moody v. Osgood*, 54 N. Y. 488.

*Pennsylvania*.—*Wynn v. Allard*, 5 Watts & S. 524.

*Rhode Island*.—*Frey v. Rhode Island Co.*, 37 R. I. 96, 91 Atl. 1.

*Texas*.—*Carter v. Walker* (Tex. Civ.), 165 S. W. 483.

*Washington*.—*Allison v. Chicago M. & St. P. Ry. Co.*, 83 Wash. 591, 145 Pac. 608; *Bowden v. Walla Walla Valley Ry. Co.*, 79 Wash. 184, 140 Pac. 549.

*Wisconsin*.—*Pietsch v. McCarthy*, 159 Wis. 251, 150 N. W. 482; *Wood v. Lusecomb*, 23 Wis. 287.

*England*.—*Pluckwell v. Wilson*, 5 Car. & P. 375; *Williams v. Holland*, 6 Car. & P. 23; *Wayde v. Lady Carr*,

2 Dowl. & R. 255.

**Absence of contributory negligence** on the part of a plaintiff is declared to be as much a part of a cause of action as the negligence of the defendant. *Tompkins v. Barnes*, 145 N. Y. App. Div. 637, 130 N. Y. Suppl. 320.

**86.** *Berz Co. v. Peoples Gas, Light & Coke Co.*, 209 Ill. App. 304; *Bernardo v. Legaspi*, 29 Phillipines Rep. 12.

**87.** *Belk v. People*, 125 Ill. 584, 17 N. E. 744; *Kennard v. Burton*, 25 Me. 39; *Parker v. Adams*, 12 Mete. (Mass.) 415; *Weber v. Beeson*, 197 Mich. 607, 164 N. W. 255; *McClung v. Pennsylvania Taximeter Cab Co.*, 252 Pa. St. 478, 97 Atl. 694; *Clay v. Wood*, 5 Esp. (Eng.) 44; *Chaplin v. Hawes*, 3 Car. & P. (Eng.) 555; *Wayde v. Lady Carr*, 2 Dowl. & R. (Eng.) 255.

**88.** Persons in other vehicles, sections 398-411. Pedestrians, sections 453-487. Cyclists, sections 503-514. Horseback riders, section 490. Guests, sections 688-695.

general exercise reasonable care to avoid injury to their fellow travelers.<sup>89</sup> He may rely on this assumption until he discovers that it is contrary to the actual fact. Of course, an

<sup>89</sup> *California*.—*Robinson v. Clemons* (Cal. App.), 190 Pac. 203.

*Illinois*.—*Trzetiatowski v. Evening American Pub. Co.*, 185 Ill. App. 451; *Kilroy v. Justrite Mfg. Co.*, 209 Ill. App. 499.

*Indiana*.—*Indianapolis St. Ry. v. Hoffman*, 40 Ind. App. 508, 82 N. E. 543; *Elgin Dairy Co. v. Shepard*, 108 N. E. 234.

*Iowa*.—*Pilgrim v. Brown*, 168 Iowa, 177, 150 N. W. 1.

*Missouri*.—*Fremian v. Green* (Mo. App.), 186 S. W. 1166.

*New York*.—*Buscher v. New York Transportation Co.*, 106 N. Y. App. Div. 493, 94 N. Y. Suppl. 796; *Clarke v. Woop*, 159 N. Y. App. Div. 437, 144 N. Y. Suppl. 595; *Crombie v. O'Brien*, 178 App. Div. 807, 165 N. Y. Suppl. 858; *Thies v. Thomas*, 77 N. Y. Suppl. 276; *Enstrom v. Neumoegen*, 126 N. Y. Suppl. 662.

*Oregon*.—*Pinder v. Wickstrom*, 80 Oreg. 118, 156 Pac. 583.

*Pennsylvania*.—*Frankel v. Morris*, 252 Pa. St. 14, 97 Atl. 104; *Brown v. Chambers*, 65 Pa. Super. Ct. 373.

*Utah*.—*Richards v. Palace Laundry Co.*, 186 Pac. 439.

*Washington*.—*Ballard v. Collins*, 63 Wash. 493, 115 Pac. 1050.

*Wisconsin*.—*Zimmermann v. Mednikoff*, 165 Wis. 333, 162 N. W. 349; *John v. Pierce* (Wis.), 178 N. W. 297.

*Canada*.—*Toronto General Trusts Corporation v. Dunn*, 15 West. L. R. 314, 20 Man. L. R. 412.

**Assumption as to speed.**—It has been held that when a traveler is violating the law of the road, he cannot assume that an automobilist will proceed at a proper rate of speed. *Bragdon v. Kellogg*, 118 Me. 42, 105 Atl. 433, wherein it was said: "Such

operators cannot confine their anticipation to a legal rate of speed as a protection. They are held to anticipate that, according 'to the usual experience of mankind, the result ought to be reasonably apprehended.' These operators must anticipate not according to the 'legal,' but the 'usual,' experience of mankind in running automobiles on the public highways. It is, then, a matter of common knowledge, the 'usual experience' that automobiles are more often driven without any reference to legal speed than in observance of it. True, in the trial of automobile cases there are almost always two rates of speed that might be marked, plaintiff's 1 and plaintiff's 2, in which the plaintiff is seldom ever going over a speed of from 8 to 12 miles, while the defendant is going at from 25 to 45 miles an hour, and sometimes so fast that his speed produces a result in the nature of a blur, as he passes. Nevertheless, the truth is that automobile operators pay little attention to the legal rate of speed. Hence it is 'the usual experience' of operators that they are not authorized to rely on the legal presumption that an approaching car is coming at a legal rate of speed, but must exercise due care in the operation of their own car, especially in approaching corners, curves, and turns in the road, where their vision may be wholly or partially obscured. Accordingly, the claim that an operator has a right to rely on the presumption of a legal rate of speed cannot be admitted."

It is a question for the jury whether a plaintiff assumed that the driver of an automobile would so act. *Tooker v. Perkins*, 86 Wash. 567, 150 Pac. 1138.

assumption along this line cannot be made, when it is apparent that a traveler is not conducting himself in a proper manner.<sup>90</sup> And the general doctrine is not to be construed as meaning that the driver of an automobile will be permitted to rely upon this assumption to the exclusion all liability for negligence on his part. It might be that a person would be proceeding along the street, either in another vehicle or on foot, unconscious of the approach of the automobile and where this is apparent to the driver of the latter, he should act as an ordinarily prudent man would under the same conditions. If he does not, and thereby injures such person, he may still be regarded as negligent and liable for any injury resulting from his want of such care.<sup>91</sup> It has been held that a person may rely on the obedience of another traveler to a provision of law, though he has no actual knowledge of the law at the time.<sup>92</sup>

### Sec. 353. Conflict of laws.

Where an action for injuries arising out of an automobile accident which happened in one State is brought in the courts of another State, the case is governed by the law of the jurisdiction where the accident happened.<sup>93</sup> The law of the place where the injury was received determines whether a right of action exists, but the law of the place where the action is brought regulates the remedy and its incidents, such as pleading, evidence and practice.<sup>94</sup>

### Sec. 354. Joinder of causes of action for injuries to two persons.

Where both a husband and wife who were injured in an automobile accident brought an action in favor of both, alleging separate causes of action for the injuries each sustained, it was held that a demurrer on the ground that several causes

90. *O'Brien v. Billing* (Pa.), 110 Atl. 89.

91. *Chase v. Seattle Taxicab & Transf. Co.*, 78 Wash. 537, 139 Pac. 499.

92. *Speer v. Southwest Missouri R. Co.*, 190 Mo. App. 328, 177 S. W. 329.

93. *Gersman v. Atchison, etc., R. Co.* (Mo.), 229 S. W. 167; *United Transp. Co. v. Hass*, 91 Misc. (N. Y.) 311, 155 N. Y. Suppl. affirmed 155 N. Y. Suppl. 1145.

94. *Levy v. Steiger*, 233 Me. 600, 124 N. E. 477.

of action were improperly united and that there was a defect and misjoinder of parties plaintiff was properly sustained.<sup>95</sup>

### Sec. 355. Damages — in general.

One whose motor vehicle is injured in a highway accident, if entitled to relief, is allowed compensatory damages.<sup>96</sup> For personal injuries, a plaintiff is also allowed compensatory damages;<sup>97</sup> and, in some cases, punitive damages are awarded as a punishment against the defendant.<sup>98</sup> Loss of earnings while a plaintiff was incapacitated is considered as an element of his damage, and evidence with reference to the same is to be considered by the jury although the testimony may be

95. *Brickner v. Kopmeier*, 133 Wis. 582, 113 N. W. 414.

96. See chapter XXVI.

97. *Weil v. Hagan*, 161 Ky. 292, 170 S. W. 618.

**No damages as warning to others.**— In *Weil v. Hagan*, 161 Ky. 292, 170 S. W. 618, the court, referring to a speech of the counsel for the plaintiff asking the jury to find a verdict against the defendant in order to protect the lives of travelers and as a warning to the drivers of automobiles, said: "If as a matter of fact plaintiff and his property were injured by reason of defendant's negligence, he was entitled to such a sum as would reasonably compensate him for the damages actually sustained, but no more. He was not entitled to a verdict that would protect the lives of citizens traveling on the highway, or that would be a warning to drivers of automobiles. Counsel for plaintiff insists that he did not go outside of the record in making the statement complained of, for the record shows that the lives of one or more citizens were endangered, and, being established by the record the words about the warning were within the limits of legitimate argument. Any of us know that in the minds of many

citizens there is a natural prejudice against automobile owners and drivers growing out of the fact that some of them operate their machines in a reckless manner. Because of this prejudice, it is extremely difficult to get a jury who will calmly and dispassionately weigh the facts of a particular case, without taking into consideration the recklessness of other automobile owners and drivers. We therefore conclude that an argument like the one in question, which was evidently designed to play on and increase this natural prejudice, and therefore to arouse the passions of the jury, was not within the bounds of legitimate argument. Where an automobile owner or driver is negligent and injures another, he should answer only for the reasonable consequences of his own acts. He should not be mulcted in damages in order that a verdict in his case may operate as a warning to others. As the language complained of was not within the range of legitimate argument, we conclude that the trial court should have sustained defendants' objection thereto and admonished the jury not to consider it."

98. Section 357.

indefinite and uncertain and is entitled to but little weight.<sup>99</sup> An averment of loss of time is said to be the same, in legal effect, as averring loss of earnings, and, where, under such an averment, evidence was received without objection showing that diminution of earnings in the future was certain, it was held that defendant was not prejudiced by lack of specific averment on the subject.<sup>1</sup> As to the selection of a physician to treat an injury, it is said that the duty of a party injured to use reasonable care to obviate, so far as possible, bad results from the injury and thereby diminish the damages, extends no further than to select one of good repute, and that for lack of care and skill shown by such physician in his treatment, the patient is not answerable, nor is the circumstance admissible to mitigate the damages for which the tortfeasor is liable.<sup>2</sup>

### Sec. 356. Damages — mental anguish.

There is a decided difference of opinion in the various jurisdictions as to the damages to be allowed for "mental anguish." In some jurisdictions, the rule is adopted that, when there is no physical injury or contact with an instrumentality frightening one, there can be no recovery for mental anguish sustained by a plaintiff.<sup>3</sup> But in other jurisdictions, a more liberal view is taken, and it is held that where substantial injury can be traced to the fright of one caused by the negligent operation of a motor vehicle, the fact that the plaintiff did not sustain any physical injury other than in consequence of the fright does not deprive him of his right of recovery.<sup>4</sup> In one case in which it was alleged that the defendant negligently ran into a carriage which had stopped at the side of the road to allow defendant to pass in his automobile

99. *Wolfe v. Ives*, 83 Conn. 174, 76 Atl. 526, 19 Ann. Cas. 752. The court said in this case that the fact that the plaintiff could not state accurately his earnings for any particular day or period, and that he kept no books of account, went rather to the weight than to the admissibility of his testimony.

1. *Scholl v. Grayson*, 147 Mo. App.

652, 127 S. W. 415.

2. *Scholl v. Grayson*, 147 Mo. App. 652, 127 S. W. 415.

3. *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781.

4. *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927.

and that the plaintiff received "a severe fright and shock; that due to such fright and shock, as aforesaid caused by the negligence of the defendant, the said plaintiff suffered injury to her body; that at the time she was pregnant, and as a result of said fright and shock there resulted a miscarriage," causing severe pain and suffering and resulting in permanent injury to her health, it was decided that when physical injury directly flows from extreme fright or shock, caused by the ordinary negligence of one who owes the duty of care to the injured person, such fright or shock is a link in the chain of proximate causation as efficient as physical impact from which like results flow.<sup>5</sup> In an action to recover for injuries caused by the negligent operation of an automobile, in frightening plaintiff's horse and overturning his buggy, there has been held to be no error in the admission of evidence, as a part of the history of the case, that plaintiff's wife and child were in the buggy and that she held the child in her arms, where the court by its instructions negatived the idea that compensation was to be allowed plaintiff for mental anguish because of their presence.<sup>6</sup>

### Sec. 357. Damages — punitive damages.

In a tort action, punitive damages may be allowed by the jury, where the acts of the defendant manifested a wanton disregard of the lives or safety of others, or were wilful or malicious.<sup>7</sup> And in some jurisdictions, exemplary damages

5. Pankopf v. Hinkley, 141 Wis. 146, 123 N. W. 625, 24 L. R. A. (N. S.) 1159.

6. Neidy v. Littlejohn, 146 Iowa, 355, 125 N. W. 198.

7. Bowles v. Lowery, 5 Ala. App. 555, 59 So. 696; National Casket Co. v. Powar, 137 Ky. 156, 125 S. W. 279; Moore v. Hart, 171 Ky. 725, 188 S. W. 861; Williams v. Baldrey, 52 Okla. 123, 152 Pac. 814. "Mere recklessness, without more, does not constitute wanton or wilful injury. Exemplary damages are allowable to one injured by the wrong of another, when the wrong is maliciously perpetrated, or where the

wrongful act is done knowingly, wantonly, and recklessly, under such circumstances as indicate that the wrongdoer knew that the act was fraught with probable injury to person or property. Leinkauff & Strauss v. Morris, 66 Ala. 406. To justify the imposition of exemplary damages, malice must accompany the wrong complained of, or such gross negligence or oppression or fraud as amounts to malice. Wilkinson v. Searcy, 76 Ala. 176; Stringer v. Railroad Co., 99 Ala. 397, 13 So. 75." Bowles v. Lowery, 5 Ala. App. 555, 59 So. 696.

Mitigation of punitive damages.—



are allowed in the case of gross negligence on the part of the defendant.<sup>8</sup> Thus, it has been held that, where an automobile was run rapidly in the night time with no lights and a child was struck, punitive damages were justified.<sup>9</sup> And punitive damages are sometimes allowed when an automobilist continues to drive his machine toward a horse which he knows is frightened on account of the machine.<sup>10</sup> It is not permissible in some jurisdictions to recover exemplary damages when the complaint alleges only simple negligence.<sup>11</sup> Punitive damages should not be so excessive as to indicate that the jury was influenced by passion or prejudice, and they must have some reasonable relation to the injury and the cause thereof and must not be disproportionate to the one or the other.<sup>12</sup>

### Sec. 358. Damages — increased damages.

Where a statute permits double or treble damages for injuries resulting from a violation of the law of the road, and two causes of action are set forth in a complaint, one for which single damages only are recoverable and the other for which double or treble may be awarded, in the discretion of the judge, in case of a general verdict which leaves it uncertain on which cause damages were assessed, a recovery for single damages only can be allowed.<sup>13</sup>

### Sec. 359. Function of jury.

Speaking in general terms, in a negligence action, the questions whether the defendant was guilty of negligence and

Where punitive damages are claimed, evidence is not admissible in mitigation thereof to the effect that the driver was careful and competent, the skill of the driver not having been an issue under the pleadings. *Adler v. Martin*, 179 Ala. 97, 59 So. 597.

8. *Williams v. Benson*, 87 Kan. 421, 124 Pac. 531; *Buford v. Hopewell*, 140 Ky. 666, 131 S. W. 502; *Searcy v. Golden*, 172 Ky. 42, 188 S. W. 1098; *Williams v. Baldrey*, 52 Okla. 126, 152 Pac. 814.

9. *Buford v. Hopewell*, 140 Ky. 666, 131 S. W. 502.

10. *Searcy v. Golden*, 172 Ky. 42, 188 S. W. 1098. And see section 543.

11. *Louisville & N. R. Co. v. Mar-kee*, 103 Ala. 160, 15 So. 511, 49 Am. St. Rep. 21; *Roach v. Wright*, 195 Ala. 333, 70 So. 271; *Bowles v. Lowery*, 5 Ala. App. 555, 59 So. 696.

12. *Buford v. Hopewell*, 140 Ky. 666, 131 S. W. 502.

13. *Dunbar v. Jones*, 87 Conn. 253, 87 Atl. 787; *Tillinghast v. Leppert*, 93 Conn. 247, 105 Atl. 615.

whether the plaintiff was guilty of contributory negligence, are within the province of the jury. On account of the complications which arise from the many different classes of highways and travelers, the different surrounding circumstances in each particular case, the application of the law of the road and regulations relative to the use of the highway, the usual conflicting evidence in such cases as to the speed of vehicles and other matters, it is clear that in automobile cases, the questions of negligence and contributory negligence are peculiarly for the jury. It may be in some cases that the court is able to determine the negligence of a party as a matter of law, as in the case of the violation of a statute or ordinance,<sup>14</sup> or when a pedestrian has failed to take rudimentary precautions for his safety,<sup>15</sup> or the driver of an automobile neglects to look for approaching cars when crossing a railroad<sup>16</sup> or street railway<sup>17</sup> track. But, nevertheless, the general rule is, that the negligence of the respective parties in an action for injuries arising out of the use of the highway, presents a problem for the determination of the jury.<sup>18</sup> The

14. Section 297.

15. See chapter XVIII.

16. Sections 557-566.

17. Sections 592-598.

18. *Alabama*.—Yarbrough v. Carter, 179 Ala. 356, 60 So. 833; Adler v. Martin, 179 Ala. 97, 59 So. 597; Reaves v. Maybank, 193 Ala. 614, 69 So. 137; Taxicab & Touring Car Co. v. Cabiness, 9 Ala. App. 549, 63 So. 774; White Swan Laundry Co. v. Wehrhan, 202 Ala. 87, 79 So. 479.

*California*.—Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460; Blackwell v. Renwick, 21 Cal. App. 131, 131 Pac. 94; Baillargeon v. Myer, 27 Cal. App. 187, 149 Pac. 378.

*Colorado*.—Kent v. Treavorgy, 22 Colo. App. 441, 125 Pac. 128.

*Illinois*.—Crandall v. Krause, 165 Ill. App. 15; Kirlin v. Chittenden, 176 Ill. App. 550; Rasmussen v. Drake, 185 Ill. App. 526; Antrim v. Noonan, 186 Ill. App. 360; Ferry v. City of Waukegan,

196 Ill. App. 81; Osberg v. Cudahy Packing Co., 198 Ill. App. 551; Walker v. Hilland, 205 Ill. App. 243.

*Indiana*.—Rump v. Woods, 50 Ind. App. 347, 98 N. E. 369.

*Iowa*.—Menefee v. Whisler, 169 Iowa, 19, 150 N. W. 1034; Topper v. Maple, 181 Iowa, 786, 165 N. W. 28.

*Kansas*.—Ratcliffe v. Speith, 95 Kan. 823, 149 Pac. 740; Pens v. Kreitzer, 98 Kan. 759, 160 Pac. 200; Keil v. Evans, 99 Kan. 273, 161 Pac. 639.

*Maryland*.—Taxicab Co. of Baltimore City v. Emanuel, 125 Md. 246, 93 Atl. 807.

*Massachusetts*.—Dudley v. Kingsbury, 199 Mass. 258, 85 N. E. 76; Chandler v. Matheson Co., 208 Mass. 569, 95 N. E. 103; Huggon v. Whipple & Co., 214 Mass. 64, 100 N. E. 1087; Griffin v. Taxi Service Co., 217 Mass. 293, 104 N. E. 838.

*Michigan*.—Johnson v. Clark Motor Co., 173 Mich. 277, 139 N. W. 30, 44

jury must base its verdict upon the evidence in the case, and if the plaintiff's evidence is entirely irreconcilable with the facts as to the position the two automobiles were found after

*L. R. A. (N. S.)* 830; *Goosen v. Packard Motor Co.*, 174 Mich. 654, 140 N. W. 947; *Schock v. Colling*, 175 Mich. 313, 141 N. W. 675; *Granger v. Far-rant*, 179 Mich. 19, 146 N. W. 218; *Brown v. Mitts*, 187 Mich. 469, 153 N. W. 714.

*Minnesota*.—*George A. Hornel Co. v. Minneapolis St. Ry. Co.*, 130 Minn. 469, 153 N. W. 867; *Benson v. Larson*, 133 Minn. 346, 158 N. W. 426; *Wenworth v. Butler*, 134 Minn. 382, 159 N. W. 828.

*Missouri*.—*Bongner v. Ziegenheim*, 165 Mo. App. 328, 147 S. W. 182; *Haacke v. Davis*, 166 Mo. App. 249, 148 S. W. 450; *Harris v. Pew*, 185 Mo. App. 275, 170 S. W. 344; *Wiedeman v. St. Louis Taxicab Co.*, 182 Mo. App. 530, 165 S. W. 1105, 1106; *Williams v. Kansas City (Mo. App.)*, 177 S. W. 783.

*New Hampshire*.—*Hamel v. Peabody*, 78 N. H. 585, 97 Atl. 220.

*New Jersey*.—*Rabinowitz v. Hawthorne*, 89 N. J. Law, 308, 98 Atl. 315; *Heckman v. Cohen*, 90 N. J. L. 322, 100 Atl. 695; *Siegeler v. Nevweiler*, 91 N. J. L. 273, 102 Atl. 349.

*New York*.—*Ward v. International Ry. Co.*, 206 N. Y. 83, 99 N. E. 268, Ann. Cas. 1914A 1170; *Millman v. Appleton*, 139 N. Y. App. Div. 738, 124 N. Y. Suppl. 482; *Cowell v. Saperston*, 149 App. Div. 373, 134 N. Y. Suppl. 284; *Taylor v. Glens Falls Automobile Co.*, 161 App. Div. 442, 146 N. Y. Suppl. 699; *Breese v. Nassau Electric Co.*, 162 App. Div. 455, 147 N. Y. Suppl. 416; *Stern v. International Ry. Co.*, 167 App. Div. 503, 153 N. Y. Suppl. 520; *Aronson v. New York Taxi-cab Co.*, 125 N. Y. Suppl. 756; *Harris v. Burns*, 133 N. Y. Suppl. 418; *Gneeco v. Pederson*, 154 N. Y. Suppl. 12.

*North Dakota*.—*Messer v. Bruening*, 25 N. D. 599, 142 N. W. 158; *Armann v. Caswell*, 30 N. D. 406, 152 N. W. 813; *Messer v. Bruening*, 32 N. D. 515, 156 N. W. 241.

*Pennsylvania*.—*Haring v. Connell*, 244 Pa. St. 439, 90 Atl. 910; *Price v. Newell*, 53 Pa. Super. Ct. 628; *Bickley v. Southern Pennsylvania Tr. Co.*, 56 Pa. Super. Ct. 113; *Bew v. John Daley, Inc.*, 260 Pa. 418, 103 Atl. 832.

*Tennessee*.—*Studer v. Plumlee*, 130 Tenn. 517, 172 S. W. 305.

*Washington*.—*Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892; *Lewis v. Seattle Taxicab Co.*, 72 Wash. 320, 130 Pac. 341; *Chase v. Seattle Taxicab Co.*, 78 Wash. 537, 139 Pac. 499; *Bruer v. Little*, 97 Wash. 319, 166 Pac. 1166.

*Wisconsin*.—*Friedrich v. Boulton*, 164 Wis. 526, 159 N. W. 803; *Shortle v. Sheill (Wis.)*, 178 N. W. 304.

Upon the general question of negligence being for the jury, Mr. Chamberlayne says, in his recent work on Evidence, "It is not disputed that the finding of the constituent facts is matter for the jury. It is only in cases where but one inference is logically permissible that the court says that all facts are established and rules, as a matter of law, as to the existence of negligence, ignoring the possibility that the jury might have reached a conclusion not permitted by the rules of reasoning. States of fact, from which more than one inference is reasonably possible, or where the evidence as to the existence of material facts is conflicting, present questions for the jury, whose finding, if rational, should not be reversed." Chamberlayne's *Modern Law of Evidence*, § 125.

their collision, the verdict for the plaintiff must be deemed to be founded on mistake, and will be set aside.<sup>19</sup> An appellate court must recognize that certain facts are controlled by immutable physical laws; and it cannot permit a jury verdict to change such facts, because to do so would, in effect, destroy the intelligence of the court.<sup>20</sup> The function of the jury in particular cases is further discussed in other parts of this work.<sup>21</sup>

### Sec. 360. Traction engines.

The use of a steam traction engine and trailers upon the public highways, is not necessarily a nuisance,<sup>22</sup> but the law imposes on the owner of a traction engine the duty to act with due regard for the rights and safety of persons traveling upon a public road in moving the engine over such road, and he may be liable for injuries due to negligence on his part. When it is shown that a steam roller, which frightened plaintiff's horse and caused it to run away, was operated by the defendant without sending a person ahead to warn travelers of its approach, in violation of the statute on the subject, a verdict for the plaintiff is warranted by the evidence, if there be no contributory negligence on his part.<sup>23</sup>

19. *Ladham v. Young*, 145 N. Y. Suppl. 1089.

20. *Austin v. Newton* (Cal. App.), 189 Pac. 471.

21. See sections 452, 487, 516, 549, 577, 614, 677.

22. *McCarter v. Ludlam, etc., Co.*, 71 N. J. Eq. 330, 63 Atl. 761; *Miller v. Addison*, 69 Md. 731, 54 Atl. 967.

23. *Buchanan's Sons v. Cranford Co.*, 112 N. Y. App. Div. 278, 98 N. Y. Suppl. 378.

## CHAPTER XVI.

## COLLISIONS WITH OTHER VEHICLES.

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391. Approaching intersecting streets—in general.
392. Approaching intersecting streets—crowded thoroughfares.
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SECTION 394. Approaching intersecting streets—priority given by statute or ordinance.

395. Vehicle standing in street.

396. Proximate cause.

397. Joint liability of both drivers to third person.

398. Contributory negligence—generally.

399. Contributory negligence—proximate result of contributory negligence.

400. Contributory negligence—unskillful driving.

401. Contributory negligence—alertness.

402. Contributory negligence—wantonness or recklessness of defendant.

403. Contributory negligence—violation of law of road.

404. Contributory negligence—sudden stop.

405. Contributory negligence—failure to give passing vehicle sufficient space.

406. Contributory negligence—absence of statutory lights.

407. Contributory negligence—excessive speed.

408. Contributory negligence—passenger in dangerous position.

409. Contributory negligence—reliance on obedience of law of road by other vehicles.

410. Contributory negligence—acts in emergency.

411. Contributory negligence—last clear chance.

412. Pleading.

413. Negligence is generally a question for the jury.

### Sec. 361. Care in avoiding other vehicles, in general.

The right to use the streets and highways by means of automobiles is not superior<sup>1</sup> or inferior<sup>2</sup> to the use by other vehicles. The duty of one operating an automobile on a public way is to use reasonable care to avoid injury to other travelers, whether they choose their method of transportation by wagon, motorcycle or automobile.<sup>3</sup> The duties of all are equal and reciprocal. One using an automobile must not negligently or carelessly exercise his rights so that injury will result to fellow travelers lawfully using the highway, but

1. Section 50.

2. Section 49.

3. *Carter v. Brown*, 136 Ark. 23, 206 S. W. 71; *Moore v. Hart*, 171 Ky. 725, 188 S. W. 861; *Standard Oil Co. of Kentucky v. Thompson* (Ky.), 226 S. W. 368; *Simmons v. Peterson*, 207 Mich. 508, 174 N. W. 536; *Carson v. Turrish*, 140 Minn. 445, 168 N. W. 349; *Ulmer v. Pistole*, 115 Miss. 485,

76 So. 522; *Spawn v. Goldbedg* (N. J.), 110 Atl. 565; *Boggs v. Jewell Tea Co.*, 263 Pa. St. 413, 106 Atl. 781.

"Everything possible."—It is error for the court to charge that it is the duty of the driver to do everything possible after he had discovered the danger to prevent an accident. *Simmons v. Peterson*, 207 Mich. 508, 174 N. W. 536.

he must have due regard for the equal rights of others on the highway, taking into consideration the tendency of the machine to frighten horses,<sup>4</sup> or to cause injury to his fellow travelers.<sup>5</sup> In other words, while it is true that both a person with an automobile and a person with a team have the right to use the highway with their respective vehicles; yet it is also true that each is obligated to exercise his rights with due regard to the corresponding rights of the other and neither has a monopoly of the highway.<sup>6</sup>

A public highway is open in all its length and breadth to the reasonable, common and equal use of the people on foot or in vehicles. The owner of an automobile has the same right as the owners of other vehicles to use the highway, and, like them, he must use reasonable care and caution for the safety of others. A traveler on foot has the same right to the use of the public highway as an automobile or any other vehicle. In using such highway all persons are bound to the exercise of reasonable care to prevent accidents. Such care must be in proportion to the danger in each case.<sup>7</sup> The degree of care and caution to be used in each case depends upon the character of the vehicle used and the locality and surroundings in which it is being used. The more dangerous the character of the vehicle and the greater its liability to do injury to others the higher is the degree of care and caution to be exercised by the person charged with the duty of its operation.<sup>8</sup> A person with a horse and wagon, and a person with an automobile, each has a right to use the highways with his respective vehicle, but it is the duty of each to exercise his right with due regard to the corresponding rights of the other.<sup>9</sup> So pedestrians and persons using vehicles of other

4. See chapter XX. as to frightening horses.

5. *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337; *McIntyre v. Orner*, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 8 Ann. Cas. 1087; *Haynes Automobile Co. v. Sinnett*, 46 Ind. App. 110, 91 N. E. 171.

6. *Gurney v. Piel*, 105 Me. 501, 74 Atl. 1151.

7. *Cecchi v. Lindsay*, 1 Boyce's (Del.), 185. 75 Atl. 376, *per* Hastings, J., judgment reversed in *Lindsay v. Cecchi*, 1 Boyce's (Del.) 133, 80 Atl. 523.

8. *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337; *Carson v. Turrish*, 140 Minn. 445, 168 N. W. 349. And see section 277.

9. *Towle v. Morse*, 103 Me. 250, 68

types have equal rights with those who use self-propelling vehicles on the public streets. A reciprocal duty of care exists among them. The measure of this duty is ordinary and reasonable care according to the circumstances. In places where many pass or congregate a greater degree of care is required than where there are few travelers.<sup>10</sup> And generally for the purpose of avoiding collision and accident all travelers should observe due care in accommodating themselves to each other. Their rights are mutual and co-ordinate, and it is the duty of each so to exercise his right of passage as not to cause injury to another having a like right. Each is under the obligation to exercise ordinary care, and each has the right to expect that such ordinary care will be exercised by the other and to rely upon this in determining his own manner of using the road.<sup>11</sup>

**Sec. 362. Proof of defendant's negligence required to support action for injuries.**

Inasmuch as the operator of an automobile is not an insurer against damage which may arise from its operation on the public highways,<sup>12</sup> a plaintiff who seeks to recover damages for an injury resulting from a collision alleged to be due to the negligence of another must establish the fact of such negligence to the satisfaction of the jury. If he succeeds in this burden, he may recover; otherwise, his action will fail.<sup>13</sup> The

Atl. 1044. "The mere fact that automobiles are run by motor power and may be operated at a dangerous and high rate of speed gives them no superior rights on the highway over other vehicles, any more so than would the fact that one is driving a race horse give such driver superior rights on the highway over his less fortunate neighbor who is pursuing his journey behind a slower horse. Highways are established and maintained at public expense for the mutual benefit of all, and all persons have a right to use them, subject only to the duty which the law imposes upon them that they shall at all times exercise ordinary care and caution for their own safety and also for the safety of all others who are traveling thereon in the exercise of their lawful rights." *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337.

10. *Dugan v. Lyon*, 41 Pa. Super. Ct. 52; *Deputy v. Kimmell*, 73 W. Va. 595, 80 S. E. 919.

11. *Lawler v. Montgomery* (Mo. App.), 217 S. W. 856; *Spangler v. Markley*, 39 Pa. Super. Ct. 351; *Brown v. Chambers*, 65 Pa. Super. Ct. 373.

12. Section 283.

13. *California*.—*Meier v. Wagner*, 27 Cal. App. 579, 150 Pac. 797; *Furtado*



mere fact of a collision is not a sufficient basis upon which to rest a charge of negligence.<sup>14</sup> But a *prima facie* case of negligence is sometimes shown by evidence that the operator of the automobile violated a statute, a municipal ordinance, or a recognized rule of the road,<sup>15</sup> but nevertheless, proof of negligence is essential to sustain the action, the violation of the regulation being considered as negligence or as evidence of negligence.<sup>16</sup> Moreover, it is possible under unusual circumstances that the doctrine of *res ipsa loquitur* may arise from a collision,<sup>17</sup> as, for example, where one vehicle runs into another standing by the side of the highway;<sup>18</sup> but ordinarily the doctrine has no application in actions arising from collisions between vehicles. Collisions between two vehicles may occur when neither party is guilty of negligence; they may occur when both parties are at fault; or they may occur when

*v. Bird*, 26 Cal. App. 153, 146 Pac. 58; *Diamond v. Weyerhaeuser*, 178 Cal. 540, 174 Pac. 38.

*Georgia*.—*Sheppard v. Johnson*, 11 Ga. App. 280, 75 S. E. 348. See also, *Shore v. Ferguson*, 142 Ga. 657, 83 S. E. 518.

*Indiana*.—*Picken v. Miller*, 59 Ind. App. 115, 108 N. E. 968.

*Iowa*.—*Withey v. Fowler Co.*, 164 Iowa, 377, 145 N. W. 923.

*Kansas*.—*Anderson v. Sterrit*, 95 Kan. 453, 148 Pac. 635.

*Maryland*.—*Gittings v. Schenuit*, 122 Md. 282, 90 Atl. 51.

*Michigan*.—*Schock v. Cooling*, 175 Mich. 313, 141 N. W. 675.

*Minnesota*.—*Eisenmenger v. St. Paul City Ry. Co.*, 125 Minn. 399, 147 N. W. 430; *Chase v. Tingdale Bros.*, 127 Minn. 401, 149 N. W. 654.

*Missouri*.—*Rowe v. Hammond*, 172 Mo. App. 203, 157 S. W. 880; *Johnson v. Springfield Traction Co.*, 178 Mo. App. 445, 163 S. W. 896.

*New Jersey*.—*Meyer & Peter v. Creighton*, 83 N. J. L. 749, 85 Atl. 344.

*New York*.—*Nemzer v. Newkirk Ave. Automobile Co.*, 154 N. Y. Suppl. 117;

*James v. Morton*, 79 Misc. Rep. 255, 139 N. Y. Suppl. 941; *Albertson v. Ansbacher*, 102 Misc. (N. Y.) 527, 169 N. Y. Suppl. 188.

*North Carolina*.—*Linville v. Nissen*, 162 N. C. 95, 77 S. E. 1096.

*Rhode Island*.—*Hermann v. Rhode Island Co.*, 36 R. I. 447, 90 Atl. 813.

*Texas*.—*Texas Traction Co. v. Wiley* (Civ. App.), 164 S. W. 1028.

*Washington*.—*Lloyd v. Calhoun*, 78 Wash. 438, 139 Pac. 231; *Tschirley v. Lambert*, 70 Wash. 72, 126 Pac. 80.

**Trespass**.—It has been thought that an action of trespass may be maintained by the owner of a vehicle on an allegation that the driver of another wrongfully drove his vehicle against the plaintiff's vehicle. Such an action is based, not on the negligence of the defendant driver, but on the wrongfulness of his act. *Reed v. Guessford*, 7 Boyce's (30 Del.) 228, 105 Atl. 428.

14. *Diamond v. Weyerhaeuser*, 178 Cal. 540, 174 Pac. 38.

15. Sections 267, 297.

16. *Hartje v. Moxley*, 235 Ill. 164, 85 N. E. 216.

one party is guilty and one is innocent of blame. Speaking in general terms, there is no liability imposed on either party in the two cases first mentioned; in the last mentioned one, the guilty traveler is responsible for such damages as proximately result from his blame. In an action to recover damages for injuries received by a plaintiff who was thrown from a wagon which, it was alleged, was struck by the defendant's automobile, the failure of the plaintiff to show that the wagon was injured by the collision is held not to invalidate a finding that the automobile struck it.<sup>19</sup>

*The court should instruct* the jury, in all such cases, as to the respective rights, duties and obligations of the parties in each case.<sup>20</sup>

### Sec. 363. Unavoidable accident — generally.

Where an automobile collides with another vehicle on the public ways, and no proof of negligence is proved as against the owner or driver of the automobile, he is not liable for damages accruing from the collision. This rule necessarily follows from the general proposition that the operator of an automobile is not an insurer against accidents.<sup>21</sup> If actionable negligence is not proved, the injury must be classed as an unavoidable accident for which there is no liability.<sup>22</sup> If some unforeseen emergency occurs, which naturally would overpower the judgment of the ordinarily careful driver of a motor vehicle, so that momentarily or for a time he is not capable

17. *Bauhofer v. Crawford*, 16 Cal. App. 679, 117 Pac. 931; *Onell v. Chappell*, 38 Cal. App. 375, 176 Pac. 370.

18. Section 395.

19. *Klein v. Burleson*, 138 N. Y. App. Div. 405, 122 N. Y. Suppl. 752.

20. As to propriety or sufficiency of instructions in particular cases see the following decisions:

*Indiana*.—*Rump v. Woods*, 50 Ind. App. 347, 98 N. E. 369.

*Kentucky*.—*Helms v. Phelp*, 157 Ky. 795, 164 S. W. 92.

*Michigan*.—*Brown v. Mitts*, 187 Mich. 469; 153 N. W. 714.

*Missouri*.—*Flannigan v. Nash*, 190 Mo. App. 578, 176 S. W. 248.

*Wisconsin*.—*Koenig v. Sproesser*, 161 Wis. 8, 152 N. W. 473.

21. Section 362.

22. *Instruction as to unavoidable accident*.—The failure of the presiding judge to instruct as to the law of unavoidable accidents is not ground for reversal, where instructions have been properly given to the effect that the defendant is not liable without proof of his negligence. *Larrow v. Martell*, 92 Vt. 435, 104 Atl. 826.

of intelligent action and as a result injury is inflicted upon a third person, the driver is not negligent. The law does not require supernatural poise or self control.<sup>23</sup> But the mere fact that the driver of an automobile became "rattled" does not necessarily excuse his negligence, it appearing that the collision occurred outside of the traveled portion of the highway and that the circumstances were not such as to justify his conduct on the ground of a sudden emergency.<sup>24</sup> And whether the surprise occasioned by the sally of a dog from a yard into the highway is such as reasonably to cause the driver of a truck to be governed for an instant by impulse rather than sound judgment, and whether it is a discomposing exigency or a usual peril of the road, are matters for the jury.<sup>25</sup>

**Sec. 364. Unavoidable accident — skidding to avoid injury to pedestrian.**

Where the driver of an automobile applies the brakes suddenly in an emergency to avoid a pedestrian in danger, and by reason of the application of the brakes, the car skids and strikes another automobile, there is ample ground for holding that the driver was not guilty of negligence.<sup>26</sup> But if the defendant is running his auto at an excessive rate of speed, he may be found negligent, and he will be responsible for injury to another vehicle, though the collision arises, in part, from the defendant's attempt to avoid children in the street.<sup>27</sup>

**Sec. 365. Unavoidable accident — deflection to avoid dog.**

One exercising due care should not hesitate to prefer the safety of human beings to that of dogs. Hence, when the driver of a motor vehicle deflects his course to avoid a dog which has suddenly run into the street, he may be found guilty of negligence in a collision with another vehicle in the street.<sup>28</sup>

23. *Massie v. Barker*, 224 Mass. 420, 113 N. E. 199. See also *Giese v. Kimball*, 184 Iowa 1283, 169 N. W. 639.

24. *Tschirley v. Lambert*, 70 Wash. 72, 126 Pac. 80.

25. *Massie v. Barker*, 224 Mass. 420,

113 N. E. 199.

26. *Moir v. Hart*, 189 Ill. App. 566.

27. *Conlon v. Trenkhorst*, 195 Ill. App. 335.

28. *Massie v. Barker*, 224 Mass. 420,

113 N. E. 199.

**Sec. 366. Unavoidable accident — failure of brakes to work.**

The fact that the brakes failed to work when the driver saw the danger of a collision with another vehicle will not excuse his failure to use the steering mechanism and thus avoid the collision, where such mechanism was in working order and there was ample room to steer past the vehicle.<sup>29</sup>

**Sec. 367. Unavoidable accident — vehicle obscured by glare of other lights.**

If an automobile carries the lights approved by the law but sustains a collision with a buggy on account of the glare of the lights of another vehicle, the negligence of the driver of the automobile is a question for the jury.<sup>30</sup> The jury may properly find it is the driver's duty to stop his machine when his view is obscured with the glare of lights. So, too, when the view of the chauffeur is dazzled from lights of buildings along the street, it may well be said that proper care requires the stopping of the automobile.<sup>31</sup>

**Sec. 368. Unavoidable accident — care to avoid dangerous situation.**

The driver of a vehicle in a street must exercise reasonable care to avoid getting into a dangerous situation, from which he will be unable to extricate himself without colliding with another vehicle; and, if he omits such care, his later vigilance,

29. *Russell v. Electric Garage Co.*, 90 Neb. 719, 134 N. W. 253, wherein it was said: "Observing then that his brakes were not having the desired effect, we think it was plainly his duty to have used his steering lever and turned out so as to avoid the collision. that the mechanism of his car was all in working order, and that there was ample room to have passed the hack on either side, is admitted. The driver says he was helpless. That, under the evidence, is an unwarranted conclusion. If he had testified that, when he found his brakes were not going to prevent a collision, he tried to turn out, but was

unable to do so, that claim might have been made with some show of reason. We do not think it is a sufficient exercise of diligence by the driver of an automobile, when he sees he is about to collide with a vehicle of any kind, to use one of the methods at hand for avoiding a collision, and, when he sees that is not going to have the desired effect, sit, either helpless or careless, and fail to use other means at hand."

30. *Jolman v. Alberts*, 192 Mich. 25, 158 N. W. 170; *Topper v. Maple*, 181 Iowa, 786, 165 N. W. 28.

31. *Buzich v. Todman*, 179 Iowa, 1019, 162 N. W. 259.

though of the greatest degree, will not avail him when danger arises from his prior negligence.<sup>32</sup> For example, when the driver of an automobile has proceeded at an excessive speed, the fact that when he discovered a wagon in his path, the greatest diligence and effort were unable to avert a collision, does not excuse him from liability.<sup>33</sup>

### Sec. 369. Injury from wagon.

After a collision between an automobile and horse-drawn vehicle, the resulting litigation, if any, is almost uniformly inaugurated by a traveler in the slower conveyance or by the owner thereof. Very seldom is an action brought to recover the damages which the owner or a passenger of the automobile has sustained. But, nevertheless, if the driver of the automobile was not guilty of contributory negligence, the driver of the other conveyance is liable to respond for such damages as proximately result from his negligence.<sup>34</sup> Thus, where an automobile which was standing in a proper place along a street was struck and damaged by a ladder which projected from a wagon, the owner was permitted to recover for the injury to the car.<sup>35</sup> And where a wagon loaded with long iron pipes backed without warning into an automobile, the chauffeur may be entitled to recover for his injuries.<sup>36</sup> And, where a teamster coming along a lane leading into a highway negligently stopped his team across the highway so as to leave insufficient space for an automobile to pass, and the chauffeur was thereby injured, it was held that a verdict in favor of the chauffeur was sustained by the evidence.<sup>37</sup> As in other cases of negligence, the autoist cannot recover if any negligence on his part contributed to the injury.<sup>38</sup>

32. *Altenkirch v. National Biscuit Co.*, 127 N. Y. App. Div. 307, 111 N. Y. Suppl. 284.

33. *Yahnke v. Lange*, 168 Wis. 512, 170 N. W. 722.

34. See *Neel v. Smith* (Iowa), 147 N. W. 183; *Roper v. Greenspon*, — Mo. App. 746, 210 S. W. 922; *Columbia Taxicab Co. v. Stroh* (Mo. App.), 215 S. W. 748; *Stoddard v. Reed* (N. Dak.),

175 N. W. 219.

35. *Denny v. Strauss & Co.*, 109 N. Y. Suppl. 26.

36. *Haag v. Cohen* (Mo. App.), 229 S. W. 296.

37. *Manion v. Loomis Sanatorium*, 162 N. Y. App. Div. 421, 147 N. Y. Suppl. 761.

38. *Roper v. Greenspon*, 272 Mo. 288, 198 S. W. 1107, L. R. A. 1918 D. 126;

**Sec. 370. Excessive speed.**

Negligence may be charged against the driver of a motor vehicle on the ground that he operated the vehicle at an unreasonable speed.<sup>39</sup> Especially is this so, when the permitted speed is prescribed by statute or municipal ordinance, and the express terms of the requirement are infringed.

**Sec. 371. Turning to right to pass approaching vehicle — duty of each to exercise reasonable care.**

It is the general rule of highway travel that each traveler, whether by automobile, wagon, or other means of conveyance, must exercise reasonable care to avoid injury to his fellow travelers.<sup>40</sup> Thus, when the driver of a horse-drawn conveyance and an automobile are approaching each other on a public highway, the legal measure of duty is the same on both, each being required to act with reasonable care to avoid an accident or collision.<sup>41</sup> When two cars meet it is the duty of each, so far as practicable, to yield to the other the space and opportunity necessary for its safe and convenient passage.<sup>42</sup>

**Sec. 372. Turning to right to pass approaching vehicle — law of road.**

The law of the road,<sup>43</sup> founded originally on custom, but later based on positive statute and municipal regulations, in this country, requires that meeting vehicles shall, as a general rule, pass each other toward the right.<sup>44</sup> In England, the

Roper v. Greenspon (Mo. App.), 192 S. W. 149. See also Cook v. Standard Oil Co., 15 Ala. App. 448, 73 So. 763; Mahar v. Lochen, 166 Wis. 152, 164 N. W. 847.

**Collision with steel beams on wagon.**—In an action for injuries received by the driver of an automobile who was struck by steel beams on a wagon, it was held that the plaintiff was guilty of contributory negligence in failing to see the beams. Roper v. Greenspon (Mo. App.), 192 S. W. 149.

39. Sections 303-325.

40. Section 361.

41. Wing v. Eginton, 92 Conn. 336, 102 Atl. 655; Webb v. Moore, 136 Ky. 708, 125 S. W. 152.

42. Wing v. Eginton, 92 Conn. 336, 102 Atl. 655; Offner v. Wilke, 208 Ill. App. 463.

43. See chapter XIV, as to the law of the road, generally.

44. *Alabama*.—Morrison v. Clark, 196 Ala. 670, 72 So. 305.

*Iowa*.—Pilgrim v. Brown, 168 Iowa, 177, 150 N. W. 1; Baker v. Zimmerman, 179 Iowa, 272, 161 N. W. 479; Buzich v. Todman, 179 Iowa, 1019, 162 N. W. 259; Dirks v. Tonne, 183 Iowa,

primary rule is that, when two vehicles meet, each should keep to the left. One is not permitted to pursue his course because in his judgment there is sufficient room for the other to pass without coming in collision.<sup>45</sup> The object of the law of the road is to prevent errors of judgment and a monopoly of the center of the road by persons disposed to use it for their own advantage and to the disadvantage of others.<sup>46</sup> Where a collision occurs between two meeting vehicles, it is proper to regard the rights of the one who is obeying the law of the road as superior to the one who is not obeying such law.<sup>47</sup> Hence it is said that a presumption of negligence is raised as against the driver of the vehicle on the wrong side of the road.<sup>48</sup>

**Sec. 373. Turning to right to pass approaching vehicle — statute requiring turn to right of center of road.**

In some jurisdictions the law of the road has been codified by statute so as to require each driver to turn to the right of the center of the road.<sup>49</sup> Such a statutory requirement has been thought to be a recognition of the common law rule of the road, which would exist without statutory enactment.<sup>50</sup> But it has also been said that the Legislature by such a statute “thereby intended to require persons so using the public high-

403, 167 N. W. 103; *Viekery v. Armistead*, 180 N. W. 893.

*Maine*.—*Palmer v. Baker*, 11 Me. 338.

*Massachusetts*.—*Jaquith v. Richardson*, 8 Mete. 213.

*Missouri*.—*Marshall v. Taylor*, 168 Mo. App. 240, 153 S. W. 527.

*New Jersey*.—*Unwin v. State*, 73 N. J. L. 529, 64 Atl. 163, affirmed *State v. Unwin*, 75 N. J. L. 500, 68 Atl. 110.

*New York*.—*Tooker v. Fowlers & Sellars Co.*, 147 App. Div. 164, 132 N. Y. Suppl. 213; *Smith v. Dygert*, 12 Barb. (N. Y.) 613; *Easring v. Laus Singh*, 7 Wend. (N. Y.) 185.

*Nevada*.—*Week v. Reno Traction Co.*, 38 Nev. 285, 149 Pac. 65.

*North Dakota*.—*Hendricks v. Hughes*,

37 N. Dak. 180, 163 N. W. 268.

45. *Hayden v. McColly*, 166 Mo. App. 675, 150 S. W. 1132.

46. *Hayden v. McColly*, 166 Mo. App. 675, 150 S. W. 1132.

47. *Morrison v. Clark*, 196 Ala. 670, 72 So. 305; *Hiscock v. Phinney*, 81 Wash. 117, 142 Pac. 461.

48. Section 267.

49. *Diehl v. Roberts*, 134 Cal. 164, 66 Pac. 202; *Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319; *Dunn v. Moratz*, 92 Ill. App. 277; *Baker v. Zimmerman*, 179 Iowa, 272, 161 N. W. 479; *Wright v. Fleischman*, 41 Misc. (N. Y.) 533, 85 N. Y. Suppl. 62.

50. *Wright v. Fleischman*, 41 Misc. (N. Y.) 533, 85 N. Y. Suppl. 62.

ways to keep to the right of the center of such thoroughfares at all times when possible to do so, regardless of whether they should actually meet or see any other person traveling on such highway in an opposite direction."<sup>51</sup> The violation of such a statute has been held to be negligence,<sup>52</sup> but ordinarily it is thought that a violation of the law of the road is merely *prima facie* evidence of negligence.<sup>53</sup> The expression "center of the road," as used in such statutes, is construed as meaning the center of the traveled or wrought part of the road.<sup>54</sup> When the highway is covered with snow, travelers who meet must turn to the right of the beaten or traveled part of the road, irrespective of the position of what is the wrought or traveled part of the road when there is no snow on the ground.<sup>55</sup> This rule to turn to the right of the center of the road applies to vehicles passing on the same side of roads and streets which are so wide that to pass safely there is no necessity to turn to the right of the center line.<sup>56</sup> A statute requiring vehicles to keep to the center of the street has no application, when the deviation is not intentional, but is merely the result of the skidding of the car across the center line.<sup>57</sup>

**Sec. 374. Turning to right to pass approaching vehicle — seasonable turn to right.**

Statutes have been enacted in some States requiring that vehicles which meet on the highway shall seasonably turn to the right.<sup>58</sup> It is not necessary for an auto driver to turn towards the right as soon as he sees that another vehicle is approaching; all that is required, is that he shall turn

51. *Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319.

52. *Slaughter v. Goldberg*, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90.

53. Section 267.

54. *Baker v. Zimmerman*, 179 Iowa, 272, 161 N. W. 479; *Clark v. Commonwealth*, 4 Pick (Mass.), 125; *Shelly v. Norman* (Wash.), 195 Pac. 243. But see *Daniel v. Clegg*, 38 Mich. 32.

55. *Jacquith v. Richardson*, 8 Metc. (Mass.) 213; *Smith v. Dygert*, 12 Barb.

(N. Y.) 613.

56. *Wright v. Fleischman*, 41 Misc. (N. Y.) 533, 85 N. Y. Suppl. 62.

57. *Chase v. Tingdale Bros.*, 127 Minn. 401, 149 N. W. 654.

58. See *Martin v. Carruthers* (Colo.), 195 Pac. 105; *Ricker v. Gray*, 118 Me. 492, 107 Atl. 295; *Flynt v. Fondern* (Miss.), 84 So. 188; *Columbia Taxicab Co. v. Roemmich* (Mo. App.), 208 S. W. 859.



"seasonably."<sup>59</sup> Such a requirement is held to mean that each should turn to the right in such season that neither shall be retarded by reason of the other's occupying his half of the way.<sup>60</sup> It is not always necessary that the traveler turn out so far that his vehicle is entirely on the right side of the center line of the highway; but, in some cases, if he turns far enough so that the other vehicle may pass safely, it may be held that compliance has been made with the statute.<sup>61</sup> Ordinarily, the driver of a team will not be regarded as negligent in failing to turn out further, where there is already sufficient space to allow an automobilist to pass in safety.<sup>62</sup> But a verdict against the defendant is warranted by evidence showing that he was driving upon the wrong side of the road, at an excessive rate of speed, and did not turn to the right in time to avoid a collision with the plaintiff.<sup>63</sup> Where it appears that plaintiff's carriage at the time of a collision with an automobile was moving slowly within about a foot of the right-hand side of the road and was lighted with lamps on each side; and that defendant's automobile coming at a high rate of speed from the opposite direction ran into the carriage without any warning of any kind, the negligence of the defendant is properly submitted to the jury.<sup>64</sup>

**Sec. 375. Turning to right to pass approaching vehicle — violation of law of road not negligence per se.**

The failure of the driver of a vehicle to turn to the right upon meeting another vehicle on the highway, is not generally negligence *per se*,<sup>65</sup> though decisions are to be found holding such conduct to be negligence as a matter of law.<sup>66</sup> On the

59. *Peters v. Cuneo*, 123 N. Y. App. Div. 740, 108 N. Y. Suppl. 264.

60. *Morrison v. Clark*, 196 Ala. 670, 72 So. 305; *Neal v. Randall*, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 668; *Bragdon v. Kellogg* (Me.), 105 Atl. 433.

61. *Buxton v. Ainsworth*, 138 Mich. 532, 101 N. W. 817, 11 Det. Leg. N. 684, 5 Ann. Cas. 146.

62. *Savoy v. McLeod*, 111 Me. 234, 88 Atl. 721, 48 L. R. A. (N. S.) 971.

63. *Lloyd v. Calhoun*, 78 Wash. 438,

139 Pac. 231.

64. *Milliman v. Appleton*, 139 N. Y. App. Div. 738, 124 N. Y. Suppl. 482.

65. *Morrison v. Clark*, 196 Ala. 670, 72 So. 305; *Needy v. Littlejohn*, 137 Iowa, 704, 115 N. W. 483; *Neal v. Randall*, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 668. See also *Hubbard v. Bartholomew*, 163 Iowa, 58, 140 N. W. 13. And see section 267.

66. See sections 267, 297.

contrary, as a general rule, a question of the defendant's negligence remains one for the jury.<sup>67</sup> Thus, in an action to recover for injuries alleged to have been caused by the defendant's failure to give the plaintiff's buggy half of the road, it has been held that, if the plaintiff's horse and buggy were outside of the traveled road, the defendant need not give one-half of the road, but could run his automobile on the traveled path, provided there was room to pass and the plaintiff's horse had shown no signs of fright.<sup>68</sup> Properly considered, the rule of the road is a rule of negligence, and the fact that a person was on the wrong side of the road when a collision took place, does not *per se* make him liable for damages, but his liability is determined by the rules of law applicable to cases of negligence.<sup>69</sup> A presumption of negligence may arise when the defendant is on the wrong side of the highway,<sup>70</sup> but the presumption is one which may be rebutted by evidence showing a sufficient reason for the deviation from the usual custom.<sup>71</sup> Indeed, the circumstances may be such that the defendant would have been deemed guilty of negligence had he not diverted his automobile to the left of the center of the highway.<sup>72</sup>

**Sec. 376. Turning to right to pass approaching vehicle — presumption of negligence from violation of law of road.**

Where a collision occurs between two vehicles meeting each other on a road whose width is adequate to permit a safe passage, a presumption arises that the traveler on the wrong side of the road is guilty of negligence, and a burden of ex-

67. *Needy v. Littlejohn*, 137 Iowa, 704, 115 N. W. 482; *McFern v. Gardner*, 121 Mo. App. 1, 97 S. W. 972.

68. *Needy v. Littlejohn*, 137 Iowa, 704, 115 N. W. 483.

69. *Alabama*.—See *McCray v. Sharpe*, 188 Ala. 375, 66 So. 441.

*Kansas*.—*Giles v. Ternea*, 93 Kans. 140, 143 Pac. 491.

*Maine*.—*Palmer v. Berker*, 11 Me. 338; *Neal v. Randall*, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 668.

*Massachusetts*.—*Parker v. Adams*, 12 Metc. 416; *Rice v. Lowell Buick Co.*, 229 Mass. 53, 118 N. E. 185.

*New Hampshire*.—*Brooks v. Hart*, 14 N. H. 307; *Taylor v. Thomas*, 77 N. H. 410, 92 Atl. 740.

*Compare* *Cool v. Peterson*, 189 Mo. App. 717, 175 S. W. 244.

70. Section 267.

71. Sections 270-274.

72. Section 275.

planation is placed on him to show facts excusing his failure to travel on the proper side of the road.<sup>73</sup> In other words, the act of traveling on the wrong side of the highway is *prima facie* evidence of negligence.<sup>74</sup> If the violation of the law is unexplained, however, it may afford conclusive evidence of carelessness.<sup>75</sup> This rule is especially forceful in case of an accident happening in the dark.<sup>76</sup> It is proper for the presiding judge to charge that the presumption is against the party who was on the wrong side of the street at the time of the accident.<sup>77</sup>

**Sec. 377. Turning to right to pass approaching vehicle — rebuttal of presumption of negligence from violation.**

The presumption that the one on the wrong side of the highway is guilty of negligence, is one which may be rebutted.<sup>78</sup>

**73. California.**—Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90; Stohlman v. Martin, 28 Cal. App. 338, 152 Pac. 319; Shupe v. Rodolph, 197 Pac. 57.

**Iowa.**—Baker v. Zimmerman, 179 Iowa, 272, 161 N. W. 479.

**Maine.**—Stobie v. Sullivan, 118 Me. 483, 105 Atl. 714.

**Massachusetts.**—Perlstein v. American Export Co., 177 Mass. 730, 59 N. E. 194.

**Michigan.**—Daniels v. Clegg, 38 Mich. 32; Buxton v. Ainsworth, 138 Mich. 532, 101 N. W. 817, 11 Det. Leg. N. 684, 5 Ann. Cas. 177.

**Missouri.**—Columbia Taxicab Co. v. Roemmich (Mo. App.), 208 S. W. 859.

**New Hampshire.**—Brooks v. Hart, 14 N. H. 307.

**New York.**—Clarke v. Woop, 159 N. Y. App. Div. 437, 144 N. Y. Supp. 595.

**Pennsylvania.**—Presser v. Dougherty, 239 Pa. St. 312, 86 Atl. 854.

And see section 267.

**74. Illinois.**—Frank C. Weber Co. v. Stevenson Grocery Co., 194 Ill. App.

432; Yellow Cab Co. v. John G. Carlson, 211 Ill. App. 299.

**Maine.**—Bragdon v. Kellogg, 105 Atl. 433.

**Massachusetts.**—Spofford v. Harlow, 3 Allen, 176; Steele v. Burkhardt, 104 Mass. 59. See also Perlstein v. American Exp. Co., 177 Mass. 530, 59 N. E. 194, 52 L. R. A. 959.

**Montana.**—Savage v. Boyce, 53 Mont. 470, 164 Pac. 887.

**New York.**—Burdick v. Worrall, 4 Barb. (N. Y.) 596.

**Pennsylvania.**—Compare Foot v. American Produce Co., 195 Pa. St. 190; 45 Atl. 934, 49 L. R. A. 764.

**Rhode Island.**—Angell v. Lewis, 20 R. I. 391, 39 Atl. 521.

**75.** Martin v. Carruthers (Colo.), 195 Pac. 105; Bragdon v. Kellogg (Me.), 105 Atl. 433.

**76.** Angell v. Lewis, 20 R. I. 391, 39 Atl. 521.

**77.** McGee v. Young, 132 Ga. 606, 61 S. E. 689.

**78.** Morrison v. Clark, 196 Ala. 670, 72 So. 305; Riepe v. Elting, 89 Iowa, 82, 56 N. W. 285, 26 L. R. A. 769;

A deviation from the usual custom is often proper, and is sometimes necessary,<sup>79</sup> for a too rigid adherence to the rule, when an injury might have been averted by an exercise of reasonable care in a variance, may render a traveler liable.<sup>80</sup> Circumstances may be such that owing to the condition of the road or street, the situation of other vehicles or the occurrence of a sudden emergency, that a driver who turns to the wrong side of the road will be regarded as justified in adopting the course thus pursued.<sup>81</sup> Thus, the driver of an automobile has been permitted to turn to the left for the purpose of avoiding a collision.<sup>82</sup> Likewise, if one is obliged by reason of an obstacle in the road to go to the wrong side of the highway, and his vehicle there collides with another

*Rice v. Lowell Buick Co.*, 229 Mass. 53, 118 N. E. 185. And see sections 270-274.

79. *Turley v. Thomas*, 8 Carr. & Payne (Eng.) 103. "But it is not to be understood that we intend to hold that the fact that the driver of a motor vehicle may violate the statute by driving on the wrong side of the road or street is itself necessarily an act of negligence in all cases. He might for a sufficient reason be compelled to drive on the left of the center of the road or street, and do so in such manner as to leave to approaching vehicles, pedestrians, or animals ample opportunity to pass with perfect safety to themselves, in which case, if damage occurred by collision with his vehicle, the question as to whose negligence was directly responsible therefor would depend for its solution upon the other circumstances attending the accident. In brief, and in other words, the fact that he was driving over the highway on the left of the center of the roadway might, where injury to another had resulted therefrom, constitute *prima facie* evidence of negligence, but it would amount to no more than that, and its evidentiary effect might properly be overcome or dispelled by other evi-

dence." *Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319.

80. *United States*.—*Allen v. Mackey*, 1 Sprague (U. S.) 219. *The Commerce*, 3 W. Rob. 295.

*California*.—*Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319.

*Kentucky*.—*Johnson v. Small*, 5 B. Mon. (Ky.) 25.

*Massachusetts*.—*Smith v. Gardner*, 11 Gray (Mass.) 418.

*Missouri*.—*Hayden v. McColly*, 166 Mo. App. 675, 150 S. W. 1132.

*New Hampshire*.—*Brooks v. Hart*, 14 N. H. 307.

*Wisconsin*.—*O'Malley v. Dorn*, 7 Wis. 236.

81. *Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319; *Foster v. Curtis*, 213 Mass. 79, 99 N. E. 961; *Shelly v. Norman* (Wash.), 195 Pac. 243.

82. *Bragdon v. Kellogg* (Me.), 105 Atl. 433; *Columbia Taxicab Co. v. Roemmich* (Mo. App.), 208 S. W. 859; *Stack v. General Baking Co.* (Mo.), 223 S. W. 89; *Clarke v. Woop*, 159 N. Y. App. Div. 437, 144 N. Y. Suppl. 595. But where the collision would not have occurred had not one of the parties turned to the left, the violation of the law of the road is no excuse, though he thought that the driver of the other

without his fault, he is not necessarily liable.<sup>83</sup> So, where the driver of an automobile turned a curve at a high rate of speed, it has been held that there could be no recovery for injuries caused by a collision with another automobile, even though the latter was on the wrong side of the highway, it appearing that such driver knew that automobiles were liable to be on such side in order to avoid rough stone and gravel on the other side.<sup>84</sup> And, where the plaintiff, acting as a reasonably prudent man, turns to the left, owing to the negligent operation by the defendant of his automobile, he may be held to be excused from obeying the law of the road.<sup>85</sup> A statute requiring vehicles to keep to the right of the center of the street has no application where a vehicle, through no fault of its driver, skids on a slippery pavement, and is thrown across the center line.<sup>86</sup> A deviation from the rule is also frequently necessary in the crowded streets of a large city.<sup>87</sup> And, it has been said that, when a light vehicle passes one heavily laden, the former should yield to the latter.<sup>88</sup> One vehicle may generally occupy any part of the road, so long as that particular portion is not being used or sought to be used by another;<sup>89</sup> but a person not having his vehicle in position so that he can properly pass other travelers, is bound to use more care and caution against collision with another vehicle he might chance to meet, than if he were pursuing his course according to the law of the road.<sup>90</sup> And, when the other vehicle approaches,

conveyance did not intend to turn out, there being sufficient room to the right to escape a collision. *Lloyd v. Calhoun*, 82 Wash. 35, 143 Pac. 458, overruling 78 Wash. 438, 139 Pac. 231.

83. *Strouse v. Whittlesey*, 41 Conn. 559.

84. *Wheeler v. Wall*, 157 Mo. App. 38, 137 S. W. 63.

85. *Columbia Taxicab Co. v. Roemich* (Mo. App.), 208 S. W. 859; *Lloyd v. Calhoun*, 78 Wash. 438, 139 Pac. 231.

86. *Chase v. Tingle Bros.*, 127 Minn. 401, 149 N. W. 654.

87. *Wayde v. Carr*, 2 Dow. & Ry. 255.

88. See *Lee v. Foley*, 113 La. 663, 37 So. 594.

89. *Morrison v. Clark*, 196 Ala. 670, 72 So. 305; *Baker v. Zimmerman*, 179 Iowa, 272, 161 N. W. 479; *Buzich v. Todman* (Iowa), 162 N. W. 259; *Parker v. Adams*, 12 Mete. (Mass.) 403; *Daniel v. Clegg*, 38 Mich. 32.

90. *New York Transp. Co. v. Gar-side*, 157 Fed. 521, 85 C. C. A. 285; *Fahrney v. O'Donnell*, 107 Ill. App. 608; *Angell v. Lewis*, 20 R. I. 391, 39 Atl. 521; *Pleckell v. Wilson*, 5 Carr. & Payne (Eng.) 103.

he must usually turn to his own side of the road,<sup>91</sup> for, in taking the wrong side of the highway he might be held to have assumed the risk of consequences accruing from his inability to get out of the way of a vehicle on the right side of the street.<sup>92</sup> The fact that it was dark so that the driver of an automobile could not see an approaching vehicle, does not excuse his failure to drive on the proper side of the street; on the contrary, the darkness is more an aggravating than a mitigating circumstance, for, when it is so dark that the driver of a motor vehicle cannot see but a short distance ahead the situation calls for unusual care.<sup>93</sup> And, if one gives up the entire beaten track of the road to another traveler, he is not chargeable with negligence because he is on the left side of the highway.<sup>94</sup>

**Sec. 378. Turning to right to pass approaching vehicle — obedience to law of road does not excuse negligence.**

The mere fact that the driver of an automobile is on the right side of the road does not necessarily determine the presence or absence of negligence on his part. The law does not allow a person on the right side of the street to run down everything in his path. The speed of the automobile and other surrounding circumstances are all to be considered on the question of his negligence.<sup>95</sup> Thus, though one has turned to his side of the highway when meeting another vehicle, an issue may remain for the jury as to whether reasonable care does not require that he should have turned out farther and thus have avoided the collision.<sup>96</sup>

91. *Parker v. Adams*, 12 Mete. (Mass.) 403; *Daniel v. Clegg*, 38 Mich. 32.

92. *Fahrney v. O'Donnell*, 107 Ill. App. 608.

93. *Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319.

94. *Baker v. Zimmerman*, 179 Iowa, 272, 161 N. W. 479.

95. *Hoover v. Reichard*, 63 Pa. Super. Ct. 517. See also *Walker v. Lee* (N. Car.) 106 S. E. 682.

96. *Wing v. Eginton*, 92 Conn. 336, 102 Atl. 655.

### Sec. 379. Turning to right to pass approaching vehicle — treble damages under statute.

The plaintiff, in order to recover treble damages under a statute, providing that drivers of any vehicles "for the conveyance of persons" meeting each other in a highway shall turn to the right and slacken speed, and any driver of such vehicle who shall, by failure to do so, drive against another vehicle, shall pay to the party injured treble damages, must show by the complaint, as well as evidence, that the defendant was driving such a vehicle; and a mere description of the vehicle as a wagon or team is insufficient.<sup>97</sup>

### Sec. 380. Overtaking and passing — in general.

Persons traveling along a street or highway in the same direction, should exercise ordinary care to avoid injury to each other.<sup>98</sup> The rear machine until it gives a signal of a desire to pass, should remain behind sufficiently far that a collision will not result from the swerving or slowing of the forward car.<sup>99</sup> The fact that the driver of the rear vehicle did not give any warning of his approach, and attempts to pass without warning, may be considered a failure of the duty to exercise reasonable care.<sup>1</sup> And negligence may generally be inferred where the driver of an automobile col-

97. *Rowell v. Crothers*, 75 Conn. 124, 52 Atl. 818.

98. *Arkansas*.—*Bennett v. Snyder*, 227 S. W. 402.

*California*.—*Furtado v. Bird*, 26 Cal. App. 153, 146 Pac. 58.

*Delaware*.—*Simeone v. Lindsay*, 6 Pen. 224, 65 Atl. 778.

*Georgia*.—*Rouche v. McCloudy*, 19 Ga. App. 558, 91 S. E. 999.

*Kansas*.—*Arrington v. Horner*, 88 Kan. 817, 129 Pac. 1159.

*Kentucky*.—*Moore v. Hart*, 171 Ky. 725, 188 S. W. 861.

*Louisiana*.—*Holtz v. Lange*, 148 La. —, 88 So. 245.

*Missouri*.—*Marshall v. Taylor*, 168 Mo. App. 240, 153 S. W. 527; *Schmitt v. Standard Oil Co.* (Mo. App.), 221

S. W. 389.

*New Jersey*.—*Decou v. Dexheimer*, 73 Atl. 49.

*Pennsylvania*.—*Piper v. Adams Exp. Co.*, 113 Atl. 562; *Wolleston v. Park*, 47 Pa. Super. Ct. 90.

*Rhode Island*.—*O'Donnell v. Johnson*, 90 Atl. 165; *Rogers v. Mann*, 70 Atl. 1057.

*Washington*.—*Cloherly v. Griffiths*, 82 Wash. 634, 144 Pac. 912.

*Wisconsin*.—*Olson v. Holway*, 152 Wis. 1, 139 N. W. 422; *Mahar v. Lochen*, 166 Wis. 152, 164 N. W. 847.

99. *Spencer v. Magrini* (Wash.), 195 Pac. 1041.

1. *Moore v. Hart*, 171 Ky. 725, 188 S. W. 861. And see section 329, as to warning of approach.

lides with the rear of a carriage which could have been seen a considerable distance away.<sup>2</sup> It is no excuse that the autoist miscalculated the space within which he attempted to pass.<sup>3</sup> Ordinary care in passing a conveyance upon a good wide improved highway in the summer season, is an entirely different rule from that of passing a conveyance in the winter season over a slippery, contracted and drifted road, with sudden, abrupt and uneven surfaces.<sup>4</sup> In the case of two cars traveling in the same direction the front one has the superior right and may maintain its position in the center of the highway if there is sufficient space on its left, as prescribed by statute, to enable the approaching car safely and conveniently to pass. If the position of the forward car in the center of the highway does not leave such room for passage, then it must, upon request or equivalent notice, if practicable and safe, so turn aside as to leave such room for passage. If at the moment there is not sufficient room in which it can do this, it is its right, and it is the duty of the rear car, to wait until a place is reached where this may be done.<sup>5</sup> An automobile has no

2. *Shaver v. Smith*, 179 Ky. 26, 200 S. W. 8; *Decou v. Dexheimer* (N. J. L.), 73 Atl. 49; *Pratt v. Burns*, 189 N. Y. App. Div. 33, 177 N. Y. Suppl. 817.

3. *Shaver v. Smith*, 179 Ky. 26, 200 S. W. 8. "The automobile was approaching the wagon from the rear. It does not appear that the wagon suddenly pulled in front of the automobile. The driver had the machine under perfect control. It was broad daylight, and the position of the wagon was known to the driver of the machine. Under these circumstances the machine collided with the wagon, and the only excuse that the driver of the machine offered is that the wagon was in the way, and he miscalculated the distance between his machine and the wagon. Even if the wagon was on the wrong side of the road and in the way, this did not give to the driver of the machine the right to run against the

wagon. Under the circumstances he should have stopped his car and requested the driver of the wagon to turn out, rather than keep on driving and come in collision with him. . . . On the other hand, if he ran into the wagon merely because he miscalculated the distance, there can be no question that the collision was due to his fault. Since the driver was under the duty to use ordinary care to avoid coming into contact with the wagon, and since the uncontradicted evidence shows that he failed to use such care, we conclude that the trial court should have directed the jury to find for plaintiff, and have left to the jury only the question of damages under a proper instruction." *Shaver v. Smith*, 179 Ky. 26, 200 S. W. 8.

4. *Burnham v. Butler*, 31 N. Y. 480.

5. *Mark v. Fritsch*, 195 N. Y. 282, 88 N. E. 380, 22 L. R. A. (N. S.) 632,



right to assume that the forward conveyance will turn out to permit him to pass.<sup>6</sup> He cannot drive his car ahead and take the chance that the forward vehicle will move to one side in time to permit him to make a safe passage.<sup>7</sup> If the driver ahead does not move so as to afford the faster vehicle an opportunity to pass, the latter must slacken his speed so as to avoid the danger of a collision, even bringing it to a stop if necessary.<sup>8</sup> It is sometimes laid down as a rule that he who attempts to pass another in the highway going in the same direction, has the right to do so in such a manner as may be most convenient under the circumstances, and if damage result to the person passed, the former must answer for it, unless the latter by his own recklessness or carelessness brought the disaster upon himself.<sup>9</sup> This general rule has been held applicable, not only where both vehicles are moving, but also when one attempts to pass a vehicle standing in the street.<sup>10</sup> After turning to the left and moving past the forward vehicle, the driver of the faster conveyance should not turn back towards the right until he has proceeded far enough so that the turn can be made with safety.<sup>11</sup>

### **Sec. 381. Overtaking and passing — forcing forward vehicle in dangerous situation.**

Where an automobile approaches another car at the rear without warning and attempts to pass at an excessive speed, and turns so close to the forward car as to force it over the bank at the side of the road, the driver of the approaching

affirming 126 App. Div. (N. Y.) 920, 110 N. Y. Suppl. 1137, per Hiscock, J.

6. O'Donnell v. Johnson, 36 R. I. 308, 90 Atl. 165.

7. Hoppe v. Peterson, 165 Wis. 200, 161 N. W. 738.

8. Morrison v. Clark, 196 Ala. 670, 72 So. 305; Furtado v. Bird, 26 Cal. App. 153, 146 Pac. 58; Shaver v. Smith, 179 Ky. 26, 200 S. W. 8.

9. Altenkirch v. National Biscuit Co., 127 N. Y. App. Div. 307, 111 N. Y. Suppl. 284. See also Menard v. Lus-

sier, 50 Que. S. E. (Canada) 159.

10. Altenkirch v. National Biscuit Co., 127 N. Y. App. Div. 307, 111 N. Y. Suppl. 284.

11. House v. Fry, 30 Cal. App. 157, 157 Pac. 500; Moreno v. Los Angeles Transfer Co. (Cal. App.), 186 Pac. 800; Shepherd v. Marston (Me.), 109 Atl. 387; Sebastine v. Haney, 68 Pitts. Leg. Journ. (Pa.) 100; Howarth v. Barrett (Pa.), 112 Atl. 536. And see section 253.

car may be liable though the actual impact was without sufficient momentum to force the car over the bank.<sup>12</sup>

### **Sec. 382. Overtaking and passing — law of the road.**

In England when one vehicle overtakes another, the rule of the road requires that the forward vehicle move toward the left side of the road, and that the rear vehicle pass to the right. In this country, however, the general practice is to the contrary, and it is now generally enacted by statute that the rear conveyance shall pass on the left side of forward vehicle.<sup>13</sup> And a corresponding duty is placed upon the driver of the forward conveyance to turn towards the right so as to give free opportunity for passage; but this duty is not generally imposed unless the road is sufficiently wide to give a reasonable opportunity for passage and unless the driver of the forward vehicle knows or should know the wishes of the rear driver in respect to passing.<sup>14</sup> Statutory enactments of this nature are not generally applicable as between an automobile and a pedestrian upon the highway.<sup>15</sup> But they may be construed as affecting the right of the driver of an automobile in passing a street car; and, if the driver goes on the wrong

12. *Granger v. Farrant*, 179 Mich. 19, 146 N. W. 218, wherein it was said: "It is true that the evidence on the part of the plaintiff sought to show that the defendant's car collided with the car in which the plaintiff was riding. But the evidence of the plaintiff was not confined to the claim that, by reason of the collision, the car in which the plaintiff was riding was forced or pushed over the embankment. We think it was material for the plaintiff to show that the defendant was operating his car at an unreasonable and unlawful rate of speed, and that, without notice or warning, he came upon and passed the Skinner car, and forced his car across and in front of the Skinner car, in such a manner as to disconcert the driver, and cause his car to go over the embankment, to the injury of the plaintiff; and that defendant might be li-

able, even if the jury should have found that the impact was not sufficient to forcibly throw the Skinner car out of its course."

13. *Hamilton, Harris & Co. v. Larimer*, 183 Ind. 429, 105 N. E. 43; *Manceaux v. Hunter Canal Co.*, 148 La. —, 86 So. 665; *Pannell v. Allen*, 160 Mo. App. 714, 142 S. W. 482; *Unwin v. State*, 73 N. J. L. 529, 64 Atl. 163, affirmed *State v. Unwin*, 75 N. J. L. 500, 68 Atl. 110. See also *Schaffer v. Miller*, 185 Iowa, 472, 170 N. W. 787. And see section 252.

14. *Morrison v. Clark*, 196 Ala. 670, 72 So. 305; *Dunkelbeck v. Meyer*, 140 Minn. 283, 167 N. W. 1034; *Piper v. Adams Exp. Co. (Pa.)*, 113 Atl. 562; *Hoppe v. Peterson*, 165 Wis. 200, 161 N. W. 738.

15. *Brown v. Thayer*, 212 Mass. 392, 99 N. E. 237.

side, the violation of the rule of the road may be considered as evidence of negligence.<sup>16</sup> A regulation of this nature does not necessarily prohibit one from driving a team and wagon along the left side of the road, but may merely require its driver to turn to the right when he is overtaken by one who indicates a desire to pass.<sup>17</sup> A regulation requiring a traveler to keep to the right of the center of the highway or to turn to the right upon meeting another traveler, is held inapplicable to the situation where one traveler overtakes another and wishes to pass.<sup>18</sup> Conversely, a statute relative to the conduct of drivers in overtaking and passing vehicles on the highway is not applicable to vehicles meeting and passing.<sup>19</sup> Under modern statutes, it is sometimes required that the driver of the rear vehicle shall give a signal of his intention to pass.<sup>20</sup>

### Sec. 383. Overtaking and passing — effect of violation of law of road.

The violation of the law of the road in passing a forward traveler on the wrong side is generally held not to be negligence *per se*;<sup>21</sup> for the guilty party may furnish some reason for his acts which will excuse his violation of the rule. The violation is generally considered to raise a presumption of negligence on the part of the guilty driver, but the presumption is one which may be rebutted by evidence showing that the variance from the rule was justified by the surrounding circumstances.<sup>22</sup> Where one driving on the right-hand side of a wide road is overtaken by an automobile, which strikes one of the rear wheels of his wagon, a clear case of negligence is established.<sup>23</sup>

16. McGourty v. DeMarco, 200 Mass. 57, 85 N. E. 891.

17. Pens v. Kreiter, 98 Kans. 759, 160 Pac. 200.

18. Smoak v. Martin, 108 S. Car. 472, 94 S. E. 869.

19. Morrison v. Clark, 196 Ala. 670, 72 So. 305; Zellmer v. McTague, 170 Iowa, 534, 153 N. W. 77.

20. Dunkelbeck v. Meyer, 140 Minn.

283, 167 N. W. 1034. And see section 264.

21. Foster v. Curtis, 213 Mass. 79, 99 N. E. 961, Ann. Cas. 1913E 1116; Granger v. Farrant, 179 Mich. 19, 146 N. W. 218; Mahar v. Lochen, 166 Wis. 152, 164 N. W. 847.

22. Sections 267-274.

23. Salinen v. Ross, 185 Fed. 997; Decon v. Dexheimer (N. J. L.), 73 Atl. 49.

**Sec. 384. Overtaking and passing — reading statute to jury.**

Where a statute provides that if a person traveling on a highway is informed that another person traveling in the same direction desires to pass him, he shall turn to the right, if there is sufficient room to enable him to do so, it has been held in an action for injuries sustained by the plaintiff, owing to her horse having been frightened by the defendant's automobile, when the defendant was attempting to pass the plaintiff going in the same direction after having given warning, that it is not error for the court to read the statute to the jury.<sup>24</sup>

**Sec. 385. Overtaking and passing — collision with second vehicle after passing first.**

When the driver of an automobile overtakes a slower conveyance and turns and passes the same on the left, he must exercise due care to avoid a third vehicle coming from the opposite direction.<sup>25</sup> Unless the street is sufficiently wide, the overtaking automobile is, considered from the point of view of a vehicle approaching from the other direction, on the wrong side of the highway. Due care would seem to require that one should not pass a traveler in front at a time when the passage will bring him into danger of collision with another vehicle.<sup>26</sup> He is not entitled to pass a vehicle on the left at the risk of other vehicles which have equal rights and which are coming from the other direction.<sup>27</sup>

24. *Nadeau v. Sawyer*, 73 N. H. 70, 59 Atl. 369.

25. Section 254.

26. *Nafziger v. Mahan* (Mo. App.), 191 S. W. 1080.

27. *Smith v. Barnard*, 82 N. J. L. 468, 81 Atl. 734, wherein it was said: "Returning to the nonsuit, the situation was this: Plaintiff's wagon on the right of the road going east, compelled to turn out slightly to the left by a wagon standing at the south curb, and in the act of passing the peddler's wagon, which was going west and about in the middle of the road; defendant's

automobile directly behind the peddler's wagon, which obstructed defendant's view. From this and from the fact as the jury might have found, that the automobile turned rather sharply to the left, struck the left fore wheel of plaintiff's wagon at an angle, as testified, and with enough force to throw all three occupants out of it and kill one of them, it was entirely open to the jury to infer that defendant had 'failed to keep a proper lookout and have his automobile under proper control;' and that if he had done either, the accident would not have resulted. As has been

Where an automobilist, on overtaking and attempting to pass two heavily loaded trucks on a road, drove his automobile between the rear truck and a passing carriage, cleared the rear truck, and struck the head one, resulting in injury to himself and his automobile, and the drivers of the trucks had stopped their horses to rest them, and the head truck was nearer the center of the road than the other and because it was dark and the road curved sharply and was on a grade, the automobilist's lights did not disclose the trucks until he was upon them, it was held that the accident was caused by the automobilist's own negligence.<sup>28</sup>

**Sec. 386. Overtaking and passing — unexpected stop of forward car.**

The driver of a vehicle may be charged with negligence, if he suddenly stops his conveyance so that a vehicle proceeding closely behind is unable to avoid a collision.<sup>29</sup> In case of a collision under such circumstances, the negligence of both parties is a question within the province of the jury.<sup>30</sup> Statutes and municipal ordinances in many cases require the driver of the forward conveyance to indicate his intention of bringing his car to a stop;<sup>31</sup> and a violation of such a regulation may form a basis for a charge of negligence.<sup>32</sup> Where an automobile is passing over the street in front of another motor vehicle and sufficiently near to render a collision probable or possible in case it should suddenly stop, it would seem that due care would require that some warning be given to indicate such an intention. So, where an automobile passed another and after

said, if the defendant's duty was to pass the peddler's wagon on the left, he was not entitled to do so entirely at the risk of other vehicles with rights equal to his own and which, coming from the opposite direction, had primarily at least as much right as he to utilize the space to the south of the peddler's wagon. As to such vehicles a duty of reasonable care rested upon him to discover and avoid them; and whether he exercised such care, under the circumstances, was a question for

the jury."

28. *Lorenze v. Tisdale*, 127 App. Div. (N. Y.) 433, 111 N. Y. Suppl. 173.

29. *Strever v. Woodward*, 178 Iowa, 30, 158 N. W. 504.

30. *Scott v. O'Leary*, 157 Iowa, 222, 138 N. W. 512; *Earle v. Pardington*, 116 N. Y. Suppl. 675.

31. Section 264.

32. *Clark v. Weathers*, 178 Iowa, 97, 159 N. W. 585.

coming in front of it suddenly stopped, causing a collision, evidence of a custom to give warning of such intention was held to be properly received as bearing upon the question of the exercise of due care.<sup>33</sup> The act of the driver of an automobile, who, while driving twenty-five feet from the curb in violation of a traffic ordinance, twice gives a stop signal, but stops only after the second one, constitutes such negligence as precludes the owner of the auto from a recovery of dam-

33. *O'Neil v. Potts* (Minn.), 153 N. W. 856. The court said in this connection: "This evidence of the custom does not appear to have been offered to show that drivers of automobiles were bound by the practice. Defendant insisted that it was proof of what the ordinary driver does under like circumstances, that it was evidence to go to the jury on the issue of negligence, and that it bore on the question as to whether or not plaintiff, Mrs. O'Neil, or the defendant or both had failed to exercise due care in driving their automobiles. The foundation laid and the proof of the custom were not in highest degree satisfactory, but we cannot say that there was not some evidence tending to show the custom of usual practice. The court admitted the testimony as bearing upon the question of ordinary care. The case was submitted to the jury under proper instructions. The court charged that: 'It is a question for the jury to determine whether, in the exercise of care and prudence, the plaintiff should have given any warning, or could have given any warning, or whether there was anything further she could have done to prevent the collision which she did not do. It is a question of fact for the jury to determine from all the evidence in the case.' There was no exception taken to this instruction, nor is it challenged as error. The learned trial judge submitted the case on the theory that every person operating an auto-

mobile must use that degree of care which a person of ordinary prudence would exercise under the same or similar circumstances, that in some situations greater care is required than in others, depending upon the dangers involved; that the care must be commensurate with the danger, and that the failure to exercise such care is negligence. In submitting the case to the jury on the question of Mrs. O'Neil's contributory negligence the court instructed the jury that the same rules and the same degree of care would be required on her part as would be required on the part of defendant, that it was her duty to use reasonable care under the circumstances, and that, whether or not she used reasonable care in the management of her car was a question for the jury to determine. . . . The evidence in relation to the custom is far from conclusive, but we cannot say that it was improperly admitted. The question as to whether a proper foundation was laid was largely in the discretion of the trial court. It was nowhere claimed that the custom was binding upon the plaintiff. It was introduced as evidence tending to show what was usually done by drivers of automobiles under similar circumstances. The failure to conform to the practice was not in itself want of ordinary care (*Texas & P. Ry. v. Behymer*, 189 U. S. 468; *Wabash Ry. v. McDaniels*, 107 U. S. 454)."

ages sustained by another car running into its rear.<sup>34</sup> In an action for damages for injury to an automobile in a collision claimed to have been caused by the defendant's turning sharply across the path of the plaintiff's automobile, thereby necessitating a similar turn by the latter and a consequent collision with a car in the rear, the questions of negligence and contributory negligence were held to be questions of fact.<sup>35</sup>

### Sec. 387. Overtaking and passing — passing near corner.

When two automobiles moving in the same direction are approaching an intersecting road or street, the driver of the rear car should consider that the driver of the forward car may desire to turn the corner into the intersecting street. If the forward car should turn to the left at the same time that the rear car should attempt to pass on the left, a collision is possible. It is now a matter of statute law in many jurisdictions that the driver of the forward vehicle, when wishing to turn a corner under such circumstances, shall give a signal of his intention.<sup>36</sup> The signal should be given although the driver of the forward car is unaware of the approach of the other car.<sup>37</sup> When a signal is given in accordance with the statute, and a collision nevertheless results, it is a question for the jury whether the parties are guilty of negligence.<sup>38</sup> In an action for damages due to the defendant's automobile colliding with the plaintiff's carriage, going in the same direction, the question whether the defendant was negligent in attempting to pass the plaintiff on the left, as the law provides, near a corner which they were approaching, when he knew that if the plaintiff should turn the corner a collision would occur, and that a delay of a few moments would show whether the plaintiff was to turn or not, was one for the jury.<sup>39</sup> Where the driver of a horse, before turning into an intersecting street, looks behind and sees the defendant's automobile one-

34. *Russell v. Kemp*, 95 Misc. (N. Y.) 582, 159 N. Y. Suppl. 865.      Pac. 660.

35. *Page v. Brink's Chicago City Express Co.*, 192 Ill. App. 389.

36. *Daly v. Case*, 88 N. J. L. 295, 95 Atl. 973.

37. *Litherbury v. Kimmet* (Cal.), 195

38. *Daly v. Case*, 88 N. J. L. 295, 95 Atl. 973.

39. See *Mendelson v. Van Rensselaer*, 118 App. Div. (N. Y.) 516, 103 N. Y. Suppl. 578.

fourth of a block away and going at between eighteen and twenty miles an hour, and is struck by the automobile when it attempts to pass on the side toward which he is driving, it is a question for the jury whether the accident is the result of the defendant's sole negligence.<sup>40</sup> In an action for injuries to a plaintiff's horse and buggy, where the evidence is conflicting as to whether the plaintiff was guilty of contributory negligence in driving on the left side of a street near a turn, it was held that the findings for the plaintiff were supported by evidence that the automobile struck the left side of the buggy before it had turned straight with the street.<sup>41</sup>

### Sec. 388. Turning corners — in general.

The driver of an automobile when turning a corner is bound to exercise due care not to cause injury to other travelers. The turning of a corner at a high rate of speed may justify the jury in charging the driver of an automobile with negligence.<sup>42</sup> Where one turns a corner on a wet pavement at such a speed that the automobile skids and a collision with another vehicle results from the skidding or from the attempt of the driver to straighten his course, the jury may properly charge the driver with negligence.<sup>43</sup> If the driver turns the corner at an excessive speed, he may be liable for injuries sustained in a collision with another vehicle, though the collision would not have happened had there not been children in the street whom the driver tried to avoid, for the jury may properly find that the excessive speed was a proximate cause of the collision.<sup>44</sup> The course to be pursued around a corner is now generally prescribed by statute or municipal ordinance, and the requirements should be obeyed.<sup>45</sup>

40. *Hallisey v. Rothschild & Co.*, 203 Ill. App. 283.

41. *Schoening v. Young*, 55 Wash. 90, 104 Pac. 132.

42. *Wright v. Young*, 160 Ky. 636, 170 S. W. 25; *MacDonald v. Kusch*, 188 N. Y. App. Div. 491, 176 N. Y. Suppl. 823; *Calahan v. Moll*, 160 Wis. 523, 152

N. W. 179. And see section 308.

43. *Wright v. Young*, 160 Ky. 636, 170 S. W. 25. And see section 338.

44. *Conlon v. Trenkhorst*, 195 Ill. App. 335.

45. *City of Oshkosh v. Campbell*, 151 Wis. 567, 139 N. W. 316.



**Sec. 389. Turning corners — turning towards the right.**

When the driver of an automobile desires to turn to the right, his course is generally simple. His principal duties are to avoid pedestrians at the crosswalks and vehicles proceeding along the street into which he is turning. Statutory or municipal regulations may require him to keep a certain distance from the curb when turning the corner, or may require him to turn as close to the curb as possible.<sup>46</sup> Where an ordinance required a person driving an automobile, upon turning the corner of any street, "to leave a space of at least six feet from the curb and the . . . automobile," and it appeared that along the street a building was being erected and that debris had been piled at the corner around which a fence or barricade had been constructed, compelling pedestrians to leave the regular walk, step into the street and walk around the outside of the fence or barricade, it was held that such fence became the curb within the meaning of the ordinance.<sup>47</sup>

**Sec. 390. Turning corners — turning towards the left.**

One wishing to turn a corner towards the left must, not only exercise due care to avoid approaching vehicles, but must also use reasonable care to avoid a collision with a vehicle which is approaching from his rear and attempting to pass on the left side at the same time that he is moving toward the left to turn the corner. Moreover, he must take proper precautions for the avoidance of vehicles proceeding along the intersecting street. Municipal regulations and statutory enactments now generally prescribe the course to be followed by one turning toward the left at a street intersection. When so turning, the driver is generally forbidden to cut the corner, but must pass to the right of the center of the intersecting streets. The failure to obey such a requirement, if it is the proximate result of a collision with another vehicle, may preclude the guilty driver from recovering for his injuries on the theory of contributory negligence, and may render him liable

46. *Frank C. Weber Co. v. Stevenson Grocery Co.*, 194 Ill. App. 432.

47. *Domke v. Gunning*, 62 Wash. 629, 114 Pac. 436.

for the injuries sustained by the persons in the other vehicle.<sup>48</sup> Indeed, if no excuse is shown for the cutting of the corner and it is a proximate cause of a collision, a finding of negligence can hardly be avoided.<sup>49</sup> But the violation is not generally considered negligence as a matter of law.<sup>50</sup> The failure to make a wide turn may be excused when the condition of the highway makes such a turn impracticable or dangerous.<sup>51</sup> Where the primary cause of an automobile collision is the defendant's violation of the rules of the road by running on the wrong side of the road when approaching an intersecting road and cutting the corner at the intersection, he cannot evade the consequences of his negligence by setting up that the plaintiff, who originally was on the proper side of the cross street, swerved in the emergency to the wrong side of the cross street in an attempt to avoid the collision.<sup>52</sup> Where the defendant's automobile collided with the plaintiff's carriage in attempting to pass when the plaintiff was turning a corner, the question, whether the plaintiff's attempt to turn the corner by keeping to the left in the usual beaten path when the law required keeping to the right, was held to be a matter for the jury.<sup>53</sup>

**48. Arkansas.**—*Temple v. Walker*, 127 Ark. 279, 192 S. W. 200.

**Illinois.**—*Walker v. Hilland*, 205 Ill. App. 243.

**Massachusetts.**—*Rice v. Lowell Buick Co.*, 229 Mass. 53, 118 N. E. 185.

**Michigan.**—*Everhard v. Dodge Bros.*, 202 Mich. 48, 167 N. W. 953.

**Missouri.**—*Bricknell v. Williams*, 180 Mo. App. 572, 167 S. W. 607.

**New York.**—*Jacobs v. Richard Carvel Co.*, 156 N. Y. Suppl. 766; *MacDonald v. Kusch*, 188 N. Y. App. Div. 491, 176 N. Y. Suppl. 823.

**South Dakota.**—*Boll v. Gruesner*, 176 N. W. 517.

**Texas.**—*Zucht v. Brooks* (Tex. Civ. App.), 216 S. W. 684.

**Washington.**—*Hellan v. Supply Laundry Co.*, 94 Wash. 683, 163 Pac. 9; *Stubbs v. Molbergh*, 108 Wash. 89, 182 Pac. 936, 6 A. L. R. 318.

**49. Jacobs v. Richard Carvel Co.**, 156 N. Y. Suppl. 766.

**50. Temple v. Walker**, 127 Ark. 279, 192 S. W. 200. See also *Eberle Brewing Co. v. Briscoe Motor Co.*, 194 Mich. 140, 160 N. W. 440.

**51. Hamilton v. Young** (Iowa), 171 N. W. 694.

**52. Bain v. Fuller**, 29 D. L. R. (Canada) 113.

**53. Mendelson v. Van Rensselaer**, 118 N. Y. App. Div. 516, 103 N. Y. Suppl. 578.

**Sec. 391. Approaching intersecting streets — in general.**

In the absence of statute or municipal ordinance giving travelers in one direction special privileges, if two travelers are approaching each other at right angles, as a general rule, the rights of each are equal, and each is bound to exercise reasonable care to avoid injury to the other.<sup>54</sup> To succeed in an action for injuries arising from the collision, the plaintiff must show the negligence of the other party.<sup>55</sup> If the driver of each of the colliding vehicles is guilty of negligence contributing to the injury, neither can recover.<sup>56</sup> What is a proper degree of care may vary according to the circumstances of particular cases. Under some conditions, a speed which would not be considered excessive or even moderate under other circumstances, would be deemed reckless. If the street intersection is one which is much frequented by vehicles and pedestrians, a much greater degree of vigilance would be required than at one over which there was little traffic.<sup>57</sup> The degree of care which the driver must exercise is one which a reasonably prudent man would exercise under the same circumstances. A driver of a motor vehicle is bound to know that at street intersections other vehicles may approach to cross or to turn into the street along which he is traveling. He should, therefore, operate his car with that degree of care which is consistent with the existing conditions, the rate of

54. *California*.—*Bidwell v. Los Angeles, etc., R. Co.*, 169 Cal. 780, 148 Pac. 197.

*Illinois*.—*Hilton v. Iseman*, 212 Ill. App. 255.

*Indiana*.—*Elgin Dairy Co. v. Sheppard* (Ind. App.), 103 N. E. 433.

*Iowa*.—*Wagner v. Kloster*, 175 N. W. 840.

*Louisiana*.—*Shields v. Fairchild*, 130 La. 648, 58 So. 497.

*Minnesota*.—*Carson v. Turrish*, 140 Minn. 445, 168 N. W. 349.

*Missouri*.—*Warrington v. Byrd* (Mo. App.), 181 S. W. 1079.

*Nebraska*.—*Barrett v. Alamito Dairy Co.*, 181 N. W. 550.

*New Hampshire*.—*Gilbert v. Bur-*

*que*, 72 N. H. 521, 57 Atl. 927.

*New Jersey*.—*Erwin v. Traud*, 90 N. J. L. 289, 100 Atl. 184; *Paulsen v. Klinge*, 92 N. J. L. 99, 104 Atl. 95.

*New York*.—*Towner v. Brooklyn Heights R. Co.*, 44 N. Y. App. Div. 628, 60 N. Y. Suppl. 289; *Van Ingen v. Jewish Hospital*, 182 App. Div. 10, 169 N. Y. Suppl. 412.

*Pennsylvania*.—*Boggs v. Jewell Tea Co.*, 263 Pa. 413, 106 Atl. 781; *Brown v. Chambers*, 65 Pa. Super. Ct. 373.

And see sections 260-262.

55. *Bayles v. Phumb*, 141 N. Y. App. Div. 786, 126 N. Y. Suppl. 425.

56. *Bernardo v. Legaspi*, 29 Philippine Rep. 12.

57. Section 279.

speed and his control over the car varying according to the traffic at the particular place. 'He should keep a careful watch ahead so as to avoid injury to persons approaching in vehicles on the intersecting street.'<sup>58</sup> But if a driver, as a reasonable, cautious and prudent man, believes he can drive over the intersection before the other car reaches it, he is not negligent in undertaking to do so, and if the driver of the other car causes a collision by reason of his negligent speed, the latter may be liable.<sup>59</sup> The weather conditions, such as a blinding snow storm or a heavy rain, may affect the degree of care to be exercised.<sup>60</sup> Where there is an obstruction to an automobilist's view of a street crossing, he must exercise a degree of care such as a reasonably prudent man would exercise under the same circumstances, to avoid injury to pedestrians or other vehicles at the crossing.<sup>61</sup> The question of which of the parties was guilty of negligence, is generally for the jury.<sup>62</sup>

### Sec. 392. Approaching intersecting streets — crowded thoroughfares.

It is a fundamental rule in the law of negligence that the degree of care to be exercised is proportionate to the danger. Thus the operator of a motor vehicle when approaching an intersecting street where traffic is crowded must exercise a greater degree of alertness and care than when approaching

**58. Alabama.**—Ray v. Brauman, 196 Ala. 113, 72 So. 16.

**Iowa.**—Fisher v. Ellston, 174 Iowa, 364, 156 N. W. 422.

**Massachusetts.**—Newton v. McSweeney, 225 Mass. 402, 114 N. E. 667.

**Mississippi.**—Ulmer v. Pistole, 115 Miss. 485, 76 So. 522.

**Missouri.**—Rowe v. Hammond, 172 Mo. App. 203, 157 S. W. 880; Mitchell v. Brown (Mo. App.), 190 S. W. 354.

**Pennsylvania.**—McClung v. Pennsylvania Taximeter Cab Co., 252 Pa. St. 478, 97 Atl. 694; Bew v. John Daley, Inc., 260 Pa. 418, 103 Atl. 832.

**Not absolute control.**—A reasonable,

not an absolute, control of the automobile is required of the driver. Baldwin's Adm'r v. Maggard, 162 Ky. 424, 172 S. W. 674.

**59. Wagner v. Kloster (Iowa), 175 N. W. 840.**

**60. See section 278.**

**61. Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919.**

**62. Whattey v. Nesbitt (Ala.), 85 So. 550; Gustavson v. Hester, 211 Ill. App. 439; Rabinowitz v. Hawthorne, 89 N. J. L. 308, 98 Atl. 315; Mead Co., Inc. v. Products Mfg. Co., 110 Misc. (N. Y.) 648, 180 N. Y. Suppl. 641.**

a street in the more open or suburban sections of a city.<sup>63</sup> Indeed, where one of the intersecting streets is a main artery of traffic, the vehicle approaching from a street of minor importance should wait and give way to the traffic along the more crowded thoroughfare.<sup>64</sup> The rule of the equal rights of travelers at street intersections gives way in some cases to the imperative need not to interfere with the traffic along the congested way. But it has been held that, in the absence of positive regulation on the subject, it is not proper to show a custom giving priority to travelers on certain streets as against those on cross streets.<sup>65</sup> Where by ordinance, it is made unlawful for the driver of an automobile to pass over a crossing at a greater speed than four miles an hour, a bicyclist or person in another vehicle is entitled to the protection afforded thereby.<sup>66</sup>

### Sec. 393. Approaching intersecting streets — priority of first arrival.

When two vehicles are approaching a street intersection on different streets, neither is justified, as a general rule, in assuming that the other will slacken his speed so as to give him priority at the crossing.<sup>67</sup> When one sees that there is apparent danger of a collision, due care would seem to require that he decrease his speed; or, if both discover the danger at the same time, each should take steps to avoid the impending collision.<sup>68</sup> But, where a vehicle reaches a crossing distinctly ahead of one approaching on an intersecting street, the one first arriving is generally regarded as having the right of way.<sup>69</sup> If the later arrival proceeds neglectful of the other's

63. *Cecchi v. Lindsay*, 1 Boyce (Del.) 185, 75 Atl. 376, reversed *Lindsay v. Cecchi*, 3 Boyce (Del.) 133, 80 Atl. 523; *Grier v. Samuel*, 4 Boyce (Del.) 106, 86 Atl. 209.

64. *Monrufel v. B. C. Electric Co.*, 9 D. L. R. (Canada) 569.

65. *Carson v. Turrish*, 140 Minn. 445, 168 N. W. 349.

66. *Ludwigs v. Dumas*, 72 Wash. 68, 129 Pac. 903.

67. *Brown v. Chambers*, 65 Pa. Super. Ct. 373. And see section 260.

68. See *Elgin Dairy Co. v. Shepard* (Ind. App.), 103 N. E. 433; *Pascagoula St. Ry. & Power Co. v. McEachern*, 109 Miss. 380, 69 So. 185.

69. *Rump v. Keebles*, 175 Ill. App. 619; *Mayer v. Mellette*, 65 Ind. App. 54, 114 N. E. 241; *Barrett v. Alimite Dairy Co.* (Neb.), 550; *Rabinowitz v. Hawthorne*, 89 N. J. L. 308, 98 Atl.

rights and a collision ensues, the injury resulting may properly be attributed to the negligence of such later arrival.<sup>70</sup> It is the latter's duty to slacken his speed or stop his car so that a collision will not ensue.<sup>71</sup> Thus, if a wagon reaches a street crossing ahead of an automobile, it has the primary right to proceed across the street; and this is so although the driver of the wagon saw the automobile approaching, provided it was not so near that a collision would naturally be expected to follow. The driver of the wagon is under no duty to anticipate the negligence of the persons in the motor vehicle.<sup>72</sup> The rule granting priority to the first arrival is not in hostility to the principle of the equality of right in the streets. The principle of equality suggests the right of the first one at a crossing to use it. The right is not an absolute one exercisable arbitrarily or irrespective of the existence of other conditions, or without regard to the rights and safety of others. The principle is little, if anything, more than a convenient and usually fair rule for the guidance of travelers, and in no sense is it a fixed test of negligence. It must be exercised with decent respect to the rights of others and with due regard to the character of the travel and other conditions present.<sup>73</sup> The relative rights of travelers at street intersections may be modified by statutory or municipal regulation.<sup>74</sup>

#### **Sec. 394. Approaching intersecting streets — priority given by statute or ordinance.**

While under the common law rule travelers at intersecting streets have equal rights, with a priority given to one who

315; *McClung v. Pennsylvania Taximeter Cab Co.*, 252 Pa. St. 478, 97 Atl. 694; *Boggs v. Jewell Tea Co.*, 263 Pa. St. 413, 106 Atl. 781; *Brown v. Chambers*, 65 Pa. Super. Ct. 373; *Yuill v. Berryman*, 94 Wash. 458, 162 Pac. 513; *W. F. Jahn & Co. v. Paynter*, 99 Wash. 614, 170 Pac. 132.

70. *Rump v. Keebles*, 175 Ill. App. 619; *Rabinowitz v. Hawthorne*, 89 N. J. L. 308, 98 Atl. 315; *McClung v. Pennsylvania Taximeter Cab Co.*, 252

Pa. St. 478, 97 Atl. 694; *Yuill v. Berryman*, 94 Wash. 458, 162 Pac. 513.

71. *Yuill v. Berryman*, 94 Wash. 458, 162 Pac. 513.

72. *Robinson v. Clemons* (Cal. App.), 190 Pac. 203; *Barrett v. Alamito Dairy Co.* (Neb.), 181 N. W. 550; *Brown v. Chambers*, 65 Pa. Super. Ct. 373.

73. *Carson v. Turrish*, 140 Minn. 445, 168 N. W. 349.

74. Section 394.

reaches the intersection distinctly in advance of another, the rule may be changed by statute or municipal ordinance. A regulation may properly be enacted giving to travelers along one street the priority over those approaching along a cross street, the intention being to relieve the crowded condition of traffic along the street to which priority is given.<sup>75</sup> And, even where an advantage may not be grounded on the traffic conditions, modern regulations generally require the traveler to give way to one approaching an intersecting street on the right side.<sup>76</sup> One of the difficulties involved under such a regulation is determining when one approaching from the right is close enough so that he can be said to be "approaching the intersection."<sup>77</sup> Such a regulation imposes on the less favored traveler an affirmative duty to keep out of the other's way, and requires him to slow, to stop, and if need be to reverse, if otherwise the vehicles are likely to come into contact.<sup>78</sup> An ordinance giving a prior right to travelers on certain streets is not abrogated by a statute regulating the operation of motor vehicles, where the statute does not cover

**75.** *Ray v. Brannan*, 196 Ala. 113, 72 So. 16; *Bruce v. Ryan*, 138 Minn. 264, 164 N. W. 982.

**76.** *California*.—*Mathes v. Aggeler & Musser Seed Co.* (Cal.), 178 Pac. 713; *Johnson v. Hendrick* (Cal. App.), 187 Pac. 782; *Maxwell v. Western Auto Stage Co.* (Cal. App.), 189 Pac. 710; *Kinney v. King* (Cal. App.), 190 Pac. 834; *Howard v. Worthington* (Cal. App.), 195 Pac. 709.

*Connecticut*.—*Newman v. Apter*, 112 Atl. 350; *Battilyon v. Smith & Son, Inc.*, 112 Atl. 649; *Lamke v. Harty Bros. Trucking Co.*, 114 Atl. 533.

*Iowa*.—*Kime v. Owens*, 182 N. W. 399.

*Maryland*.—*Chiswell v. Nichols*, 112 Atl. 363.

*Minnesota*.—*Carson v. Turrish*, 140 Minn. 445, 168 N. W. 349; *Lindahl v. Morse*, 181 N. W. 323.

*New Jersey*.—*Erwin v. Traud*, 90 N.

J. L. 289, 100 Atl. 184; *Paulsen v. Klinge*, 92 N. J. L. 99, 104 Atl. 95.

*New York*.—*Brillinger v. Ozias*, 186 N. Y. App. Div. 221, 174 N. Y. Suppl. 282.

*Pennsylvania*.—*Dickler v. Pullman Taxi Service Co.*, 66 Pitts. Leg. Journ. (Pa.) 93; *Weber v. Breenbaum*, 113 Atl. 413.

*South Dakota*.—*Boll v. Gruesner*, 176 N. W. 517.

*Washington*.—*Chilberg v. Parsons*, 186 Pac. 272; *Noot v. Hunter*, 109 Wash. 343, 186 Pac. 851.

**77.** *Mathes v. Aggeler & Musser Seed Co.*, 179 Cal. 697, 178 Pac. 713; *Lee v. Pesterfield*, 77 Okla. 317, 188 Pac. 674.

**78.** *Kinney v. King* (Cal. App.), 190 Pac. 834; *Golden Eagle Dry Goods Co. v. Moekbee* (Colo.), 189 Pac. 850; *Brillinger v. Ozias*, 186 N. Y. App. Div. 221, 174 N. Y. Suppl. 282; *Hull v. Creseent Mfg. Co.*, 109 Wash. 129, 186 Pac. 322.

the subject of priorities at intersecting streets.<sup>79</sup> The violation of traffic regulations of this character is to be considered on the question of the negligence of the parties,<sup>80</sup> and, like other violations of the law of the road, may create a presumption of negligence against the guilty traveler.<sup>81</sup> It still remains, however, the province of the court and jury to determine whether the respective parties have exercised the degree of care imposed on them; and the fact that one party is entitled to priority does not relieve him from the duty of exercising reasonable care to avoid injury to other travelers.<sup>82</sup> The driver, not entitled to priority may properly assume that the other will not approach at an excessive speed.<sup>83</sup> One entitled to priority under the law is nevertheless required to keep a lookout for cars approaching from his left; and, if he fails in this respect, he may be charged with negligence.<sup>84</sup> But, until he discovers to the contrary, he is entitled to assume that he will be accorded the right of way.<sup>85</sup> One entitled to priority along a certain street is not necessarily allowed to carry such privilege with him when he is turning from such street into a cross street.<sup>86</sup> When making the turn, he must

79. *Bruce v. Ryan*, 138 Minn. 264, 164 N. W. 982; *Freeman v. Green* (Mo. App.), 186 S. W. 1166. See also *Seager v. Foster*, 185 Iowa, 32, 169 N. W. 681, 8 A. L. R. 690.

80. *Covel v. Price*, 39 Cal. App. 646, 179 Pac. 540; *Bruce v. Ryan*, 138 Minn. 264, 164 N. W. 982.

81. Section 267.

82. *Alabama*.—*Ray v. Brannan*, 176 Ala. 113, 72 So. 16.

*Colorado*.—*Golden Eagle Dry Goods Co. v. Mockbee*, 189 Pac. 850.

*Michigan*.—*Gleck v. Luckenbill*, 183 N. W. 729.

*Minnesota*.—*Roseman v. Peterson*, 179 N. W. 647; *Lindahl v. Morse*, 181 N. W. 323.

*Missouri*.—*Schneider v. Hawks* (Mo. App.), 211 S. W. 681.

*New Jersey*.—*Erwin v. Traud*, 90 N. J. L. 289, 100 Atl. 184; *Paulsen v. Klinge*, 92 N. J. L. 99, 104 Atl. 95;

*Spawm v. Goldberg*, 110 Atl. 565.

*New York*.—*Ward v. Clark*, 189 N. Y. App. Div. 344, 179 N. Y. Suppl. 466; *Blum v. Gerardi*, 111 Misc. (N. Y.) 617, 182 N. Y. Suppl. 297; *Schultz v. Nicholson*, 116 Misc. (N. Y.) 114.

*Oklahoma*.—*Lee v. Pesterfield*, 77 Okla. 317, 188 Pac. 674.

*Washington*.—*Greater Motors Corp. v. Metropolitan Taxi Co.*, 197 Pac. 327.

83. *Golden Eagle Dry Goods Co. v. Mockbee* (Colo.), 189 Pac. 850.

84. *Ulmer v. Pistole*, 115 Mass. 485, 76 So. 522; *Erwin v. Traud*, 90 N. J. L. 289, 100 Atl. 184. But see *Oberholzer v. Hubbell* (Cal. App.), 171 Pac. 436; *Ward v. Clark*, 189 N. Y. App. Div. 344, 179 N. Y. Suppl. 466.

85. *Freeman v. Green* (Mo. App.), 186 S. W. 1166.

86. *Clark v. Fotheringham*, 100 Wash. 12, 170 Pac. 323.



exercise caution to avoid a collision with vehicles passing along the cross street, and reasonable care may require that he yield or delay his turn, if another vehicle is then passing.<sup>87</sup>

### Sec. 395. Vehicle standing in street.

For a reasonable period, the owner of an automobile may permit the same to remain motionless in the street, when it will not unduly impede travel along the street, and when such practice is not forbidden by statute or municipal ordinance.<sup>88</sup> When, therefore, a motor car or other vehicle is lawfully standing on the side of the street with sufficient room for other vehicles to pass without a collision, it may be negligent for another vehicle to run into it.<sup>89</sup> Thus, when an automobile which was standing in a proper place along a highway was struck and damaged by a ladder which projected from a wagon, the owner of the automobile was permitted to recover for his damages.<sup>90</sup> It may be that in some cases the doctrine of *res ipsa loquitur* would apply when a standing vehicle is struck by a moving one, so as to place on the driver of the moving vehicle the burden of explaining the cause of the accident;<sup>91</sup> but the doctrine is not applicable when it is shown by the plaintiff that his automobile was injured on account of a collision between a street car and a truck whereby the truck was thrown against his car.<sup>92</sup> Even if the doctrine were applicable in such a case, it would not operate to shift the burden of proof upon the truck owner to show that the proximate cause of the accident was negligence in the operation of the railway, as the truck owner was bound only to overcome any presumption of negligence on his part which, in the

87. *Buzieh v. Todman*, 179 Iowa, 1019, 162 N. W. 259; *W. F. Jahn & Co. v. Paynter*, 99 Wash. 614, 170 Pac. 132; *Clark v. Fotheringham*, 100 Wash. 12, 170 Pac. 323.

88. See section 340, *et seq.*

89. *Collins v. Marsh*, 176 Cal. 639, 169 Pac. 389; *Mitchell v. Kramer*, 211 Ill. App. 563; *Odon v. Schmidt*, 52 La. Ann. 219, 28 So. 350; *Denson v. McDonald Bros.*, 144 Minn. 252, 175 N. W. 108; *Albertson v. Ausbacher*, 102

Misc. (N. Y.) 527, 169 N. Y. Suppl. 188; *Baum v. American Ry. Express Co.*, 177 N. Y. Suppl. 156; *Smoak v. Martin*, 108 S. Car. 472, 94 S. E. 869.

90. *Denny v. Strauss & Co.*, 109 N. Y. Suppl. 26.

91. *Bauhofer v. Crawford*, 16 Cal. App. 679, 117 Pac. 931.

92. *O'Donohoe v. Duparquet, Huot & Moneuse Co.*, 67 Misc. (N. Y.) 435, 123 N. Y. Suppl. 193.

absence of explanation, might be inferred from the happening of the accident.<sup>93</sup> But, when negligence is shown on the part of the drivers of two machines approaching an intersecting street, thereby causing one to swerve and strike an automobile standing by the curb, the drivers may be concurrent tortfeasors and may be sued jointly or severally.<sup>94</sup> The law of the road requiring vehicles to keep on the right side of the highway has no application in an action for injuries arising from a motor vehicle running into carriage or other conveyance standing by the side of the highway.<sup>95</sup>

A person leaving an automobile unattended in the street must exercise reasonable care to avoid injury to other persons;<sup>96</sup> and whether he has fulfilled his duty of care, is generally a question for the jury.<sup>97</sup> The absence of lights on a motor vehicle after dark, may be sufficient to charge its operator with negligence,<sup>98</sup> though the leaving of an unlighted car without indication of danger in a public highway, is not negligence as a matter of law.<sup>99</sup> The driver should fix the brakes or otherwise adjust its mechanism so that it will not automatically start.

### Sec. 396. Proximate cause.

Assuming the negligence of an automobile driver, it is a general rule in the law of negligence that one is liable for those injuries which proximately result from an act of negligence.<sup>1</sup> There must be a casual connection between the act of negligence and the resulting injury.<sup>2</sup> But his liability extends

93. *O'Donohoe v. Duparquet, Huot & Moneuse Co.*, 67 Misc. (N. Y.) 435, 123 N. Y. Suppl. 193.

94. *Foley v. Lord*, 232 Mass. 368, 122 N. E. 393.

95. *Smoak v. Martin*, 108 S. Car. 482, 94 S. E. 869.

96. *American Express Co. v. Terry*, 126 Md. 254, 94 Atl. 1026.

97. *American Express Co. v. Terry*, 126 Md. 254, 94 Atl. 1026. See also *Harris v. Burns*, 133 N. Y. Suppl. 418.

98. *Jaquith v. Worden*, 73 Wash.

349, 132 Pac. 33, 48 L. R. A. (N. S.) 827. And see sections 344-348.

99. *Nesbit v. Crosby*, 74 Conn. 554, 51 Atl. 550.

1. *Hartje v. Moxley*, 235 Ill. 164, 85 N. E. 216; *Greater Motors Corp. v. Metropolitan Taxi Co.* (Wash.), 197 Pac. 327.

2. *Morrison v. Clark*, 196 Ala. 670, 72 So. 305; *Ackerman v. Fifth Ave. Coach Co.*, 175 App. Div. 508, 162 N. Y. Suppl. 49; *Carlisle v. Hargreaves* (Wash.), 192 Pac. 894.

to all injuries which are the proximate result of the negligence in question.<sup>3</sup> When a motor vehicle is not licensed and registered according to the statute on the subject, the violation of the law does not generally make the automobile a trespasser, and its owner is not liable as such, though a different rule prevails in Massachusetts.<sup>4</sup> The failure to observe the law is not a proximate cause of an injury occasioned by the machine. But, when one negligently manages a motor vehicle so as to cause another conveyance to collide with a third vehicle, the injury to the second or third vehicle may be held to be the proximate result of the negligence.<sup>5</sup> Thus, where the driver of an automobile negligently comes into a street at a high rate of speed or unlawfully cuts the corner, so that another automobile in veering away to avoid an accident, collides with a plaintiff's car, the driver of the first mentioned auto may be liable for the damages to the plaintiff's car.<sup>6</sup> In such a case, whether the injury is the proximate result of the act of neglect, may be a question for the jury.<sup>7</sup> And when automobiles collide with such force as to force one of them against a pedestrian or other vehicle, the negligent driver may be liable for the injuries, although it was not his car which struck the pedestrian.<sup>8</sup> Similarly, if a collision forces a car across a sidewalk and against a building so that an occupant of the building is thrown down, there may be liability.<sup>9</sup> So, too, when one machine strikes a wagon and throws out an occupant thereof, and another machine following close behind strikes the occupant, an action may be maintained against the drivers of both machines.<sup>10</sup>

3. *Haynes v. Sosa* (Tex. Civ. App.), 198 S. W. 976.

4. Sections 125-127.

5. *Page v. Brink's Chicago City Express Co.*, 192 Ill. App. 389; *Jackson v. Burns*, 203 Ill. App. 196; *Conloy v. Lafayette Motor Car Co.* (Mo. App.), 221 S. W. 165.

6. *Jackson v. Burns*, 203 Ill. App. 196; *Hellan v. Supply Laundry Co.*, 94 Wash. 683, 163 Pac. 9.

7. *Hellan v. Supply Laundry Co.*, 94 Wash. 683, 163 Pac. 9.

8. *Stuart v. Doyle* (Conn.), 112 Atl. 653; *Sullivan v. William Ohlhaber Co.*, 291 Ill. 359, 126 N. E. 191; *Meech v. Sewall*, 232 Mass. 460, 122 N. E. 446.

9. *Howarth v. Barrett* (Pa.), 112 Atl. 536.

10. *Daggy v. Miller*, 180 Iowa 1146, 162 N. W. 854.

**Sec. 397. Joint liability of both drivers to third person.**

Where, by reason of the concurrent negligence of both drivers of two colliding vehicles, a passenger in one is injured, he has his remedy against both drivers.<sup>11</sup> The cause of action is a joint tort, for which both drivers are jointly and severally liable.<sup>12</sup> Two defendants, under such circumstances, may be joined as defendants, although there is no common duty, common design, or concert of action between them.<sup>13</sup> It is not material that one of the defendants is a taxicab company, and hence as a common carrier of passengers is charged with the highest degree of care to avoid injury to its passenger.<sup>14</sup> The negligence of one of the drivers is no excuse for the negligence of the other; each defendant is bound to answer for the results of his own negligence.<sup>15</sup> Thus, the fact that the

11. As to injuries to guests, see Chapter XXIV. As to liability for injuries to a passenger carried for hire, see sections 169-170.

12. *Kilkenny v. Bockius*, 187 Fed. 382; *Carter v. Brown*, 136 Ark. 23, 206 S. W. 71; *Blackwell v. American Film Co.* (Cal. App.), 192 Pac. 189; *Zucht v. Brooks* (Tex. Civ. App.), 216 S. W. 684. "It is difficult to imagine a more typical case of a joint tort than the case of two drivers, who by their simultaneous negligence come into collision, with a force that is the resultant of the momentum of each or both, and which resultant is so transmitted to a passenger as to throw him out of one of the vehicles, to his injury. For a court to analyze an event of this kind into two causes of action, so distinct and independent that the two defendants could not be joined in a single action, would be to ignore physical law as well as common law." *Kilkenny v. Bockius*, 187 Fed. 382.

**Amendment of complaint.**—When a complaint alleges that two defendants owned and negligently operated both automobiles, whereby they came into collision to the damage of the plaintiff,

and the facts are that the defendants severally owned and severally operated the automobiles, the declaration should be amended to state the case the plaintiff intends to present to the jury. *Kilkenny v. Bockius*, 187 Fed. 382.

**Joint tort-feasors.**—"Where two parties are guilty of separate acts of negligence which jointly and concurrently co-operate and cause an injury, the parties are joint tort-feasors. In a suit against two defendants a petition is not subject to demurrer upon the ground that there was a misjoinder of actions or parties defendant, where the petition alleges that the plaintiff was injured in a collision between two automobiles caused by the concurrent negligence of the two defendants in approaching each other from intersecting roadways, each driving an automobile at an illegal rate of speed. *Akin v. Brantley* (Ga. App.), 106 S. E. 214.

13. *Mitchell v. Brown* (Mo. App.), 190 S. W. 354; *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174, 4 A. L. R. 1480.

14. *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174, 4 A. L. R. 1480. And see section 282.

15. *Blackwell v. American Film Co.*

vehicle in which the plaintiff was riding did not have the lights required by statute, does not excuse the negligence of the driver of the automobile colliding therewith.<sup>16</sup> When each defendant attempts to show that the other is solely blamable for the accident, the jury may find a verdict against both; or, in case of conflicting evidence, may believe the evidence produced by one of the defendants and exonerate him while holding the other.<sup>17</sup>

### • Sec. 398. Contributory negligence — generally.

As a general rule a traveler injured by a collision on the highway must be free from contributory negligence, and where a suit is brought, the plaintiff must prove, not only want of care on the part of the defendant, but also reasonable care on his part.<sup>18</sup> If both parties are in *pari delicto*,

(Cal. App.), 192 Pac. 189. See also *Hackworth v. Ashby*, 165 Ky. 796, 178 S. W. 1074, wherein it was said: "The issue in this case was whether the defendants, through the driver of their car, were negligent, and whether such negligence, if any, caused or contributed to the plaintiff's injuries. These things being found to be true, negligence on the part of Carrather's in driving the car in which plaintiff was riding would not excuse the negligence of defendants, for even if Carrather's was negligent, and his negligence concurred with negligence upon the part of the defendants in causing plaintiff's injuries, she may recover from the defendant therefor. *Paducah Traction Company v. Sin*, 111 S. W. 356, 33 Ky. Law Rep. 792. Nor is the degree to which defendants negligence contributed in causing the injury necessary to be determined." See also *Mitchell v. Brown* (Mo. App.), 190 S. W. 354; *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174, 4 A. L. R. 1480.

16. *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174, 4 A. L. R. 1480.

17. *Mitchell v. Brown* (Mo. App.),

190 S. W. 354.

18. *Connecticut*.—*Hawkins v. Garford Trucking Co.*, 114 Atl. 94.

*Illinois*.—*Yellow Cab Co. v. John G. Carlsen*, 211 Ill. App. 299; *Gustavson v. Hester*, 211 Ill. App. 439.

*Iowa*.—*Dirks v. Tonne*, 183 Iowa, 403, 167 N. W. 103.

*Kentucky*.—*Standard Oil Co. of Kentucky v. Thompson*, 226 S. W. 368.

*Maine*.—*Sylvester v. Gray*, 118 Me. 74, 105 Atl. 815.

*Michigan*.—*Geeck v. Luckenbill*, 183 N. W. 729.

*Minnesota*.—*Hornden v. Miller*, 145 Minn. 483, 175 N. W. 891.

*New York*.—*Albertson v. Ansbacher*, 102 Misc. (N. Y.) 527, 169 N. Y. Suppl. 188.

*Ohio*.—*Chesrown v. Bevier*, 128 N. E. 94.

*Tennessee*.—*Bejach v. Colby*, 141 Tenn. 686, 214 S. W. 869.

*Vermont*.—*Bianchi v. Millar*, 111 Atl. 524.

*Washington*.—*Abling v. Nielson*, 186 Pac. 887.

*Wisconsin*.—*Yahnke v. Lange*, 168 Wis. 512, 170 N. Y. 722.

the law will afford relief to neither.<sup>19</sup> Modifications of the general rule have been made by statute in some jurisdictions. Thus in a few States, the doctrine of "comparative" negligence is in force.<sup>20</sup> And, within recent years statutes in some jurisdictions have removed the burden from the plaintiff of showing absence of contributory negligence, and placed on the defendant the affirmative burden of establishing such defense.<sup>21</sup> Whether the driver of a vehicle or a passenger therein has been guilty of contributory negligence which was the proximate cause of an accident, is generally a question for the jury. In another place in this work is discussed the questions relative to the imputation of the negligence of the driver of a vehicle to a passenger therein.<sup>22</sup>

### Sec. 399. Contributory negligence — proximate result of contributory negligence.

One of the fundamental propositions of the law of negligence is that of the contributory negligence of an injured person, to bar a recovery, must be the proximate cause of the injury sustained. Negligence on the plaintiff's part which does not contribute to the injury will not prevent his recovery.<sup>23</sup> Thus, negligence in the management of his vehicle

19. *Berz Co. v. Peoples' Gas Light & Coke Co.*, 209 Ill. App. 304; *Hilton v. Iseman*, 212 Ill. App. 255.

20. *Robison v. Troy Laundry (Neb.)*, 180 N. W. 43.

21. *Howard v. Worthington (Cal. App.)*, 195 Pac. 709; *Hallowell v. Cameron (Cal.)*, 199 Pac. 803; *Levy v. Steiger*, 233 Mass. 600, 124 N. E. 477.

22. Sections 679-687.

23. *California*.—*House v. Fry*, 30 Cal. App. 157, 157 Pac. 500; *Wilkinson v. Rohrer (Cal. App.)*, 190 Pac. 650.

*Georgia*.—*Schofield v. Hatfield (Ga. App.)*, 103 S. E. 732.

*Illinois*.—*Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337; *Moyer v. Shaw Livery Co.*, 205 Ill. App. 273.

*Iowa*.—*Clark v. Weathers*, 178 Iowa, 97, 159 N. W. 585.

*Maine*.—*Kennard v. Burton*, 25 Me. 39.

*Massachusetts*.—*Parker v. Adams*, 12 Metc. (Mass.) 415.

*Missouri*.—*Lawler v. Montgomery (Mo. App.)*, 217 S. W. 856; *Stack v. General Baking Co. (Mo.)*, 223 S. W. 89; *Alyea v. Junge Baking Co. (Mo. App.)*, 230 S. W. 341.

*Nebraska*.—*Robinson v. Troy Laundry*, 180 N. W. 43.

*Pennsylvania*.—*Hardie v. Barrett*, 257 Pa. 42, 101 Atl. 75.

*Washington*.—*DeLys v. Powell-Sanders Co.*, 90 Wash. 31, 155 Pac. 407.

*Wisconsin*.—*Mahar v. Lochen*, 166 Wis. 152, 164 N. W. 847; *Benesch v. Pagel*, 177 N. W. 860.

*England*.—*Chaplin v. Hawes*, 3 Car. & P. 555; *Wayde v. Lady Carr*, 2 Dowl. & R. 255; *Clay v. Wood*, 5 Esp. 44.

after a collision caused by the defendant's negligence, will not relieve the defendant from liability, unless the plaintiff's conduct actually contributed to the result.<sup>24</sup> And the failure of plaintiff's vehicle to have the statutory lights fastened thereto, will not forbid a recovery, unless the absence of lights is one of the proximate causes of the collision.<sup>25</sup> So, the fact that a motor truck was not kept reasonably close to the right-hand curb, as required by ordinance, will not bar an action for injuries thereto, where the colliding automobile had ample space to pass.<sup>26</sup> And the fact that the plaintiff's machine was not duly registered and licensed according to the statutory requirements, does not generally bar the plaintiff's remedy.<sup>27</sup> Likewise, the failure of the chauffeur to have a license as required by law, is not ordinarily the proximate cause of a collision with another vehicle, and will not preclude a recovery for his injuries.<sup>28</sup>

#### **Sec. 400. Contributory negligence — unskillful driving.**

Unskillful or reckless driving on the part of one injured by a collision between two vehicles will generally be a bar to a recovery for his injuries, if his conduct actually contributed to the injury. Where the plaintiff was unable to stop his motor vehicle in time to avoid a collision with a wagon across the road, and one of the causes of the accident was the unexpected failure of the transmission gears to work, and they had never before failed, it was held that the driver of the motor vehicle was not guilty of contributory negligence as a matter of law.<sup>29</sup> When one automobile negligently attempted to pass

24. *Belk v. People*, 125 Ill. 584, 17 N. E. 744.

25. Section 347.

26. *House v. Fry*, 30 Cal. App. 157, 157 Pac. 500.

27. *Dixon v. Boeving* (Mo. App.), 208 S. W. 279. And see section 125.

28. *Moyer v. Shaw Livery Co.*, 205 Ill. App. 273; *Stack v. General Baking Co.* (Mo.), 223 S. W. 89. And see section 226.

29. *Manion v. Loomis Sanatorium*, 162 N. Y. App. Div. 421, 147 N. Y.

Suppl. 761, wherein it was said: "It cannot be said that, as matter of law, the plaintiff was guilty of contributory negligence, barring recovery in view of the absence of evidence that the transmission had ever before caught, or that any difficulty whatever had ever before been experienced in reversing the motion of the car; that the plaintiff was an experienced chauffeur and machinist, and thoroughly familiar with this car by reason of having operated it for three seasons, and knew that he could

another motor vehicle and as a result thereof, the latter was crowded off the bank, it was held to be a question for the jury whether the driver was guilty of contributory negligence in his control and management of his car.<sup>30</sup>

#### **Sec. 401. Contributory negligence — alertness.**

Reasonable care requires that one driving along a public highway should exercise the degree of alertness exercised by an ordinary prudent man to avoid collisions with other conveyances. The driver of a vehicle cannot be said to be in the exercise of due care if he is asleep while proceeding along the public highway and, if he sustains a collision with another conveyance while in such condition, he will not generally be permitted to recover.<sup>31</sup> But there is no imperative duty resting upon pedestrians or upon travelers in a horse-drawn vehicle on public highways to keep a continuous lookout for automobiles, under penalty that, if they fail to do so and are injured, contributory negligence will be conclusively imputed to them.<sup>32</sup> The duty resting upon the driver of an ordinary horse-drawn vehicle to be watchful for the approach of automobiles and to prevent injury from them, is no greater than the duty resting upon the drivers of automobiles to be watchful for travelers in other vehicles in order to prevent injuring them. The rights and duties of each in the premises are reciprocal.<sup>33</sup> To enable an automobilist to recover for injuries received in a collision with another vehicle, he should have had the machine under reasonable control and running at

stop it within 100 feet, traveling at the speed of twenty miles per hour, and hence in less than that distance traveling from twelve to fifteen miles per hour, and that the teamster was crossing the road diagonally from the lane headed towards the barn upon the opposite side of the highway, and traveling at a pace which the uncontradicted testimony shows would, had he continued it, have taken him sufficiently far to have allowed the plaintiff by continuing along the right hand side

of the highway to pass in safety in the rear of the wagon."

**30.** *Granger v. Farrant*, 179 Mich. 19, 146 N. W. 218.

**31.** *Grogitzki v. Detroit Ambulance Co.*, 186 Mich. 374, 152 N. W. 923. See also *Savage v. Boyce*, 55 Mont. 470, 164 Pac. 887.

**32.** *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337.

**33.** *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337, affirming 189 Ill. App. 631.



such a speed as would enable him to stop before striking an obstruction. He is held to have seen that which with ordinary care he would have seen in time to avert an injury.<sup>34</sup> A traveler is not required to be continuously on the alert to see if an approaching vehicle, which is upon the proper side of the road, will violate the law of the road, there being no intervening obstacle or cause to lead a person in the exercise of reasonable care to anticipate that such a course will be pursued.<sup>35</sup> One approaching a railroad crossing is charged with grave duties as to stopping and looking for the trains,<sup>36</sup> but the rules as to railroad crossings have no application to the usual travel upon public highways, as between automobiles and other highway conveyances.<sup>37</sup> One approaching a street intersection is not necessarily required to stop, look, and listen, as is required in many States if one is approaching a railroad crossing. A question for the jury is generally presented.<sup>38</sup> But one who attempts to cross an intersecting street without looking in either direction may be adjudged to be guilty of contributory negligence as a matter of law.<sup>39</sup>

34. *Roper v. Greenspon* (Mo. App.), 192 S. W. 149; *Farrell v. Fire Ins. Salvage Corps*, 189 N. Y. App. Div. 795, 179 N. Y. Suppl. 477.

35. *Tschirley v. Lambert*, 70 Wash. 72, 126 Pac. 80. See also *Trout Auto Livery Co. v. People's Gas Light & Coke Co.*, 168 Ill. App. 56.

36. See Chapter XXI.

37. *Oberholzer v. Hubbell* (Cal. App.), 171 Pac. 436; *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337.

**Distinction between railroad crossings and street crossings.**—"Railroads are engaged in the performance of a business of a quasi public nature, and in carrying out the purposes for which they are created must necessarily often operate their trains at such a high rate of speed that they cannot be brought to a sudden stop without endangering the lives and safety of those riding

therein. They travel on fixed tracks and cannot turn aside, and the danger to be encountered in entering thereon is so well known and is a matter of such common knowledge that, when a traveler on a public highway fails to use the ordinary precautions before driving thereon, the general knowledge and experience of mankind condemn such conduct as negligence. But a public street crossing is not ordinarily a dangerous place, and all persons entering thereon have a right to assume that all others about to use the same will exercise due care and caution to prevent injury to them." *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337.

38. *Oberholzer v. Hubbell* (Cal. App.), 171 Pac. 436; *Warrington v. Byrd* (Mo. App.), 181 S. W. 1079.

39. *Jacobson v. O'Dette* (R. I.), 103 Atl. 653.

### Sec. 402. Contributory negligence — wantonness or recklessness of defendant.

The fact that the plaintiff was guilty of contributory negligence which was one of the causes of a collision with another vehicle on the highway, will not, as a general proposition, bar a recovery for his damages, if the injury was principally caused by the wanton or reckless operation of the defendant's vehicle.<sup>40</sup> Thus, though one is on the wrong side of the highway, or is otherwise in a position where another has a primary right to pass and is thus perhaps guilty of contributory negligence, nevertheless the driver of another vehicle cannot run him down with impunity.<sup>41</sup>

### Sec. 403. Contributory negligence — violation of law of road.

When a collision is the result of a violation of the law of the road, negligence is *prima facie* charged against the guilty party,<sup>42</sup> and he is generally not entitled to recover for his injuries.<sup>43</sup> The presumption of negligence which arises from a violation of the law of the road, is one which may be rebutted by evidence showing some excuse for the variance from the proper course.<sup>44</sup> Thus, the plaintiff may rebut the infer-

40. *Black v. Blacksher*, 11 Ala. App. 545, 66 So. 863; *Grogitski v. Detroit Ambulance Co.*, 186 Mich. 374, 152 N. W. 923.

41. *Brooks v. Hart*, 14 N. H. 307.

42. Section 267.

43. *California*.—*Kinney v. King* (Cal. App.), 190 Pac. 834.

*Iowa*.—*Buzich v. Todman*, 179 Iowa. 1019, 162 N. W. 259; *Giese v. Kimball*, 184 Iowa, 1283.

*Louisiana*.—*Reems v. Chavigny*, 139 La. 539, 71 So. 798.

*Maine*.—*Ricker v. Gray*, 118 Me. 492, 107 Atl. 295; *Sylvester v. Gray*, 118 Me. 74, 105 Atl. 815.

*Missouri*.—*Barton v. Faeth*, 193 Mo. App. 402, 186 S. W. 52.

*New York*.—*Brillinger v. Ozias*, 184 N. Y. App. Div. 221, 174 N. Y. Suppl.

282; *Russell v. Kemp*, 95 Misc. (N. Y.) 582, 159 N. Y. Suppl. 865.

*Wisconsin*.—*Haswell v. Reuter*, 177 N. W. 8.

**Disregard of rules.**—Where the driver of a buggy in the streets of a city disregards all the rules prescribed for vehicular traffic and is grossly negligent from the standpoint of common experience, and as a result of such negligence is brought into collision with another vehicle, he is not entitled to recover from the owner of the other vehicle the damages which he thereby sustains. *Reems v. Chavigny*, 139 La. 539, 71 So. 798.

44. *Hoover v. Reichard*, 63 Pa. Super. 517. "If it was true that the plaintiff was so situated, as he claims, that he could not turn from his course in the

ence of negligence by showing that he was compelled to drive his machine to the wrong side of the highway in order to avoid the negligence of the defendant.<sup>45</sup> And the fact that the plaintiff is violating the law of the road does not authorize another person to run him down.<sup>46</sup> Nor does it relieve one from the obligation of exercising reasonable care for the avoidance of injury to such traveler.<sup>47</sup> Where the driver of an automobile turned a curve at a high rate of speed, it was held there could be no recovery for injuries caused by collision with another automobile, even though the latter was on the wrong side of the road, it appearing that such driver knew that automobiles were liable to be on such side in order to avoid rough stone and gravel on the other side.<sup>48</sup> Where a chauffeur on a wet day drove an automobile at a speed of twelve or thirteen miles an hour on a street where the view was obstructed, and, in order to avoid a motor truck which was about to turn into the side street, handled his car so that it skidded sideways into the truck, he is guilty of contributory negligence, though the truck was not on the proper side of the street at the turning.<sup>49</sup> Where the primary cause of an automobile collision was the defendant's violation of the law of the road by running on the wrong side of the road when approaching an intersection and cutting the corner at that intersection, he cannot evade the consequences of his negligence by setting up that the plaintiff, who was originally on the proper side of the street, had swerved in the emergency to the wrong side in an attempt to avoid the collision.<sup>50</sup> The circumstance that a team was driven on the left side of the road when it was overtaken by an automobile driven at a dangerous rate of speed, does not necessarily constitute con-

center of the highway, because other vehicles near prevented him from so doing, negligence is not to be imputed to him for his failure to turn to the right when meeting the vehicle of the defendant." *Hayden v. McColly*, 166 Mo. App. 675, 150 S. W. 1132. And see sections 270-274.

45. *Eberle Brewing Co. v. Briscoe Motor Co.*, 194 Mich. 140, 160 N. W.

440.

46. Section 402.

47. *Ray v. Brannan*, 196 Ala. 113, 72 So. 16.

48. *Wheeler v. Wall*, 157 Mo. App. 38, 137 S. W. 63.

49. *Ellison v. Atlantic Refining Co.*, 62 Pa. Super. Ct. 370.

50. *Bain v. Fuller*, 29 D. L. R. (Canada) 113.

tributory negligence on the part of the driver, where the statute does not prohibit the driving on the left side of the road but only requires the driver to turn to the right when another overtakes him and indicates a desire to pass.<sup>51</sup> But, in a case where the collision between two automobiles would not have occurred had the plaintiff not turned to the left, his recovery of damages will be barred, although he thought that the defendant was not going to turn out, such belief not being well founded and there being an opportunity to turn to the right.<sup>52</sup> Even though the plaintiff has violated the law of the road, there always remains the question whether the violation was a proximate cause of his injuries; if not the proximate cause, the violation does not bar his right of action.<sup>53</sup>

#### **Sec. 404. Contributory negligence — sudden stop.**

The driver of a vehicle may be charged with negligence if he suddenly slows or stops his vehicle when he knows that there is another vehicle so close behind that a collision will probably ensue.<sup>54</sup> Particularly is this so when the driver of the forward car violates a positive regulation requiring him to give a signal to a following machine of his intention to stop.<sup>55</sup>

#### **Sec. 405. Contributory negligence — failure to give passing vehicle sufficient space.**

Ordinarily the driver of a team will not be regarded as negligent in failing to turn out further to allow an automobilist

51. *Pens v. Kreitzer*, 98 Kans. 759, 160 Pac. 200.

52. *Lloyd v. Calhoun*, 82 Wash. 35, 143 Pac. 458, overruling 78 Wash. 438, 139 Pac. 231.

53. *House v. Fry*, 30 Cal. App. 157, 157 Pac. 500; *Wilkinson v. Rohrer*, (Cal. App.) 190 Pac. 650; *Mahar v. Lochen*, 166 Wis. 152, 164 N. W. 847.

54. *Strever v. Woodward*, 178 Iowa, 30, 158 N. W. 504.

**Giving stop signal.**—The act of the driver of an automobile, who, while

driving twenty-five feet from the right-hand curb in violation of a traffic ordinance twice gave a stop signal but stopped only after the second one, constitutes such contributory negligence as precludes a recovery for damages by defendant's car running into the rear of the automobile. *Russell v. Kemp*, 95 Misc. (N. Y.) 582, 159 N. Y. Suppl. 865.

55. *Clark v. Weathers*, 178 Iowa, 97, 159 N. W. 585.

more room where there is already sufficient space for him to pass in safety.<sup>56</sup> Thus, one who has turned sufficiently to allow an approaching automobile one-half of the road is not by his failure to pass over to the untraveled part of the highway, guilty of contributory negligence.<sup>57</sup> When an automobile coming at a dangerous speed attempts to pass a wagon from behind, the driver of the wagon is not guilty of contributory negligence if he has not sufficient time to turn out.<sup>58</sup> To charge one with contributory negligence in failing to turn towards the right so as to permit a vehicle in the rear to pass, it must be shown that the road was sufficiently wide to enable a safe passage, and also that the driver of the forward vehicle knew or should have known the intention of the rear driver to pass.<sup>59</sup>

#### Sec. 406. Contributory negligence — absence of statutory lights.

The failure of a traveler to have a light fastened to his vehicle, when such a light is not imperative by reason of statute or municipal ordinance, is not negligence *per se*.<sup>60</sup> But, when a light is required by statutory or municipal regulation, a different question is presented; and, if the omission of duty is one of the contributing causes to a collision with another vehicle, its operator may be charged with negligence.<sup>61</sup>

56. *Savoy v. McLeod*, 111 Me. 234, 88 Atl. 721, 48 L. R. A. (N. S.) 971.

57. *Traeger v. Wasson*, 163 Ill. App. 572.

58. *Pens v. Kreitzer*, 98 Kans. 759, 160 Pac. 200.

59. *Dunkelbeck v. Meyer*, 140 Minn. 283, 167 N. W. 1034.

60. *Decou v. Dexheimer*, — N. J. L. —, 73 Atl. 49. See also *Harding v. Cavanaugh*, 91 Misc. (N. Y.) 511, 155 N. Y. Suppl. 374. "Generally speaking, at common law, the driver of a wagon upon a highway at night is under no duty to carry a light to warn others of the presence of his vehicle or its load. If he stops in the highway, the circumstances may doubtless be

such as to make it negligence to fail to warn other travelers of the obstruction thus occasioned. But whether such failure can be said to be negligence must, of necessity, depend upon the circumstances." *Roper v. Greenspon* (Mo. App.), 192 S. W. 149, L. R. A. 1918 D. 126. And see sections 344-348 as to lights.

61. *Colorado*.—*Martin v. Carruthers*, 195 Pac. 105.

*Connecticut*.—*Hale v. Rernikoff*, 111 Atl. 907.

*Iowa*.—*Topper v. Maple*, 181 Iowa, 786, 165 N. W. 28.

*Missouri*.—*Roper v. Greenspon*, 272 Mo. 288, 198 S. W. 1107; *Roper v. Greenspon* (Mo. App.), 210 S. W. 922.

The requirement of a light is for the protection, not only of the immediate vehicle, but also of other vehicles with which it might come into collision.<sup>62</sup> Of course, the absence of a light does not justify the driver of another vehicle in running down the plaintiff's conveyance.<sup>63</sup> And, if the absence of the light is not a proximate cause of the collision, the disobedience of the regulation is not material and the plaintiff will not necessarily fail in his action.<sup>64</sup> If the defendant should have seen the plaintiff's vehicle, although it was not lighted, the absence of the light is not the proximate cause of the collision.<sup>65</sup>

### Sec. 407. Contributory negligence — excessive speed.

Contributory negligence on the part of the driver of a vehicle coming into collision with another, may be based on the excessive speed of the plaintiff's conveyance.<sup>66</sup> And, especially is this true when the proper speed is prescribed by statute or municipal ordinance and such regulation is violated. It may be considered *prima facie* negligence or negligence *per se* for the driver of an automobile to exceed the speed limit, and if the speed is the proximate cause of a collision with another vehicle, such driver will not be permitted to recover for his injuries.<sup>67</sup>

*New York.*—Martin v. Herzog, 176 N. Y. App. Div. 614, 163 N. Y. Suppl. 189, affirmed 228 N. Y. 164, 126 N. E. 814; Martin v. Herzog, 228 N. Y. 164, 126 N. E. 814.

*Ohio.*—Chesrown v. Bevier, 128 N. E. 94.

*Rhode Island.*—J. Samuels & Bro. v. Rhode Island Co., 40 R. I. 232, 100 Atl. 402.

*Wisconsin.*—Yahnke v. Lange, 168 Wis. 512, 170 N. W. 722.

<sup>62.</sup> Martin v. Herzog, 176 N. Y. App. Div. 614, 163 N. Y. Suppl. 189, affirmed, 228 N. Y. 164, 126 N. E. 814.

<sup>63.</sup> Decou v. Dexheimer (N. J. L.), 73 Atl. 49. See also Kopper v. Bernhardt (N. J. L.), 103 Atl. 186.

<sup>64.</sup> *Colorado.*—Martin v. Caruthers, 195 Pac. 105.

*Illinois.*—Graham v. Hagmann, 270 Ill. 252, 110 N. E. 337, affirming 189 Ill. App. 631; Culver v. Harris, 211 Ill. App. 474.

*Missouri.*—Roper v. Greenspon (Mo. App.), 192 S. W. 149.

*Ohio.*—Chesrown v. Bevier, 128 N. E. 94.

*Pennsylvania.*—Hardie v. Barrett, 257 Pa. 42, 101 Atl. 75.

<sup>65.</sup> Ireson v. Cunningham, 90 N. J. L. 960, 101 Atl. 49. See also Kopper v. Bernhardt, 91 N. J. L. 697, 103 Atl. 186.

<sup>66.</sup> See sections 303-325; Surneian v. Simmons (R. I.), 107 Atl. 229.

### Sec. 408. Contributory negligence — passenger in dangerous position.

Where a woman in an automobile, for the purpose of avoiding a collision with an approaching truck, reached out her hand to motion to the driver to stop, it was held that her act was not one which rendered her guilty of contributory negligence so as to preclude a recovery for injury to her hand struck by the truck.<sup>68</sup> And, where the owner of a passenger automobile truck stood on a step at the rear thereof when the truck collided with an automobile, it was held that such owner was not necessarily guilty of contributory negligence in taking such a position.<sup>69</sup> Similarly, the owner of an automobile is not necessarily guilty of negligence in taking a position on the floor between the front seat and the wind shield with his feet on the running board.<sup>70</sup> While in most jurisdictions the negligence of the driver of an automobile is not imputed to a passenger therein,<sup>71</sup> yet such passenger is bound to exercise reasonable care. Contributory negligence may be charged against him by reason of the fact that he continues as a passenger when he knows that the driver is intoxicated.<sup>72</sup>

### Sec. 409. Contributory negligence — reliance on obedience of law of road by other vehicles.

A traveler is not necessarily guilty of contributory negligence in assuming that other travelers will obey the law of the road, where there is nothing to indicate an intention to violate it.<sup>73</sup> When one is driving a vehicle according to the rule of the road as declared by statute or ordinance greater vigilance

67. *Barton v. Faeth*, 193 Mo. App. 402, 186 S. W. 52; *Noot v. Hunter*, 109 Wash. 343, 186 Pac. 851.

68. *Withey v. Fowler*, 164 Iowa, 377, 145 N. W. 823.

69. *Moore v. Hart*, 171 Ky. 725, 188 S. W. 861.

70. *McClung v. Pennsylvania Taximeter Cab Co.*, 252 Pa. St. 478, 97 Atl. 694.

71. Section 679.

72. *Lynn v. Goodwin*, 170 Cal. 112,

148 Pac. 927.

73. *Ray v. Brannan*, 196 Ala. 113, 72 So. 16; *Moreno v. Los Angeles Transfer Co.* (Cal. App.), 186 Pac. 800; *Kilroy v. Justrite Mfg. Co.*, 209 Ill. App. 499; *Columbia Taxicab Co. v. Roemmich* (Mo. App.), 208 S. W. 859; *Presson v. Parker* (Mo. App.), 224 S. W. 1009; *Jacobs v. Richard Carvel Co.*, 156 N. Y. Suppl. 766; *Stubbs v. Molberget*, 108 Wash. 89, 182 Pac. 936, 6 A. L. R. 318.

is imposed on the drivers of other vehicles than upon the driver of the vehicle proceeding properly.<sup>74</sup> Thus, where two travelers have equal rights at a street intersection, the one first at the crossing is generally entitled to the right of way, and he may proceed to exercise his right of way though he sees the other vehicle approaching, provided the other is not so close that a collision may naturally be anticipated.<sup>75</sup> And, where the right of way is given by municipal ordinance to the travelers along one of the streets in preference to those along the cross street, the privileged traveler is entitled to assume that drivers on cross streets will respect his priority, at least until he observes to the contrary.<sup>76</sup> So, too, one approaching another conveyance from the rear has a right to assume that the forward vehicle will be directed to the right-hand side of the road so as to permit the rear one to pass, until it becomes obvious that no effort will be made to do so or the danger of a collision is imminent.<sup>77</sup> The driver of a vehicle may assume, when another vehicle is approaching in accordance with the law of the road, that it will so continue.<sup>78</sup> A driver who is obeying the law of the road, is not required to be constantly on the alert to see if an approaching vehicle which is upon the proper side, will violate the rule, there being no obstacle or cause to lead a person in the exercise of reasonable care to anticipate that such a course will be pursued.<sup>79</sup> When, under a regulation authorizing the act, a driver gives a signal that he intends to turn a corner or make some other turn, and he suffers a collision with another vehicle as he is making the turn, his contributory negligence may be a question for the

74. *Shilliam v. Newman*, 94 Wash. 637, 162 Pac. 977.

75. *Carbaugh v. White Bus Line* (Cal. App.), 195 Pac. 1066; *Barrett v. Alamito Dairy Co.* (Neb.), 181 N. W. 550; *Rabinowitz v. Hawthorne*, 89 N. J. L. 308, 98 Atl. 315; *Brown v. Chambers*, 65 Pa. Super. Ct. 373. And see section 260.

76. *Ray v. Brannan*, 196 Ala. 113, 72 So. 16; *Carbaugh v. White Bus Line* (Cal. App.), 195 Pac. 1066; *Freeman v. Green* (Mo. App.), 186 S. W. 1166;

*Noot v. Hunter*, 109 Wash. 343, 186 Pac. 851.

77. *Cook v. Standard Oil Co.*, 15 Ala. App. 448, 73 So. 763.

78. *Elgin Dairy Co. v. Shephard*, 183 Ind. 466, 108 N. E. 234.

79. *Tschirley v. Lambert*, 70 Wash. 72, 126 Pac. 80; *Stubbs v. Molberget*, 108 Wash. 89, 182 Pac. 936, 6 A. L. R. 318. See also *Trout Livery Co. v. People's Gas, Light & Coke Co.*, 168 Ill. App. 56.



jury.<sup>80</sup> When the driver of one vehicle observes that the driver of another is not obeying the law of the road, he cannot proceed regardless, for his right to assume the obedience to the law of road ceases.<sup>81</sup> Thus, when he sees that another vehicle is unable to turn out because of a rut in the road, he should stop or take other steps to avoid a collision.<sup>82</sup> But he may until the vehicles are reasonably close together assume that the one on the wrong side will turn to the right side to permit the passage.<sup>83</sup> And, although one may rely on the obedience of the law of road by others, he is nevertheless required to exercise reasonable care for his safety. Mere reliance will not always suffice to establish due care on his part.<sup>84</sup> It is a question for the jury whether one injured assumed that the driver of an automobile would act in accordance with the law of the road.<sup>85</sup>

#### Sec. 410. Contributory negligence — acts in emergency.

When one is suddenly placed in a dangerous position by the negligence of another, the law recognizes that he may not exercise the judgment that he would under other circumstances, and his conduct is not so closely scrutinized.<sup>86</sup> The rule is that where one without his own fault is, through the negligence of another, put in such apparent peril as to cause loss of self-possession, and as a natural result thereof he, in attempting to escape, puts himself and property in a more dangerous position, this is not in law contributory negligence that will prevent him recovering for the injury.<sup>87</sup> Thus, where

80. *Daly v. Case*, 88 N. J. L. 295, 95 Atl. 973. See also *Frank C. Weber Co. v. Stevenson Grocery Co.*, 194 Ill. App. 432.

81. *Dirks v. Tonne*, 183 Iowa, 403, 167 N. W. 103.

82. *Dirks v. Tonne*, 183 Iowa, 403, 167 N. W. 103.

83. *Shaw v. Wilcox* (Mo. App.), 224 S. W. 58; *John v. Pierce* (Wis.), 178 N. W. 297.

84. *Ray v. Brannan*, 196 Ala. 113, 72 So. 16.

85. *Tooker v. Perkins*, 86 Wash. 567, 150 Pac. 1138.

86. See *Collins v. Marsh*, 176 Cal. 639, 169 Pac. 389; *Rhodes v. Firestone Tire & Rubber Co.* (Cal. App.), 197 Pac. 392; *Mayer v. Mellette*, 65 Ind. App. 54, 114 N. E. 241; *Bragdon v. Kellogg* (Me.), 105 Atl. 433; *Franson v. Talk Paper Co.*, 135 Minn. 284, 160 N. W. 789; *Dixon v. Boevig* (Mo. App.), 208 S. W. 279.

87. *Shupe v. Rodolph* (Cal.), 197 Pac. 57; *Book v. Aschenbrenner*, 165

the primary cause of an automobile collision is the defendant's violation of the rules of the road by running on the wrong side of the road when approaching an intersection and cutting the corner at the intersection, he cannot evade the consequences of his negligence by setting up that the plaintiff, who was originally on the proper side of the cross street, had swerved in the emergency to the wrong side in an attempt to avoid the collision.<sup>88</sup> And a jury may be justified in finding that the driver, when confronted with a collision, is not negligent in accelerating the speed of the machine, though temporarily the speed is excessive.<sup>89</sup> But the driver of an automobile will not be excused from negligence because of the fact that he became "rattled," it appearing that the collision occurred outside of the traveled portion of the highway and that the circumstances were not such as to justify his conduct on the ground of a sudden emergency.<sup>90</sup> The driver of an automobile will not be charged with negligence where the collision is the result of conduct of a similar character on the part of the person injured. So where the fall of a horse was caused by the act of its driver, in the desire to avoid a collision, where his fear was unfounded, it was held that the defendant was not liable.<sup>91</sup>

#### Sec. 411. Contributory negligence — last clear chance.

Under the last clear chance, or similar doctrine, which has a considerable application in some States, one who has negligently exposed himself to injury is not precluded from recovering, if the defendant discovered the peril in sufficient time to have avoided the injury and negligently failed to do so.<sup>92</sup> This doctrine may be applied in case of a collision of a

Ill. App. 23; *Stack v. General Baking Co. (Mo.)*, 223 S. W. 89; *Henderson v. Dimond (R. I.)*, 110 Atl. 388.

88. *Bain v. Fuller*, 29 D. L. R. (Canada) 113.

89. *Mayer v. Mellette*, 65 Ind. App. 54, 114 N. E. 241; *Paul v. Pfefferkorn (Wis.)*, 178 N. W. 247.

90. *Tschirley v. Lambert*, 70 Wash.

72, 126 Pac. 80.

91. *Carter v. Wilker (Tex. Civ. App.)*, 165 S. W. 483.

92. *Howard v. Worthington (Cal. App.)* 195 Pac. 709; *Shaw v. Wilcox (Mo. App.)*, 224 S. W. 58; *King v. Brenham Auto Co. (Tex. Civ. App.)*, 145 S. W. 278. See also *Presson v. Parker (Mo. App.)*, 224 S. W. 1009.

motor vehicle with another conveyance.<sup>93</sup> As was said in one case,<sup>94</sup> "A man does not become an outlaw, with the brand of Cain upon him, and whom 'everyone that findeth' him may slay, because he disregards his safety and puts himself in the way of danger. The persons and lives of human beings are held in too high esteem by the laws of every civilized community to permit automobiles and other vehicles to be recklessly and wilfully run over them and mutilate or destroy them, and then to permit the guilty parties to escape punishment by the plea that the victim got in the way of the vehicle." And in a few States, the rule is extended so as to bring the doctrine into play, not only when the defendant discovered the peril of the plaintiff in sufficient time to avoid the injury, but also when he should in the exercise of due care, have done so.<sup>95</sup> In other States, the rule is not so extended.<sup>96</sup> In order to apply the doctrine it should appear that the defendant had an opportunity to avoid the accident.<sup>97</sup>

### Sec. 412. Pleading.

In an action by a person injured by a collision between his vehicle and an automobile, while he need not set forth in his pleading a detailed and minute statement of the circumstances of the cause of action, yet he must set forth the facts upon which he bases his action with a particularity and certainty that will reasonably inform the defendant what he proposes to prove at the trial, in order that the defendant may have a fair opportunity to meet and controvert these facts in defense. The rules of pleading require that the time, place and circumstances of the matter in action, so far as relied on and within the knowledge of the party, must be specified with a fullness and fairness that will reasonably apprise the opposing party of what he is required to meet. So while an averment of the

93. *Schneider v. Hawks* (Mo. App.), 211 S. W. 681; *King v. Brenham Auto Co.* (Tex. Civ. App.), 145 S. W. 278.

94. *King v. Brenham Auto Co.* (Tex. Civ. App.), 145 S. W. 278.

95. *Whitman v. Collon*, 196 Mich. 540, 162 N. W. 950.

96. *Collins v. Marsh*, 176 Cal. 639, 169 Pac. 389. See also *Blackburn v. Marple* (Cal. App.), 184 Pac. 873.

97. *Lawrence v. Goodwill* (Cal. App.), 186 Pac. 781; *Carbaugh v. White Bus Line* (Cal. App.), 195 Pac. 1066.

fact of a collision, without stating the particular act of negligence that caused it, may be sufficient in those exceptional cases where by reason of the relation of the parties the law places upon one a high duty to prevent injury to another, or where the act itself bespeaks the negligence as its cause, it cannot be held that from the mere statement of the fact of collision upon a highway, between wayfarers with equal rights and duties, the law will infer the collision to have been the result of negligence, or the negligence to have been that of the defendant. In such cases the fact of collision is not the cause of action, but the acts of negligence that caused the fact of collision constitute the cause of action. It therefore devolves upon the plaintiff, in holding the defendant accountable for the fact of collision, which may have been the result of inevitable accident or of one of many negligent acts of either party, to disclose to the defendant the cause of the collision and to state the acts that contributed to its occurrence.<sup>98</sup> A

98. *Campbell v. Walker*, 1 Boyce's Del. 580, 76 Atl. 475, holding that the expression "so negligently and carelessly operated and ran his automobile" states no fact or circumstance that fastens upon the defendant the negligence which must be shown to entitle the plaintiff to recover and is subject to the objections that it is a statement of a conclusion of fact, arising from acts and circumstances not set forth in the declaration and that it is a statement so general as to admit almost any proof to sustain it.

**Sufficiency and construction of complaint.**—See also the following cases:

*Alabama*.—*Dozier v. Woods*, 190 Ala. 279, 67 So. 283; *Mullins v. Lemley* (Ala.), 88 So. 831; *Taxicab Co. v. Grant*, 3 Ala. App. 393, 57 So. 141; *Overton v. Bush*, 2 Ala. App. 623, 56 So. 852.

*California*.—*Tognazzini v. Freeman*, 18 Cal. App. 468, 123 Pac. 540; *Mathes v. Aggeler & Musser Seed Co.*, 179 Cal. 697, 178 Pac. 713; *Saylor v. Taylor* (Cal. App.), 183 Pac. 843; *Wiley v. Cole* (Cal. App.), 199 Pac. 550.

*Georgia*.—*Fuller v. Inman*, 10 Ga. App. 680, 74 S. E. 287.

*Illinois*.—*O'Brien v. Crawford*, 208 Ill. App. 485.

*Indiana*.—*National Motor Vehicle Co. v. Kellum*, 184 Ind. 457, 109 N. E. 196; *Picken v. Miller*, 59 Ind. App. 115, 108 N. E. 968; *Meyers v. Winona Interurban Ry. Co.*, 58 Ind. App. 516, 106 N. E. 377.

*Iowa*.—*Willis v. Schertz*, 175 N. W. 321.

*Kansas*.—*Giles v. Ternes*, 93 Kan. 140, 143 Pac. 491.

*Minnesota*.—*Fairchild v. Fleming*, 125 Minn. 431, 147 N. W. 434.

*Missouri*.—*Conley v. Lafayette Motor Car Co.* (Mo. App.), 221 S. W. 165.

*New York*.—*Hicks v. Serrano*, 74 Misc. 274, 133 N. Y. Suppl. 1102, affirmed 149 App. Div. 926, 133 N. Y. Suppl. 1126.

*Washington*.—*Cloherly v. Griffiths*, 82 Wash. 634, 144 Pac. 912.

**Particulars need not be given.**—See *Lum Yet v. Hugill*, 1 Dom. Law Rep. (Canada) 897.

count of a declaration alleging the fact of a collision of the defendant's automobile with the vehicle in which the plaintiff was riding and averring that the collision and consequent injury were due to the negligence of the defendant "in that the defendant is blind in one of his eyes and of imperfect vision, and is not on account of said blindness and imperfection of vision competent to run and operate an automobile on the public roads with reasonable safety to other users of the said public roads, and plaintiff alleges that on account of the premises it was negligence for the defendant to operate and run said automobile then and there, and that by reason of said blindness and imperfect vision of the defendant the said automobile collided with and struck the said vehicle," is held to be a sufficient allegation and not demurrable.<sup>99</sup> It was, however, said that as incompetence is the one ingredient in the negligence charged, the plaintiff must show at the trial, in order to succeed upon such count, that the imperfection of the defendant's vision extended to the point of rendering him incompetent to safely operate the automobile, as otherwise his vision, though shown to be to a lesser extent imperfect, could not have entered into the cause of collision.<sup>1</sup> Where a plaintiff alleges the negligent running of an automobile as the cause of a collision with a vehicle and the negligence alleged was careless guiding of the car and running it at an excessive rate of speed and the defendant pleaded that the collision was brought about by circumstances beyond his control, in that the steering gear of his automobile, just before he reached the spot where it struck plaintiff's buggy, became choked in such a manner that he could not steer the same to the right to avoid a collision, such plea was held to be in the nature of a plea in confession and avoidance, which required the defendant, in case the plaintiff proved *prima facie* either of the grounds of negligence averred as the proximate cause of the alleged injuries, not only to show that the steering gear of the automobile had suddenly become so deranged that he could not prevent the collision, but that such derangement, and not the

99. *Campbell v. Walker*, 1 Boyce 1. *Per Woolley, J.*  
(Del.) 580, 76 Atl. 475.

grounds of negligence relied on by the plaintiff, was the efficient and proximate cause of the collision and of the consequent injuries.<sup>2</sup> A complaint alleging that defendant did "negligently, carelessly and recklessly drive said motor car upon said avenue at such unlawful rate of speed, without keeping a proper lookout before him and without giving the proper signals of his approach," is not to be construed as alleging negligence as to the rate of speed only, but as alleging in addition thereto negligence, in not keeping the proper lookout and in not giving the proper signals of his approach.<sup>3</sup> A complaint alleging that the defendant carelessly and negligently drove an automobile at high speed and with great violence against the plaintiff's horses standing in the highway, whereby they were frightened and ran away and were injured, is not supported by evidence showing that the automobile while under control was moving slowly in the direction of the horses, but did not come in contact with either of them.<sup>4</sup> But a complaint alleging that the defendant ran into the plaintiff's vehicle with his automobile is supported whether or not the defendant was driving or was in the automobile.<sup>5</sup> The general rule is that when reliance is placed on particular acts of negligence, the proofs must be confined to those acts.<sup>6</sup>

**Sec. 413. Negligence is generally a question for the jury.**

When two vehicles collide on the public highway with damage to one or both, the question of the negligence or contributory negligence of the drivers is generally for the jury.<sup>7</sup>

2. *Posener v. Harvey* (Tex. Civ. App.), 125 S. W. 356.

An order for particulars was held properly refused in an action to recover damages for death alleged to be caused by the negligent operation of an automobile, where the statement of claim showed some particulars of negligence. *Cuperman v. Ashdown* (Manitoba), 16 West. L. R. 687.

Meeting allegations as to proceeding at slow rate of speed.—*Abrahamson v. Yuille*, 7 R. P. Q. 61.

3. *Diamond v. Cowles*, 174 Fed. 571, 98 C. C. A. 417.

4. *Trout Brook Co. v. Hartford Elec. Co.*, 77 Conn. 338, 59 Atl. 405.

5. *Morrison v. Clarke*, 196 Ala. 670, 72 So. 305; *Shepard v. Wood*, 116 N. Y. App. Div. 861, 102 N. Y. Suppl. 306.

6. *Hunter v. Quaintance* (Colo.), 168 Pac. 918.

7. *Arkansas*.—*Bennett v. Snyder*, 227 S. W. 402.

*Alabama*.—*Wyker v. Texas Co.*, 201 Ala. 585, 79 So. 7.

Especially is this so, when the evidence as is usually the case,

*Arkansas*.—Carter v. Brown, 136 Ark. 23, 206 S. W. 71.

*California*.—Oberholzer v. Hubbell (Cal. App.), 171 Pac. 436; Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38. Newman v. Overholtzer (Cal.), 190 Pac. 175; Saylor v. Taylor (Cal. App.), 183 Pac. 843; Blackburn v. Marple (Cal. App.), 184 Pac. 873; Blackburn v. Marple (Cal. App.), 184 Pac. 875; Maxwell v. Western Auto Stage Co. (Cal. App.), 189 Pac. 710; Blackwell v. American Film Co. (Cal. App.), 192 Pac. 189; Sinclair v. Pioneer Truck Co. (Cal. App.), 196 Pac. 281; Rhodes v. Firestone Tire & Rubber Co. (Cal. App.), 197 Pac. 392. "If there was any substantial evidence tending to show that the collision was caused by negligence on the part of defendant's driver, the action of the court in directing a verdict was, of course, erroneous. The existence or nonexistence of negligence is ordinarily a question of fact to be determined by a jury. On the other hand, the court may withdraw the case from the jury and direct a verdict where the evidence is undisputed, 'or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.'" Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38.

*Connecticut*.—Neuman v. Apter, 112 Atl. 350.

*Georgia*.—Rouche v. McCloudy, 19 Ga. App. 558, 91 S. E. 999; Pedcock v. West (Ga. App.), 102 S. E. 360.

*Illinois*.—Page v. Brink's Chicago City Express Co., 192 Ill. App. 389; Hallissey v. Rothschild & Co., 203 Ill. App. 283; Walker v. Hilland, 205 Ill. App. 243; Moyer v. Shaw Livery Co., 205 Ill. App. 273.

*Iowa*.—Baker v. Zimmerman, 179 Iowa, 272, 161 N. W. 479; Barnes v.

Barnett, 184 Iowa 936, 169 N. W. 365; Wagner v. Kloster, 175 N. W. 840; Lonnecker v. Van Patten, 179 N. W. 432; McSpadden v. Axmear, 181 N. W. 4.

*Kentucky*.—Slate v. Witt, 188 Ky. 133, 221 S. W. 217.

*Maine*.—Lyons v. Jordan, 117 Me. 117, 102 Atl. 976; Shepherd v. Marston, 109 Atl. 387.

*Maryland*.—American Express Co. v. Terry, 126 Md. 254, 94 Atl. 1026; Wingert v. Cohill, 110 Atl. 857; Buckey v. White, 111 Atl. 777.

*Massachusetts*.—Massie v. Barker, 224 Mass. 420, 113 N. E. 199; Walters v. Davis, 129 N. E. 443.

*Michigan*.—Jolman v. Alberts, 192 Mich. 25, 158 N. W. 170; Eberle Brewing Co. v. Briscoe Motor Co., 194 Mich. 140, 160 N. W. 440; Whitman v. Collin, 196 Mich. 540, 162 N. W. 950; Hopkins v. Tripp, 198 Mich. 94, 164 N. W. 395; Harris v. Bernstein, 204 Mich. 685, 171 N. W. 521; Simmons v. Peterson, 207 Mich. 508, 174 N. W. 536.

*Minnesota*.—Dunkelbeck v. Meyer, 140 Minn. 283, 167 N. W. 1034; Young v. Avery Co., 141 Minn. 483, 170 N. W. 693.

*Missouri*.—Brickell v. Williams, 180 Mo. App. 572, 167 S. W. 607; Warrington v. Byrd (Mo. App.), 181 S. W. 1079; Calhoun v. Mining Co., 202 Mo. App. 564, 209 S. W. 318; Pabst Brewery Co. v. Laetner (Mo. App.), 208 S. W. 487; Shaw v. Wilcox (Mo. App.), 224 S. W. 58; Alyea v. Junge Baking Co. (Mo. App.), 230 S. W. 341.

*Nebraska*.—Lord v. Roberts, 102 Neb. 49, 165 N. W. 892.

*New Jersey*.—Rabinowitz v. Hawthorne, 89 N. J. L. 308, 98 Atl. 315.

*New York*.—Milliman v. Appleton, 139 App. Div. 738, 124 N. Y. Suppl. 482; Pratt v. Burns, 189 App. Div. 33, 177 N. Y. Supp. 517; Harding v. Cavanaugh, 91 Misc. (N. Y.) 511, 155 N. Y.

is conflicting.<sup>8</sup> And when the evidence is such that reasonable minds might reach different conclusions, negligence becomes a question of fact.<sup>9</sup> But, where the plaintiff's testimony is entirely irreconcilable with the facts surrounding the accident, such as the position of the automobiles thereafter, a verdict for the plaintiff may be deemed as founded on a mistake, and may be set aside.<sup>10</sup>

Suppl. 374; *Blum v. Gerardi*, 111 Misc. 617, 182 N. Y. Suppl. 297.

*Pennsylvania*.—*Bew v. John Daley Inc.*, 260 Pa. 418, 103 Atl. 832; *Lancaster v. Reese*, 260 Pa. 390, 103 Atl. 891; *Dickler v. Pullman Taxi Service Co.*, 66 Pitts. Leg. Journ. 93; *Sebastine v. Haney*, 68 Pitts. Leg. Journ. 100; *Mechling v. Harvey*, 68 Pitts. Leg. Journ. (Pa.) 149.

*Rhode Island*.—*Rogers v. Mann*, 70 Atl. 1057; *Jacobson v. O'Dette*, 108 Atl. 653.

*Texas*.—*Melton v. Manning* (Civ. App.), 216 S. W. 488.

*Utah*.—*Boeddcher v. Frank*, 48 Utah, 363, 159 Pac. 634.

*Vermont*.—*Bianchi v. Millar*, 111 Atl. 524.

*Washington*.—*Luger v. Windell*, 187

Pac. 407; *Kane v. Nakmoto*, 194 Pac. 381; *McCreedy v. Fournier*, 194 Pac. 398; *Boeing v. Gottstein Furniture Co.*, 196 Pac. 575.

*Wisconsin*.—*Paul v. Pfefferkorn*, 178 N. W. 247; *Wagner v. Larsen*, 182 N. W. 336.

8. *Brown v. New Haven Taxicab Co.* (Conn.), 105 Atl. 706; *Forsythe v. Killam*, 193 Ill. App. 534; *Lyons v. Jordan* (Me.), 102 Atl. 976; *Savage v. Boyce*, 53 Mont. 470, 164 Pac. 887; *Ireson v. Cunningham*, 90 N. J. L. 960, 101 Atl. 49; *Whetstone v. Jensen*, 96 Oreg. 576, 189 Pac. 983.

9. *Calhoun v. Mining Co.* (Mo. App.), 209 S. W. 318; *Shortle v. Sheill* (Wis.), 178 N. W. 304.

10. *Ladham v. Young*, 145 N. Y. Suppl. 1089.



**CHAPTER XVII.**

## COLLISION WITH PEDESTRIAN.

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## Sec. 414. General duties of foot travelers and drivers of motor vehicles.

In the absence of statutory or municipal regulation affecting the question, the right of a pedestrian is neither superior nor inferior to the rights of the operator of a motor vehicle. They have equal rights in the street.<sup>1</sup> The driver of the

1. *United States*.—Lane v. Sargent, 217 Fed. 237.

*Delaware*.—Brown v. City of Wilmington, 4 Boyce, 492, 90 Atl. 44; Wolleston v. Stiltz, 114 Atl. 198.

*Illinois*.—Crandall v. Krause, 165 Ill. App. 15; Wortman v. Trott, 202 Ill. App. 528.

*Indiana*.—Harker v. Gruhl, 62 Ind. App. 177, 111 N. E. 457.

*Kansas*.—Eames v. Clark, 177 Pac. 540.

*Kentucky*.—Bruce's Adm'r v. Callahan, 185 Ky. 1, 213 S. W. 557.

*Massachusetts*.—Emery v. Miller, 231 Mass. 243, 120 N. E. 654.

*Michigan*.—Tuttle v. Briscoe Mfg. Co., 190 Mich. 22, 155 N. W. 724.

*Missouri*.—Frankel v. Hudson, 271 Mo. 495, 196 S. W. 1121; Reynolds v. Kenyon (Mo.), 222 S. W. 476; Carradine v. Ford, 195 Mo. App. 684, 187 S. W. 285; Young v. Bacon (Mo. App.), 183 S. W. 1079; Dignum v. Weaver (Mo. App.), 204 S. W. 566; Meenach v. Crawford, 187 S. W. 879; Moffatt v. Link (Mo. App.), 229 S. W. 836.

*New York*.—Seaman v. Mott, 127 N. Y. App. Div. 18, 110 N. Y. Suppl. 1040; Miller v. New York Taxicab Co., 120 N. Y. Suppl. 899.

*Pennsylvania*.—Schoepp v. Gerety, 263 Pa. St. 538, 107 Atl. 317; Twinn v. Noble (Pa.), 113 Atl. 686.

*Vermont*.—Aiken v. Metcalf, 90 Vt. 196, 97 Atl. 669.

*Washington*.—Locke v. Greene, 100 Wash. 397, 171 Pac. 245.

"It is true, as we have said, that in a general sense the pedestrian and the automobilist have equal rights in streets

that are set apart for the use of vehicles as well as the accommodation of foot travelers, and each has rights that the other is bound to respect, and it is also true that the automobile must use only the carriage way of the street, while the pedestrian, except at street crossings, uses generally only the sidewalk. But the pedestrian, in the use of the street at a regular crossing, has the same right to its use as vehicles, and is under no legal duty to give way to automobiles. The automobile can go around him as well as he can go around it. It can get out of the way of the pedestrian about as easily and quickly as he can get out of its way, although it is usually the case, and rightfully so, that the pedestrian endeavors to keep out of the way of vehicles at street crossings; but, if he does not,—this does not excuse the driver of that vehicle who runs him down, unless it be that the driver was free from negligence, and the pedestrian by his own want of care was to blame for the collision." Weidner v. Otter, 171 Ky. 167, 188 S. W. 335.

**Prejudice against automobiles.**—In Gregory v. Slaughter, 124 Ky. 345, 8 L. R. A. (N. S.) 1228, 30 Ky. L. Rep. 500, 99 S. W. 247, which holds an automobilist liable in damages for colliding with a pedestrian on a highway, the court says in the opinion: "The appellant complains in his brief that he is the victim of public prejudice against automobiles. This may be true, and, if so, that prejudice is based upon the carelessness of a large number of automobilists of a character similar to

machine must exercise reasonable care to avoid injury to persons lawfully in the street;<sup>2</sup> and such persons are bound to

that of which this record shows appellant was guilty. The owners of automobiles have the same right on the public highways as the owners of other vehicles; but when one drives so dangerous a machine through the public thoroughfares it is incumbent upon him to exercise corresponding care that the safety of the traveling public is not endangered thereby. When owners of automobiles learn that it is confidently believed that whatever prejudice may now exist against them in the public mind will entirely disappear."

2. *United States*.—*Bishop v. Wight*, 221 Fed. 391, 137 C. C. 200; *Lane v. Sargent*, 217 Fed. 237.

*Alabama*.—*Dozier v. Woods*, 190 Ala. 279, 67 So. 283; *White Swan Laundry Co. v. Wehran*, 202 Ala. 87, 79 So. 479.

*Arkansas*.—*Texas Motor Co. v. Buffington*, 134 Ark. 320, 203 S. W. 1013.

*California*.—*Park v. Orbison* (Cal. App.), 184 Pac. 428; *Lampton v. Davis Standard Bread Co.* (Cal. App.), 191 Pac. 710.

*Delaware*.—*Brown v. City of Wilmington*, 4 Boyce, 492, 90 Atl. 44.

*Illinois*.—*Devine v. Brunswick-Balke-Collender Co.*, 270 Ill. 504, 110 N. E. 780; *Kessler v. Washburn*, 157 Ill. App. 532; *Goldblatt v. Brocklebank*, 166 Ill. App. 315; *Miller v. Eversole*, 184 Ill. App. 362.

*Indiana*.—*Wellington v. Reynolds*, 177 Ind. 49, 97 N. E. 155; *Harker v. Gruhl*, 62 Ind. App. 177, 111 N. E. 457; *Gardner v. Vance*, 63 Ind. App. 27, 113 N. E. 1006.

*Iowa*.—*Brown v. Des Moines Bottling Works*, 174 Iowa, 715, 156 N. W. 829; *Wine v. Jones*, 183 Iowa, 1166, 162 N. W. 196, 168 N. W. 318.

*Kentucky*.—*Gregory v. Slaughter*, 124 Ky. 345, 99 S. W. 247, 30 Ky. L. Rep. 500, 8 L. R. A. (N. S.) 1228;

*Forgy v. Rutledge*, 167 Ky. 182, 180 S. W. 90; *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335.

*Michigan*.—*Bouma v. Dubois*, 169 Mich. 422, 135 N. W. 322; *Patterson v. Wagner*, 204 Mich. 261, 171 N. W. 356.

*Missouri*.—*Haacks v. Davis*, 166 Mo. App. 249, 148 S. W. 450; *Carradine v. Ford*, 195 Mo. App. 684, 187 S. W. 285; *Edmonston v. Barrock* (Mo. App.), 230 S. W. 650.

*New Jersey*.—*Pool v. Brown*, 89 N. J. L. 314, 98 Atl. 262.

*New York*.—*Brewster v. Barker*, 129 N. Y. App. Div. 724, 113 N. Y. Suppl. 1026; *Sommerman v. Seal*, 176 App. Div. 598, 163 N. Y. Suppl. 770; *Gnecco v. Pederson*, 154 N. Y. Suppl. 12.

*North Carolina*.—*Manley v. Abernathy*, 167 N. C. 220, 83 S. E. 343.

*Oregon*.—*Weygandt v. Bartle*, 88 Oreg. 310, 171 Pac. 587.

*Pennsylvania*.—*Virgilio v. Walker*, 254 Pa. 241, 98 Atl. 815; *Twinn v. Noble* (Pa.), 113 Atl. 686.

*Rhode Island*.—*Gouin v. Ryder*, 38 R. I. 31, 94 Atl. 670; *Greenhalch v. Barber*, 104 Atl. 769.

*South Carolina*.—*King v. Holliday*, 108 S. E. 186.

*Utah*.—*Musgrave v. Studebaker Bros. Co. of Utah*, 48 Utah, 410, 160 Pac. 117.

*Vermont*.—*Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669.

*Virginia*.—*Core v. Wilhelm*, 124 Va. 150, 98 S. E. 27.

*Washington*.—*Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519.

*Canada*.—*White v. Hegler*, 29 D. L. R. 480, 34 W. L. R. 1061.

**Degree of care.**—Where the question as to whether an infant who was killed by an automobile was free from contributory negligence is very close and

exercise the same degree of caution for their own safety.<sup>3</sup>

doubtful and probably a finding of freedom from contributory negligence is against the weight of evidence, a judgment for the plaintiff will be reversed where the court charged that in view of the congested condition of the street where the accident occurred it was "the duty of the defendant to use great care and caution in proceeding along that street." The court should have charged that the defendant should have exercised the care and caution which a careful and prudent driver would have exercised under the same circumstances. Although the error was slight, it is sufficient for a reversal where the preponderance of proof in the plaintiff's favor was very doubtful. *Sommerman v. Seal*, 176 N. Y. App. Div. 598, 163 N. Y. Suppl. 770. "The driver of the automobile was under a legal duty to use reasonable care to avoid colliding with vehicles or persons in the public highway. His duty was to be on the alert to observe persons who were in the street or about to cross the street and to use reasonable care to avoid colliding with them. He was under a duty to have his automobile under proper control. He was under an obligation to take notice of the conditions existing in the public street and to propel his car in a manner suitable to those conditions. He was under a duty to observe the condition which existed at the crosswalk." *Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262.

The operation of an automobile upon the crowded streets of a city necessitates exceeding carefulness on the part of the driver. Moving quietly as it does, without the noise which accompanies the movements of a street car or other ordinary heavy vehicle, it is necessary that caution should be continuously exercised to avoid collisions with pedestrians unaware of its approach. The speed should be limited, warnings of

approach given, and skill and care in its management so exercised as to anticipate such collisions as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions. The pedestrian also must use such care as an ordinarily prudent man would use under like circumstances. *Lampe v. Jacobsen*, 46 Wash. 533, 90 Pac. 654.

"High" care.—"Automotive vehicles have become a very important and necessary part of the business and social life of the people, and, in view of their advantages and benefits, are permitted to operate upon the public streets and highways, though carrying with them great potential possibilities of danger and destruction. Society, therefore, in conceding them the right to operate, exacts of those taking their advantages a high degree of care in avoiding the known evil results which follow a different course. On those portions of the highways, known to be used by such vehicles, between the points provided for the passage of pedestrians, the latter, in attempting to cross, do so in large measure at their peril, subject to the requirement that the drivers of such vehicles shall not knowingly or wantonly strike and injure them. But at the points provided for the passage of pedestrians they have the right to assume that the operators of such machines will observe that high degree of care imposed by the circumstances. No other condition is consistent with the common and necessary right to use such avenues of intercourse. The frequent occurrence of collisions and accidents argue most forcefully for a rigid enforcement of all traffic regulations intended to prevent such occurrences. Otherwise, the individual who, through choice or necessity, adopts the original mode of locomotion provided by nature, must "take his life

The law imposes reciprocal obligations.<sup>4</sup> The reasonable care required of the operator of a motor vehicle takes into con-

and limb in his own hands." We do not mean by this that he is to be excused for failing to use his own senses to avoid being injured; but the greater duty and care rests upon those who use these dangerous agencies carrying such great possibilities of harm." *Mequet v. Algiers Mfg. Co.*, 147 La. 364, 84 So. 904.

"Highest" degree of care.—Statutory provisions may require that the drivers of motor vehicles exercise the "highest" degree of care. *Reynolds v. Kenyon (Mo.)*, 222 S. W. 476; *Dignum v. Weaver (Mo. App.)*, 204 S. W. 566. See section 281. The statute in Missouri was subsequently repealed. See *Edmonston v. Barrock (Mo. App.)*, 230 S. W. 650.

3. See chapter XVIII.

4. *Texas Motor Co. v. Buffington (Ark.)*, 203 S. W. 1013; *Harker v. Gruhl*, 62 Ind. App. 177, 111 N. E. 457; *Bruce's Adm'r v. Callahan*, 185 Ky. 1, 213 S. W. 557; *Mears v. McElfish (Md.)*, 114 Atl. 701; *Core v. Wilhelm*, 124 Va. 150, 98 S. E. 27; *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519. "The law imposes reciprocal obligations. Those reciprocal obligations are the offspring of elementary and familiar legal principles which, by reason of their soundness and wisdom, have become firmly imbedded in the law. In fact, it is strict observance of those legal principles which tends to make our public highways passable and safe to the drivers of vehicles and pedestrians, alike. The circumstance that new elements of locomotion such as electricity, steam, etc., have been added to vehicles, using public highways, has not wrought any modification of those legal principles." *Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262.

"While the pavement along the streets is primarily intended for pedestrians, and the driveway or street is intended for vehicles, a pedestrian nevertheless has the same right in the street as a vehicle; that is to say, their rights are co-ordinate, concomitant, and equal. One does not have to give away absolutely to the other; each is obliged to respect the rights of the other and to do no act, while occupying the street, that will bring unnecessary delay or injury to the other. A pedestrian may cross the street between the intersections at pleasure, but he must take into account the equal right of vehicles and their probable presence in the street. He cannot obstruct traffic by standing in the street unnecessarily, nor arbitrarily require vehicles to move out of his way, but his use of the street must be regulated according to the corresponding rights of others." *Bruce's Adm'r v. Callahan*, 185 Ky. 1, 213 S. W. 557.

"The defendant in his car and the plaintiff on foot were each entitled to the use of the highway. They had reciprocal rights and duties as to its use. Neither could be unmindful of the fact that the road was intended to be available for every legitimate purpose and method of public travel. The driver of the automobile was obliged to anticipate that pedestrians might be using the thoroughfare. It was especially incumbent upon him to exercise reasonable care to avoid injury to travelers who, out of regard to their own safety, would naturally make use of the unpaved margin. The fact that the headlights on the automobile approaching from the city may have made it more difficult for the driver of the defendant's car to see the pedestrians on the side of the road did not relieve him

sideration the dangers which may be expected of such a machine; and hence his care may be deemed greater than that of one driving a horse and wagon.<sup>5</sup> And it must be recognized that the danger to pedestrians from motor vehicles is as great, or even greater, than the danger from street cars.<sup>6</sup> In

of the duty to the proper care to observe their presence. If he could not see them because of any insufficiency of his own headlights, or because of the glare of those on the approaching car, he might have reduced the speed of his automobile and given warning signals to any one possibly exposed to the danger of collision." *Mears v. McElfish* (Md.), 114 Atl. 701.

5. *Weihe v. Rathjen Mercantile Co.*, 34 Cal. App. 302, 167 Pac. 287; *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44; *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335; *Tuttle v. Briscoe Mfg. Co.*, 190 Mich. 22, 155 N. W. 724; *Manley v. Abernathy*, 167 N. C. 220, 83 S. E. 343; *Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669. "The owners of automobiles have the same right on the public highways as the owners of other vehicles; but, when one drives so dangerous a machine through the public thoroughfares, it is incumbent upon him to exercise corresponding care that the safety of the traveling public is not endangered thereby." *Gregory v. Slaughter*, 124 Ky. 345, 99 S. W. 247, 30 Ky. Law Rep. 500, 8 L. R. A. (N. S.) 1228. "It is, too, a familiar rule in the law of negligence that the care to be exercised must correspond with the capacity to injure, and accordingly the automobilist is under a much higher degree of care to look out for the pedestrian, than the pedestrian is to look out for the automobilist. The pedestrian cannot merely by the manner in which he uses the street harm the automobilist, but the automobilist may by his manner of using the street kill the pedestrian; and so, generally speaking,

the pedestrian is only required to look after his own safety, and not the safety of others, while the automobilist must look out for the safety of the pedestrian rather than his own." *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335. The plaintiff and defendant had equal and reciprocal rights in the use of the highway, and each was bound to so make use of his own right as not to interfere with that of the other. Each was bound to exercise due care; but the degree of watchfulness which this rule imposed upon them was not the same. The defendant was driving a machine, which on account of its speed, weight and quietness was capable of doing great damage, and the law puts upon one so situated a greater and more constant caution. He was bound to exercise care commensurate with the dangers arising from the lack of it." *Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669.

**Instruction to jury.**—An instruction to the jury to the effect that the driver of the automobile was not bound to exercise the "highest degree of care" but "ordinary care at and just prior to the time and place in question to avoid injuring the deceased," has been held to be proper. *Gordon v. Stadelman*, 202 Ill. App. 255.

6. *Meenach v. Crawford* (Mo.), 187 S. W. 879, wherein it was said: "In fact, automobiles are more dangerous to travel on the streets than street cars; the latter are confined to permanently fixed tracks, while the former are not restricted to any particular portions of the street; they run as fast, and on account of their great weight, collisions

considering whether the operator of a motor vehicle was negligent, among the things to be considered are the size, weight, speed and noise of the car and the condition of the streets.<sup>7</sup> What is reasonable care by an operator of a motor vehicle on the public highways depends upon the circumstances of the particular case, as bearing upon the conduct and the affairs of men; for what may be deemed reasonable and prudent in one case may, under different circumstances and surroundings, be gross negligence.<sup>8</sup>

### Sec. 415. Proximate cause.

Unless an injury to a pedestrian is the proximate result of an act of negligence on the part of the operator of a motor vehicle, there can be no recovery.<sup>9</sup> In other words, the negligence of the operator of the machine must be shown to be the proximate cause of the plaintiff's injuries.<sup>10</sup> The burden of

with them are just as disastrous to man and property as are collisions with the cars. All that vehicles and pedestrians have to do in order to avoid injury from the latter is to keep off of the car tracks, but not so with automobiles; one can never tell in what part of the street they will appear, nor what course they will take in the presence of apparent or threatened collision. A person in trying to diverge from the course of one may step in front of another, or the same automobile may turn in the same direction the pedestrian takes and run him down, he having no knowledge of the course the former will take."

7. *Bellinger v. Hughes*, 31 Cal. App. 464, 160 Pac. 838; *Collett v. Standard Oil Co.*, 186 Ky. 142, 216 S. W. 356.

8. *White Swan Laundry Co. v. Wehrhan*, 202 Ala. 87, 79 So. 479; *Ginter v. O'Donoghue* (Mo. App.), 179 S. W. 732. "In order to determine whether the requisite care was observed, the running of the car must be viewed in the light of the 'exigencies of the situation.'" *Ginter v. O'Donoghue* (Mo. App.), 179 S. W. 732.

9. Death as result of injuries.—In

an action for the death of a boy alleged to have been caused by being run over by the defendant's motor truck in a public street, the evidence was held sufficient to show that death resulted from the injuries, where the identity of the boy was clearly established, and though the character and extent of the injuries were not shown, the evidence disclosed that he died within an hour after he was injured, and it also appeared that the defendant's counsel in the examination of witnesses assumed that the boy was killed. *Devine v. Ward Baking Co.*, 188 Ill. App. 588.

10. *Feehan v. Slater*, 89 Conn. 697, 96 Atl. 159; *City of Hagerstown v. Raltz* (Md.), 104 Atl. 267; *Bibb v. Grady* (Mo. App.), 231 S. W. 1020; *Cantanno v. James A. Stevenson Co.*, 172 N. Y. App. Div. 252, 158 N. Y. Suppl. 335; *Cohen v. Goodman & Sons, Inc.*, 189 N. Y. App. Div. 209, 178 N. Y. Suppl. 528; *Frashella v. Taylor*, 157 N. Y. Suppl. 881; *Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134; *Schell v. Dubois*, 94 Ohio, 93, 113 N. E. 664; *Flanigan v. McLean* (Pa. St.), 110 Atl. 370.

establishing that the injury was the proximate result of the negligence, is upon the plaintiff.<sup>11</sup> But to sustain a recovery for the injuries in question, it is not required that the precise form of injury which resulted could have been foreseen; it is sufficient if it appears that the defendant's negligence would probably cause harm to some person.<sup>12</sup> Even the violation of a municipal or statutory regulation affords no cause of action save for those injuries which are a proximate result of the violation.<sup>13</sup> Thus, the violation of a statute making it a felony to use the automobile of another without authority, is not the proximate cause of an injury to one occasioned by a use of a machine contrary to the statute, and the pedestrian cannot recover without proof of other negligence on the part of the driver.<sup>14</sup> And negligence, if any, in leaving an automobile unattended in the highway is not generally deemed the proximate cause of an injury, when the intervening act of a trespasser starts the machine.<sup>15</sup> But the fact that the driver of another vehicle or a pedestrian (other than the plaintiff) in the street was also guilty of negligence which contributed to the accident, does not excuse the defendant from responsibility for his own acts of neglect which were a proximate cause of the accident.<sup>16</sup> For example, if the operator of a motor car makes a sudden turn to avoid a careless pedestrian in the street and thereby collides with another person, the driver's negligence, if any, is not excused by the negligence of the per-

11. *Jabbour v. Central Constr. Co.* (Mass.), 131 N. E. 194; *Amley v. Saginaw Milling Co.*, 195 Mich. 189, 161 N. W. 832.

12. *Regan v. Cummings*, 228 Mass. 414, 117 N. E. 800.

13. *Connecticut*.—*Feehan v. Slater*, 89 Conn. 697, 96 Atl. 159; *Cohen v. Goodman & Sons, Inc.*, 189 N. Y. App. Div. 209, 178 N. Y. Suppl. 528.

*Michigan*.—*Johnston v. Cornelius*, 200 Mich. 209, 166 N. W. 983, L. R. A. 1918D 880.

*North Carolina*.—*Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134.

*Ohio*.—*Schell v. Dubois*, 94 Ohio, 93,

113 N. E. 664.

*South Carolina*.—*Whaley v. Ostendorf*, 90 S. Car. 281, 73 S. E. 186.

*Vermont*.—*Dervin v. Frenier*, 91 Vt. 398, 100 Atl. 760.

*Washington*.—*Burlie v. Stephens*, 193 Pac. 684.

And see section 300.

14. *Johnston v. Cornelius*, 200 Mich. 209, 166 N. W. 983, L. R. A. 1918D 880.

15. Section 342.

16. *Solomon v. Braufman*, 175 N. Y. Suppl. 835; *Mehegan v. Faber*, 158 Wis. 645, 149 N. W. 397.



son causing the swerve.<sup>17</sup> Or if one driving at an unreasonable speed swings his machine toward the sidewalk to avoid a child, and collides with a push cart which is thrown against one standing on the sidewalk, the driver may be liable.<sup>18</sup> So, too, if a fire auto, in dodging a street car which unlawfully obstructs its path, strikes a pedestrian, the act of the motorman of the street car may be deemed the proximate cause of the injury to the pedestrian.<sup>19</sup> And negligence in leaving an automobile unattended in the highway may be deemed the proximate cause of an injury sustained by a pedestrian when a car runs into the standing auto and pushes it against the pedestrian.<sup>20</sup> Similarly, a driver who negligently propels his car so as to strike another motor vehicle and push it against a pedestrian may be liable for his injuries, though the driver of the latter car was also guilty of negligence.<sup>21</sup> If an automobile is negligently driven against a pedestrian in a street thereby throwing such pedestrian against a third person so as to cause injuries to the latter, the negligence of the driver is said to be the proximate cause of the injuries sustained by such third person.<sup>22</sup> The alleged negligence of a city in main-

17. *Mehegan v. Faber*, 158 Wis. 645, 149 N. W. 397.

18. *Solomon v. Braufman*, 175 N. Y. Suppl. 835.

19. *King v. San Diego Elec. Ry. Co.*, 176 Cal. 266, 168 Pac. 131.

20. *Keiper v. Pacific Gas & Elec. Co.* (Cal. App.), 172 Pac. 180.

21. *Mathes v. Aggeler & Musser Seed Co.*, 179 Cal. 697, 178 Pac. 713; *Meech v. Sewall*, 232 Mass. 460, 122 N. E. 446.

22. *Frankel v. Norris*, 252 Pa. 14, 97 Atl. 104, wherein it was said: "The proximate cause of the plaintiff's injuries was manifestly the negligent act of the defendant in driving his machine past the street car after it had stopped. It was a breach of a statutory duty which naturally and proximately resulted in the plaintiff's injuries. There was no intervening cause which broke the connection between the

defendant's negligent act and its resultant consequence. *McNamee's* act in alighting from the car and passing to the pavement, as already observed, was not culpable in any way, and it would not have caused the injury to the plaintiff if it had not been for the act of the defendant in driving his machine against him. There was a continuous and connected succession of events beginning with, and caused by, the negligent act of the defendant, unbroken by any new or independent cause, and ending with the plaintiff's injuries, which would not have occurred without the initial wrongful act of the defendant. That some of the persons who were alighting from the car would in some manner be injured by defendant's illegal act was readily to be anticipated and should have been foreseen by the defendant. To render his act the proximate cause of the plaintiff's

taining a faulty contour of the street and curbing, and in permitting a table to remain on the sidewalk, is not the proximate cause of an injury to a child on the walk who is injured by an automobile backing upon the sidewalk and pushing the child against the table.<sup>23</sup> So, too, the wrongful act of municipal employees in permitting an obstruction on a sidewalk does not render it liable for injuries sustained by one who steps into the street to avoid the obstruction and is thereby struck by a motor vehicle.<sup>24</sup> And the negligence of a street railway company in having a glaring light which blinded the driver of a motor bus, may not be the proximate cause of an injury to a pedestrian from the bus, for under such circumstances it is the duty of the driver to stop the machine and his negligence in continuing may be deemed an intervening cause.<sup>25</sup> If the jury finds that the proximate cause of the accident was the

injury, the law does not require that the defendant should have foreseen the particular consequence or precise form of the injury, or the particular manner in which it occurred if by the exercise of reasonable care he might have foreseen or anticipated that some injury might result from his negligent act. 29 Cyc. 495. A man of ordinary intelligence would have recognized the great danger to passengers alighting from the car and passing to the pavement in running his machine between the car and the curb. The fact that the intervening cause was a human being instead of an inanimate object does not, as the defendant contends, under the facts of this case, make it a responsible cause which relieves him from liability. *McNamee* was not negligent, as pointed out above, in alighting from the car and crossing the street to the pavement. He was simply an innocent instrument in the continuous succession of events, the first of which was the negligent act of the defendant, which resulted in the plaintiff's injuries. But if his conduct was culpable, the jury have found, under the court's

instructions, that the defendant in the natural and ordinary course of events should have anticipated what happened, and therefore the defendant's negligence was an essential link in the chain of causation, and the connection between the defendant's negligent act and the plaintiff's injury was not broken. 1 *Shear. & Red. Neg.* (6th Ed.), § 32. The negligent act of the defendant must therefore be regarded as the proximate cause of the plaintiff's injuries."

See also *Walker v. Rodriguez*, 139 La. 251, 71 So. 499; *Greenhalch v. Barber* (R. I.), 104 Atl. 769.

23. *City of Hagerstown v. Raltz* (Md.), 104 Atl. 267.

Steam fom engine obstructing view of driver and causing machine to strike pedestrian. Verdict against construction company operating the machine, sustained. *Pisarki v. Wisconsin Tunnel & Constr. Co.* (Wis.), 183 N. W. 164.

24. *Jones v. City of Ft. Dodge*, 185 Iowa, 600, 171 N. W. 16.

25. *Kilgore v. Birmingham, etc., Power Co.*, 200 Ala. 238, 75 So. 996.

negligence of the driver of another car, which caused plaintiff to jump suddenly in defendant's path, the latter would not be liable.<sup>26</sup> In the absence of unusual circumstances, the driver of a motor vehicle is not liable for injuries sustained by a pedestrian who falls on ice by the side of the way where he stepped to avoid the machine.<sup>27</sup> But liability has been sustained where a pedestrian stepped in front of a horse while avoiding an automobile negligently driven.<sup>28</sup>

### Sec. 416. Unavoidable accident.

While reasonable care is exacted of the driver of an automobile,<sup>29</sup> this is far from requiring him to be an insurer against accidents to pedestrians.<sup>30</sup> In an action by a pedestrian for injuries received in a collision with a motor vehicle, the burden is placed on the plaintiff of showing that some negligence of the defendant was the proximate cause of his injury,<sup>31</sup> and also, in those jurisdictions where common law rules

26. *Twinn v. Noble* (Pa.), 113 Atl. 209; *Boyce's* (27 Del.) 106, 86 Atl. 209; *Wollaston v. Stiltz* (Del.), 114 Atl. 198.

27. *White v. Metropolitan St. Ry. Co.*, 195 Mo. App. 310, 191 S. W. 1122. *Illinois*.—*Smith v. Schoenhofen Brewing Co.*, 201 Ill. App. 552.

28. *Maitland v. McKenzie*, 28 O. L. R. (Canada) 506. *Louisiana*.—*Hahn v. P. Graham & Co.*, 148 La. —, 86 So. 651.

29. Section 277.

30. *Czarniski v. Security Storage & Constr. Co.*, 131 N. E. 194. *Massachusetts*.—*Jabbour v. Central*

31. *And see section 283.* *Michigan*.—*Barger v. Bissell*, 188 Mich. 366, 154 N. W. 107.

**Not an insurer.**—"Drivers upon highways are not held as insurers against accidents arising from the negligence of children or their parents, and though in law such negligence in a particular case may not be a defense, as contributory negligence, for a driver also guilty of negligence, the fact of an accident does not establish liability or raise a presumption that the driver is negligent." *Barger v. Bissell*, 188 Mich. 366, 154 N. W. 107. See also *Herald v. Smith* (Utah), 190 Pac. 932.

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*31. Arkansas*.—*Millsaps v. Brogdon*, 97 Ark. 469, 134 S. W. 632. *Missouri*.—*Winter v. Van Blarcom*, 258 Mo. 418, 167 S. W. 498.

*Delaware*.—*Grier v. Samuel*, 4 401, 82 S. E. 71. *New York*.—*Polsky v. New York Transp. Co.*, 96 App. Div. 613, 88 N. Y. Suppl. 1024; *Capell v. New York Transp. Co.*, 150 App. Div. 723, 135 N. Y. Suppl. 691; *Cantanno v. James A. Stevensen Co.*, 172 N. Y. App. Div. 252, 158 N. Y. Suppl. 335; *Brianzi v. Crane Co.*, 196 App. Div. 58.

*Oregon*.—*Sorsby v. Benninghoven*, 82 Oreg. 345, 161 Pac. 251. *Pennsylvania*.—*Foster v. Curtis*, 63 Pa. Super. Ct. 473. *Virginia*.—*Hicks v. Romaine*, 116 Va. 401, 82 S. E. 71.

prevail, that he was not guilty of contributory negligence.<sup>32</sup> As a general proposition, these questions are for the jury.<sup>33</sup> The mere proof of the injury to a pedestrian raises no presumption of negligence on the part of the driver of the motor vehicle.<sup>34</sup> When a foot traveler suddenly appears in front of an automobile moving at a reasonable rate of speed, and obeying the rules of the road for automobile travel and the driver cannot by the exercise of due diligence stop the machine before it strikes such person, from the standpoint of the driver, the accident is unavoidable, and he is not liable for the ensuing injuries.<sup>35</sup> And the same doctrine applies when the person injured is a child who darts in front of a moving automobile.<sup>36</sup> The mere fact, however, that a child runs in front of a moving motor vehicle so suddenly that the driver has no notice of danger, does not necessarily relieve him from liability. There still remains the question whether the negligent driving of the automobile made it impossible for the driver to avoid the accident after seeing the child.<sup>37</sup>

#### Sec. 417. Persons under disability.

Persons under physical disability, such as aged, crippled, intoxicated, blind or deaf persons are favored by the law. Moreover, their conduct as bearing on the question of con-

**Instructions to jury.**—Where, in an action to recover for personal injuries to the plaintiff, who was injured by the defendant's vehicle while waiting for a street car to pass, the only specific charges of negligence alleged against the defendant are the excessive speed of the vehicle and the failure to give warning of its approach, it is reversible error for the court to refuse to charge in effect that, unless the plaintiff establishes one of the two specific charges of negligence, there can be no recovery. *Capell v. New York Transp. Co.*, 150 N. Y. App. Div. 723, 135 N. Y. Suppl. 691.

32. See Chapter XVIII.

33. Section 452.

34. *Horowitz v. Gottwalt* (N. J. Law), 102 Atl. 930; *Brianzi v. Crane Co.*, 196 App. Div. 58; *Vannett v. Cole* (N. Dak.), 170 N. W. 663; *Flanigan v. McLean* (Pa. St.), 110 Atl. 370; *King v. Brillhart* (Pa. St.), 114 Atl. 515.

35. *McMillen v. Shathmann*, 264 Pa. 13, 107 Atl. 332; *Magee v. Cavins* (Tex. Civ. App.), 197 S. W. 1015.

36. *Hyde v. Huberger*, 87 Conn. 704, 87 Atl. 790; *Winter v. Van Blarcom*, 258 Mo. 418, 167 S. W. 498; *Sorsby v. Benninghoven*, 82 Ore. 345, 161 Pac. 251; *Stahl v. Sollenberger*, 246 Pa. St. 525, 92 Atl. 720. And see section 419.

37. *Osberg v. Cudahy Packing Co.*, 198 Ill. App. 551.

tributory negligence, may not be so carefully scrutinized by the courts.<sup>38</sup> The operator of motor vehicle, as is the driver of any other vehicle, is bound to exercise the degree of care which an ordinarily prudent man would exercise under the same circumstances to avoid injury to a pedestrian who is lacking in the capacity of a normal man, such as an intoxicated, aged, blind, or deaf person, or a person otherwise infirm.<sup>39</sup> As has been said,<sup>40</sup> "It is a rule of law that one driving or operating a vehicle is bound to consider the lack of capacity of those in his way to care for their own safety, when such incapacity is known or should have been known by him, and the law exacts greater care toward those who are unable to care for themselves, as children, blind persons, and in fact drunken persons, when such incapacity is known or should have been known by the one driving or operating a vehicle." Of course, no special care is imposed on the driver of the automobile in such cases, unless he knows, or by the exercise of reasonable care should know, that the person was under some disability.<sup>41</sup> The fact that an injured pedestrian was intoxicated at the time of an accident, may be considered, not only as bearing on his contributory negligence, but also on the question whether the driver of the automobile striking him was exercising due precautions.<sup>42</sup> And, reasonable care must be exercised so as to avoid collision with a pedestrian who is deaf.<sup>43</sup> A beggar on his crutches had the same right to the use of the streets of a city as has the man in his automobile. Each is bound to the exercise of ordinary care for his own safety and the prevention of injury to others in the use thereof.<sup>44</sup> So, too, a blind person may lawfully use the streets and highways, the law requiring him, however, to use ordinary care under the circumstances.<sup>45</sup> Thus, it has been held that the

38. Section 481.

39. *Brown v. City of Wilmington*, 4 Boyce's (27 Del.) 492, 90 Atl. 44. See also *Waruna v. Dick*, 261 Pa. 602, 104 Atl. 749.

40. *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44.

41. *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44.

42. *Brown v. City of Wilmington*, 4 Boyce's (27 Del.) 492, 90 Atl. 44.

43. *Furtado v. Bird*, 26 Colo. App. 153, 146 Pac. 58.

44. *Millsaps v. Brogdon*, 97 Ark. 469, 134 S. W. 632.

45. *McLaughlin v. Griffin*, 55 Iowa, 302, 135 N. W. 1107.

driver of an automobile, who met an old man, almost blind, cautiously walking along the side of the road, was guilty of negligence in failing to stop his machine or turn out, the old man being thereby struck by the machine and injured.<sup>46</sup> And, where an aged woman was struck at a curve by an automobile which was being operated by a beginner, the court said it was satisfied that the operator's whole attention was concentrated on the "reverse curve" which he was executing perhaps for the first time in his life in so contracted a space and not on what was ahead of him, and did not see the old lady until he was right upon her, and then lost his head, and it was concluded that the judicial cause of the accident was defendant's inattention to what was ahead of him, in combination with his lack of skill in the management of his machine.<sup>47</sup>

#### Sec. 418. Children in street — in general.

Children, aged persons, and those under physical disability are, speaking in general terms, favored by the law.<sup>48</sup> A child, as well as an adult, may assume that motorists will obey regulations relative to the driving of motor vehicles.<sup>49</sup> A person operating a motor vehicle along the streets of a city or village is bound to recognize the fact that children will be found playing in the street and that they may sometimes attempt to cross the street unmindful of its dangers. While it is said in some jurisdictions that he is bound to exercise only ordinary care, this is construed to mean care commensurate with the danger and probability of injury.<sup>50</sup> And the danger of injury

46. *Apperson v. Lazro*, 44 Ind. App. 186, 88 S. E. 99. See also *McLaughlin v. Griffin*, 155 Iowa, 302, 135 N. W. 1107.

47. *Navailles v. Dielmann*, 124 La. 421, 50 So. 449.

48. Section 417.

49. *Kolunkiewicz v. Burke*, 91 N. J. L. 567, 103 Atl. 249.

50. *Thies v. Thomas*, 77 N. Y. Suppl. 276.

Only ordinary care required.—"Appellant was not required to use a higher degree of care at one place than an-

other, but he was only required to use ordinary care wherever he might be. While it is a correct proposition that what might be ordinary care where there were no children or persons crossing a street would not be ordinary care and might be negligence where there were children and a crowded street, yet ordinary care was all he was required to use, and ordinary care is such care as an ordinarily reasonable and prudent person would use under all the circumstances and conditions existing at the time and place and which are or ought

to a child being greater than to an adult, as a practical proposition, the courts will hold the driver of an automobile liable for injuries to a child, when the circumstances of the accident, if the injury had resulted to an adult, might not justify a verdict against the driver. This is largely on account of the liberality of the courts in their consideration of the contributory negligence of the infant. The conduct of children is not judged by the same rules which govern that of adults: and, while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under like circumstances.<sup>51</sup> It is a matter of common knowledge, that, especially in cities of considerable size, children use the streets as a playground, not confining themselves to the sidewalk but occupying or at unexpected moments running upon or across the part of the thoroughfare used by vehicles. Of such use of the streets by children, motorists or users of other vehicles must be assumed to have knowledge, and, where their presence can be observed, a degree of care commensurate with the ordinary emergencies presented in these instances must be exercised. One driving a vehicle must not assume that children of immature age will exercise care for their protection and will not expose themselves to danger.<sup>52</sup> The rate of speed is not necessarily determinative of the question. What would

to be known to the party." *Miller v. Eversole*, 184 Ill. App. 362.

**Instructions.**—The court should instruct the jury as to the degree of care to be exercised by the operator of a car as well as by the child injured by it. *Reaves v. Maybank*, 193 Ala. 614, 69 So. 137.

**Greater care.**—"An operator of an automobile on a public street is not an insurer against damages to children or other persons. He is only required to exercise ordinary care or such care as an ordinarily prudent person would exercise under like or similar circumstances, and, as indicated, the degree

of care required to be exercised will be greater when the safety of children or others of immature judgment is involved, and when such facts are known to the operator of the car. What would constitute reasonable care in one case might not be reasonable care in another." *Herald v. Smith (Utah)*, 190 Pac. 932. See also *Glineo v. Wimer (W. Va.)*, 107 S. E. 198.

**51.** Sections 478-480.

**52.** *Krug v. Walldren Express & Van Co.*, 214 Ill. App. 18; *Reynolds v. Kenyon (Mo.)*, 222 S. W. 476; *Herald v. Smith (Utah)*, 190 Pac. 932; *Ratcliffe v. McDonald*, 123 Va. 781, 97 S. E. 307.

be reasonable on one street would not be in another; even a much less rate might be deemed negligence on the part of one operating the car.<sup>53</sup> Even as low a speed as five or six miles an hour may be gross negligence when driving through a crowd of children playing in the street.<sup>54</sup> And, independently of statute or municipal regulation affecting the speed of automobiles when passing schoolhouses, it is expected that the driver will proceed at a moderate rate at such places.<sup>55</sup> A person who drives so dangerous a machine as an automobile through the principal street of a large city, upon a bright, dry day, and who sees, at a distance of 150 feet in front of him, two boys, ages ten and twelve, respectively, trailing in a soap box wagon behind an ice wagon, should take such precautions in his driving as that, in no event or situation, conceivable to an intelligent man, will he run over and kill the boys.<sup>56</sup> The questions of negligence and contributory negligence are as a general proposition for the jury to decide.<sup>57</sup>

**Sec. 419. Children in street — child suddenly coming in front of or near machine.**

When a motor vehicle is proceeding along at a lawful speed and is obeying all the requirements of the law of the road and all the regulations for the operation of such machine, the driver is not, as a general proposition, liable for injuries received by a child who darts in front of the machine so suddenly that its driver cannot stop or otherwise avoid the injury.<sup>58</sup> It is to be remembered that the driver of a motor

53. *Savoy v. McLeod*, 111 Me. 234, 88 Atl. 721, 48 L. R. A. (N. S.) 971; *Haacke v. Davis*, 166 Mo. App. 249, 148 S. W. 450; *Deputy v. Kimmell*, 73 W. Va. 595, 80 S. E. 919. See also *Lauterbach v. State*, 132 Tenn. 603, 179 S. W. 130.

54. *Haacke v. Davis*, 166 Mo. App. 249, 148 S. W. 450.

55. *Lampton v. Davis Standard Bread Co.* (Cal. App.), 191 Pac. 710; *Tripp v. Taft*, 219 Mass. 81, 106 N. E. 578; *Heidner v. Germschied*, 41 S. Dak. 430, 171 N. W. 208. See also *Miller v.*

*Eversole*, 184 Ill. App. 362.

56. *Albert v. Munch*, 141 La. 686, 75 So. 513.

57. Section 487.

58. *Connecticut*.—*Hyde v. Huberger*, 87 Conn. 704, 87 Atl. 790; *Kishalaski v. Sullivan* (Conn.), 108 Atl. 538. "No evidence was offered from which the jury could reasonably have found negligent conduct on the defendant's part. There was an entire absence of testimony that he was traveling at an excessive speed, that he did not have his car under suitable control, or that he



vehicle does not insure other travelers against accident.<sup>59</sup> Thus, where the street was clear and the machine was being driven at a speed of eighteen miles an hour, and the driver did not see a young child standing behind a telegraph pole, but just as he was abreast of the child it ran out and was struck by the rear fender, it was held that he was not liable for the injuries, the speed at which he was traveling being permitted by statute.<sup>60</sup> Similarly, where a truck was standing by the curb with the hub of a wheel over the edge of the curb, the driver is not liable to injuries received by a child of tender years who was playing "tag" and ran toward the

failed to exercise due care in any respect or at any time. There was no testimony to indicate that the plaintiff had left the sidewalk, where he was just before the accident, until the moment before he was hit, or that there was anything in the situation which called for special precaution on the defendant's part to avoid the accident which were not taken. On the contrary, the evidence indicated strongly that the plaintiff did not leave the walk, or come into a position of danger, or of apparent danger, until the defendant's car was so close to him that no reasonable efforts on its driver's part could have avoided running him down. The case is not one in which the plaintiff merely failed to present, as he was bound to do, evidence pointing to the defendant's negligence contributory to the injury to the plaintiff; the evidence presented went far to disprove such negligence." *Hyde v. Hubinger*, 87 Conn. 704, 87 Atl. 790.

*Iowa*.—*Bishard v. Engelback*, 180 Iowa, 1132, 164 N. W. 203.

*Maine*.—*Levesque v. Dumont*, 116 Me. 25, 99 Atl. 719.

*Massachusetts*.—*Lovelt v. Scott*, 232 Mass. 541, 122 N. E. 646.

*Missouri*.—*Winter v. Van Blarcom*, 258 Mo. 418, 167 S. W. 498.

*New York*.—*Jordan v. Am. Sight-*

*Seeing Coach Co.*, 129 N. Y. App. Div. 313, 113 N. Y. Suppl. 786; *Chiappone v. Grenebaum*, 189 App. Div. 579, 178 N. Y. Supp. 854; *Meltzer v. Barrett*, 193 App. Div. 183, 184 N. Y. Suppl. 241; *Brianzi v. Crane Co.*, 196 App. Div. 58.

*Oregon*.—*Sorsby v. Benninghoven*, 82 Oreg. 345, 161 Pac. 251.

*Pennsylvania*.—*Stahl v. Sol'enberger*, 246 Pa. St. 525, 92 Atl. 720; *Wetherill v. Showell, Fryer & Co.*, 264 Pa. St. 449, 107 Atl. 808. "The defendant cannot fairly or reasonably be charged with negligence, in failing to stop his automobile and avoid the accident, unless it appeared that the boy entered the roadway at a sufficient distance from the automobile, to permit of its being stopped before the collision occurred. If the boy suddenly left the footway, at a place where the driver had no reason to expect him to do so, and ran directly in front of the automobile, the result could hardly have been other than disastrous, even though the machine had been moving at a very reasonable rate." *Stahl v. Sollenberger*, 246 Pa. St. 525, 92 Atl. 720.

*Washington*.—*Burlie v. Stephens*, 193 Pac. 684.

59. Section 283.

60. *Sorsby v. Benninghoven*, 82 Oreg. 345, 161 Pac. 251.

truck at the moment it started and was struck by the hub.<sup>61</sup> So, too, when it appeared that an automobile was proceeding at a moderate rate on the proper side of the street, that it was a large machine which could have been seen by a boy if he had looked, that the roadway was clear in front of it; that the boy who was interested in catching a ball suddenly ran in front of it from the sidewalk at a distance of from four to twelve feet and that the automobile was stopped so that its wheels skidded and only proceeded five feet beyond the boy's body, it was held that the negligence of the defendant was not shown.<sup>62</sup>

This general doctrine necessarily implies that the operator of the machine has been guilty of no pre-existing negligence which contributed to the injury and made it impossible to avoid the accident after seeing the child.<sup>63</sup> Thus, if one is running his automobile at a speed in excess of the statutory limit, he cannot escape liability because the child who was injured ran in front of the automobile so suddenly that the accident was then unavoidable.<sup>64</sup> Moreover, if he sees or should have seen the child soon enough to have avoided an injury, an entirely different situation arises.<sup>65</sup>

#### **Sec. 420. Children in street — climbing on machine.**

As a general proposition the duty of the driver of a motor vehicle is to keep a lookout to avoid pedestrians and vehicles which may appear in front of his machine. He is, therefore, not generally required to look out for children who may at-

61. *Cantanno v. James A. Stevenson Co.*, 172 N. Y. App. Div. 252, 158 N. Y. Suppl. 335, wherein it was said: "The contention of the learned counsel for the appellant is that the driver should have watched until his hub was clear of the sidewalk. If the child before the truck was started had been in such relation to the truck as to show a probability that its progress would injure him, that duty might arise. But the mere fact that children were playing near it and might run into it furnishes no occasion for such rule, and the deci-

sions cited do not justify its application in the present case."

62. *Jordan v. Am. Sight-Seeing Coach Co.*, 129 N. Y. App. Div. 313, 113 N. Y. Suppl. 786.

63. *Osberg v. Cudahy Packing Co.*, 198 Ill. App. 551.

64. *Lauterbach v. State*, 132 Tenn. 603, 179 S. W. 130; *Locke v. Greene*, 100 Wash. 397, 171 Pac. 245.

65. *Yeager v. Gately & Fitzgerald, Inc.*, 262 Pa. 466, 106 Atl. 76. See also *Goff v. Clarksburg Dairy Co. (W. Va.)*, 103 S. E. 58.

tempt to climb on the side or rear of his vehicle.<sup>66</sup> Where it appeared that a loaded truck was proceeding at a moderate rate of speed; that it was making considerable noise; that as the truck approached, a boy ran out in the street, and for about ten feet ran alongside the truck behind the front wheels, then caught hold of it near its center on the right side and hung there a short time, and then seeming to lose his hold, fell down in front of the rear wheel, which passed over him. it was held that the driver was not negligent.<sup>67</sup> Nor is it the usual duty of a chauffeur to look for trespassers on the far side of his car, though, if he sees a child there, it might be his duty to allow him an opportunity to get off the car before he starts it.<sup>68</sup> If the driver knows that a child is climbing on the machine, he must not recklessly operate the car in such a way as to cause injury to such child.<sup>69</sup> And, though he has driven the child from the machine, he may be said not to have fulfilled his duty if he starts the machine without further thought of the child.<sup>70</sup> The fact that his machine is one which is more or less attractive to children and excites their desire to climb thereon, does not necessarily affect the question.<sup>71</sup> Such a child is regarded by the law as a trespasser, toward whom the duty of the driver is fulfilled if he commits no intentional and wilful wrong.<sup>72</sup> The doctrine of the "Turntable Cases" as to

66. *Hebard v. Mabie*, 98 Ill. App. 543; *Smith v. Schoenhofen Brewing Co.*, 201 Ill. App. 552; *Gamble v. Uncle Sam Oil Co. of Kan.*, 100 Kans. 74, 163 Pac. 627.

67. *Smith v. Schoenhofen Brewing Co.*, 201 Ill. App. 552.

68. *Ostrander v. Armour & Co.*, 176 App. Div. 152, 161 N. Y. Suppl. 961, wherein it was said: "It is a care of serious moment imposed upon the busy teamster to make a search around his car lest a child too young for discretion and undirected by parents has tucked herself away in an obscure place beyond the casual and convenient notice of the driver. The driver, by such rule, in responsibility supersedes guardians and other custodians in watchfulness

of the children on each block where his business requires him to stop. An automobile is a legitimate vehicle on the street, and entitled to stop without accumulating children upon it. I am not convinced that it is the usual duty of a chauffeur to search for infantile trespassers enconcealed on the far side of his car."

69. *Stipetich v. Security Stove & Mfg. Co. (Mo. App.)*, 218 S. W. 964; *Higbee Co. v. Jackson (Ohio)*, 128 N. E. 61.

70. *Ziehm v. Vale*, 98 Ohio. 306, 120 N. E. 702, 1 A. L. R. 1381.

71. *Hebard v. Mabie*, 98 Ill. App. 543; *Gamble v. Uncle Sam Oil Co. of Kan.*, 100 Kans. 74, 163 Pac. 627.

72. *Gamble v. Uncle Sam Oil Co. of*

attractive or alluring nuisances does not apply to a motor vehicle proceeding along the streets.<sup>73</sup> Of course, if the driver of the vehicle expressly invites a child or other person to board the conveyance, a different question is presented, but the mere fact that children had previously climbed on the vehicle does not amount to an invitation in a particular case.<sup>74</sup>

### Sec. 421. Confused pedestrian.

It sometimes happens that a pedestrian becomes confused at the approach of an automobile, and, first starting in one direction and then in another, misleads the driver of the vehicle as to his course so that eventually a collision becomes unavoidable. When the driver of the machine sees that the maneuvers of the pedestrian are such that his future course is uncertain, he must exercise such care as is warranted by the circumstances.<sup>75</sup> Where the pedestrian's course is vacillating and both he and the driver of the automobile are turning first in one direction and then in the other, reasonable care would seem to require that the machine be brought under control so that it can be stopped before striking the foot traveler.<sup>76</sup> The questions of negligence and contributory negligence in such cases are generally for the jury,<sup>77</sup> though, if the driver of the machine has brought his car under control,

Kan., 100 Kans. 74, 163 Pac. 627; *Ostrander v. Armour & Co.*, 176 N. Y. App. Div. 152, 161 N. Y. Suppl. 961.

73. *Gamble v. Uncle Sam Oil Co. of Kan.*, 100 Kans. 74, 163 Pac. 627. "The attractive nuisance doctrine cannot be extended to include motor trucks, nor made applicable to cases like this one. Motor trucks are in common use, and no more attractive nuisances than are drays and other ordinary vehicles used for carrying persons and goods along the streets and highways." *Gamble v. Uncle Sam Oil Co. of Kansas*, 100 Kans. 74, 163 Pac. 627.

74. *Gamble v. Uncle Sam Oil Co. of Kansas*, 100 Kans. 74, 163 Pac. 627; *Ostrander v. Armour & Co.* (N. Y.),

176 App. Div. 152, 161 N. Y. Suppl. 961.

75. *Raymond v. Hill*, 68 Cal. 473, 143 Pac. 743; *Westcoat v. Decker*, 85 N. J. L. 716, 90 Atl. 290; *Citizens Motor Car Co. v. Hamilton*, 32 Ohio Cir. Ct. Rep. 407; *Dougherty v. Davis*, 51 Pa. Super. Ct. 229.

76. *Little v. Maxwell*, 183 Iowa, 164, 166 N. W. 760; *Weil v. Kreutzer*, 134 Ky. 563, 121 S. W. 471; 24 L. R. A. (N. S.) 557. See also *Frankel v. Hudson*, 271 Mo. 495, 196 S. W. 1121.

77. *McKiernan v. Lehmaier*, 85 Conn. 111, 81 Atl. 969; *Heartsell v. Billows*, 184 Mo. App. 420, 171 S. W. 7; *Coughlin v. Weeks*, 75 Wash. 568, 135 Pac. 649. And see section 487.

and the collision results because the pedestrian has suddenly jumped in front thereof, it may be held as a matter of law that the driver was not guilty of negligence.<sup>78</sup> Thus, where it appeared that a man crossing a street at a street intersection, and after reaching a space between two surface railway tracks, upon hearing the horn from the defendant's automobile which was then between twenty and forty feet from him, threw up his hands, took one or two steps in front of the machine and was instantly hit, the automobile being run at a speed between eleven and twelve miles per hour, it was held that a verdict that he was free from contributory negligence and that the accident was caused solely by the negligence of the chauffeur was against the weight of the evidence.<sup>79</sup>

#### Sec. 422. Workmen in street.

The rights of a workman whose duties require his continual presence in a street are somewhat different from those of a pedestrian who uses the streets merely as a means for travel from one place to another. The operator of a motor vehicle should appreciate the fact that the employment of a workman in a street requires that his attention be devoted to his work rather than to the approach of vehicles.<sup>80</sup> Under such circumstances, reasonable prudence on the part of the driver of the machine would seem to require that he have his car under control so that he can avoid the workman if the latter does not notice his approach, and, in case of a collision, he may be charged with negligence.<sup>81</sup> And the driver may be deemed

78. *Virgilio v. Walker*, 254 Pa. 241, 98 Atl. 815. See also *Carlson-Leonard* (Cal. App.), 200 Pac. 40.

79. *Wall v. Merkert*, 166 N. Y. App. Div. 608, 152 N. Y. Suppl. 293.

80. *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519.

81. *Carneghi v. Gerlach*, 208 Ill. App. 340; *Ostermeier v. Kingsman, etc., Co.*, 255 Mo. 128, 164 S. W. 218; *Papic v. Freund* (Mo. App.), 181 S. W. 1161; *White v. East Side Mill & Lumber Co.*, 84 Oreg. 224, 161 Pac. 969, 164 Pac.

736; *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519. "Plaintiff was lawfully upon the roadway, in the performance of his duty, in plain view, and the driver of any vehicle upon such roadway was bound to take notice of him and to exercise the care enjoined by law upon the drivers of such vehicles not to injure him; and plaintiff could rightfully assume that this would be done." *Nehing v. Charles M. Monroe Stationery Co.* (Mo. App.), 191 S. W. 1054.

guilty of negligence if he fails to give any warning of his approach.<sup>82</sup> If a workman in the street, while engaged in his work, without any movement on his part, is struck from behind by a motor vehicle, in broad day-light, a *prima facie* case of negligence is established.<sup>83</sup> The question of negligence and contributory negligence are generally for the jury.<sup>84</sup> Thus, the driver of an automobile has been held liable for injuries received by a workman on street railway tracks.<sup>85</sup> And liability may be imposed where a car has struck a policeman or traffic officer engaged in the performance of his duties in the street.<sup>86</sup> Similarly, an employee of a city sewer gang has been allowed to recover injuries sustained by a collision with a taxicab.<sup>87</sup> So, too, a highway or bridge employee, may recover for injuries sustained from a motor vehicle.<sup>88</sup> A flagman at a railroad grade crossing may maintain an action for injuries from a collision with an automobile.<sup>89</sup>

### Sec. 423. Driving past street car — in general.

When the driver of an automobile sees a street car standing at a regular stopping place, it is his duty to recognize the fact that passengers may attempt to get on or off as he is passing the car, and he should exercise due precautions to avoid injury to such persons.<sup>90</sup> Not only must he expect pas-

**82.** Sections 329-331.

**83.** *Nehing v. Charles M. Monroe Stationery Co.* (Mo. App.), 191 S. W. 1054.

**84.** *Carneghi v. Gerlach*, 208 Ill. App. 340; *Nehing v. Charles M. Monroe Stationery Co.* (Mo. App.), 191 S. W. 1054. Sections 452, 487.

**85.** *King v. Grien*, 7 Cal. App. 473, 94 Pac. 777; *Dube v. Keogh Storage Co.* (Mass.), 128 N. E. 782; *Cecola v. 44 Cigar Co.*, 253 Pa. 623, 98 Atl. 775; *Morrison v. Conley Taxicab Co.*, 94 Wash. 436, 162 Pac. 365.

**86.** *James v. Mott*, (Mo. App.), 215 S. W. 913; *Xenodochius v. Fifth Ave. Coach Co.*, 129 N. Y. App. Div. 26, 113 N. Y. Suppl. 135; *Fitzsimmons v. Isman*, 166 N. Y. App. Div. 262, 151 N.

Y. Suppl. 551; *White v. East Side Mill & Lumber Co.*, 84 Oreg. 224, 161 Pac. 969, 164 Pac. 736; *Heath v. Seattle Taxicab Co.*, 73 Wash. 177, 131 Pac. 843.

**87.** *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519.

**88.** *Nehing v. Charles M. Monroe Stationery Co.* (Mo. App.), 191 S. W. 1054.

**89.** *Davis v. Barnes*, 201 Ala. 120, 77 So. 612. See also *Carter v. Redmond*, 142 Tenn. 258, 218 S. W. 217.

**90.** *United States*.—*New York Transp. Co. v. Garside*, 157 Fed. 521, 85 C. C. A. 285; *Taxi Service Co. v. Phillips*, 187 Fed. 734, 109 C. C. A. 482; *Taxicab Co. v. Parks*, 202 Fed. 909, 121 C. C. A. 267.

sengers on the side of the car from which they alight, but he must anticipate that some passengers may pass behind the car to the other side.<sup>91</sup> The courts in some jurisdictions are constrained to say that more than ordinary care is required of the operator of a motor car when he is passing a stationary street car;<sup>92</sup> but other courts, in reaching the same practical

*Arkansas*.—*Minor v. Mapes*, 102 Ark. 351, 144 S. W. 219.

*California*.—*Bannister v. H. Jevne Co.*, 28 Cal. App. 133, 151 Pac. 546.

*Connecticut*.—*Kearns v. Widman*, 108 Atl. 681.

*Georgia*.—See *Wadley v. Dooly*, 138 Ga. 275, 75 S. E. 153.

*Illinois*.—*Kerchner v. Davis*, 183 Ill. App. 600; *Rasmussen v. Drake*, 185 Ill. App. 526.

*Indiana*.—*Wellington v. Reynolds*, 177 Ind. 49, 97 N. E. 155.

*Maine*.—*Wetzler v. Gould*, 110 Atl. 686.

*Massachusetts*.—*Harnett v. Tripp*, 231 Mass. 382, 121 N. E. 17.

*Michigan*.—*Levyn v. Koppin*, 183 Mich. 232, 149 N. W. 993.

*Minnesota*.—*Liehecht v. Crandall*, 110 Minn. 454, 126 N. W. 69; *Kling v. Thompson-McDonald Lumber Co.*, 127 Minn. 468, 149 N. W. 947; *Johnson v. Johnson*, 137 Minn. 198, 163 N. W. 160.

*Missouri*.—*Shamp v. Lambert*, 142 Mo. App. 567, 121 S. W. 770; *Bongner v. Ziegenheim*, 165 Mo. App. 328, 147 S. W. 182; *Mecnach v. Crawford*, 187 S. W. 879.

*New York*.—*Kalb v. Redwood*, 147 N. Y. App. Div. 77, 131 N. Y. Suppl. 789; *Cowell v. Saperston*, 149 App. Div. 373, 134 N. Y. Suppl. 284; *O'Neil v. Kopke*, 170 N. Y. App. Div. 601, 156 N. Y. Suppl. 664; *Sternfield v. Willison*, 174 App. Div. 842, 161 N. Y. Suppl. 472; *Caesar v. Fifth Ave. Stage Co.*, 45 Misc. (N. Y.) 331, 90 N. Y. Suppl. 359.

*Pennsylvania*.—*Kauffman v. Nelson*, 225 Pa. St. 174, 73 Atl. 1105; *Frankel v. Norris*, 252 Pa. 14, 97 Atl. 104; *Mc-*

*Evoy v. Quaker City Cab Co.*, 264 Pa. 418, 107 Atl. 777.

*Rhode Island*.—*Marsh v. Boyden*, 33 R. I. 519, 82 Atl. 393.

*Texas*.—*Posener v. Long* (Civ. App.), 156 S. W. 591.

*Vermont*.—*Adams v. Averill*, 87 Vt. 230, 88 Atl. 738.

*Washington*.—*Yanse v. Seattle Taxicab & Transfer Co.*, 91 Wash. 415, 157 Pac. 107.

*Canada*.—*Rose v. Clark*, 19 West. L. R. 456.

**Auto coming from behind pedestrian.**

—"The complaint in this case shows that appellee was in the center of Main Street, running north, trying to catch a street car; that appellant, driving his automobile, was coming up behind appellee, and gradually approaching him; that appellant saw appellee in the street ahead of him, but that appellee was unaware of the presence of the machine. The right of appellee to be in the street for the purpose of boarding a street car is clear. Under the conditions alleged in the complaint, it was the duty of appellant to exercise ordinary care to avoid running against appellee." *Wellington v. Reynolds*, 177 Ind. 49, 97 N. E. 155.

<sup>91</sup> *Johnson v. Johnson*, 137 Minn. 198, 163 N. W. 160; *McMonagle v. Simpers* (Pa. St.), 110 Atl. 83.

<sup>92</sup> *Kelly v. Schmidt*, 142 La. 91, 76 So. 250. "And a chauffeur, driving a machine on a portion of the public highway which is usually used by vehicles going in an opposite direction, and driving by a standing street car at the regular place for taking on and putting

result, say that only reasonable care is required, but that reasonable care is such care as is commensurate with the danger. The amount of care required depends on the character of the machine as to size and weight, the speed and noise thereof, and the condition of the streets and other surrounding circumstances.<sup>93</sup> It may be considered negligence for a person in charge of an automobile to run it along a street past a street car that has stopped to allow passengers to get on and off, at a rate of not more than six or seven miles an hour.<sup>94</sup> The questions of negligence,<sup>95</sup> and contributory negligence,<sup>96</sup> in these cases, are generally for the jury.<sup>97</sup> Driving close to the street car at any considerable speed is sufficient to sustain a charge of negligence.<sup>98</sup> Thus, where the evidence tended to show that the plaintiff, after alighting from a street car, looked up and down the street and then passed behind the car toward the other side of the street and was immediately struck by the defendant's automobile, which was being driven at a high rate of speed within a few inches of the car, it was

off passengers, must use extra precautions to avoid accidents. Under such circumstances he will certainly be presumed, in case of accident, to have seen a person standing in the roadway, or near the rear end of the street car, and his employer will be responsible in damages for an accident occurring through his fault." *Kelly v. Schmidt*, 142 La. 91, 76 So. 250.

**Greater care.**—The driver of an automobile should exercise a greater degree of care at points where persons are in the habit of getting on and off cars than under ordinary circumstances. So a defendant was held liable for an injury to a person seeking to board a car at such a point where the driver of an automobile attempted to pass between the car and a vehicle which he had overtaken. *Rose v. Clark*, 19 West. L. R. (Canada) 456.

93. *Bellinger v. Hughes*, 31 Cal. App. 464, 160 Pac. 838.

94. *Brewster v. Barker*, 129 N. Y.

App. Div. 907, 113 N. Y. Suppl. 1026.

**Twelve miles.**—A speed of twelve miles an hour when passing a street car has been held sufficient evidence of negligence to justify a verdict against the owner of the automobile. *Bannister v. H. Jevne Co.*, 28 Cal. App. 133, 151 Pac. 546.

95. Section 452.

96. Section 487.

97. **Question for jury.**—Where a person leaves a street car and proceeds at an ordinary pace toward the sidewalk, it cannot be said as a matter of law that the driver of an automobile who saw him in time to avoid a collision, but in fact ran into him, was free from negligence; under such circumstances, the questions of negligence and contributory negligence are for the jury. *Hefferon v. Reeves*, 140 Minn. 505, 167 N. W. 423.

98. *Naylor v. Haviland*, 88 Conn. 256, 91 Atl. 186; *Johnson v. Johnson*, 137 Minn. 198, 163 N. W. 160.



held that the questions of negligence and contributory negligence were for the jury.<sup>99</sup> And, where there was evidence that a street car conductor stepped off the front end of his car to the street for the purpose of going to the rear thereof, and that when he stepped off, an automobile going from three to five miles an hour struck him though there was plenty of room near the curb for the auto to pass in safety, it was held that the negligence of the driver of the automobile was a question for the jury.<sup>1</sup>

#### **Sec. 424. Driving past street car — moving street car.**

While the driver of an automobile is bound to anticipate that a standing street car is receiving or discharging passengers who may pass along the street in front of his machine, the situation is different in case of a moving street car. The operator of a motor vehicle is not bound to anticipate that a person will jump from a moving car in front of his vehicle, and, hence, in the absence of statute or municipal regulation affecting the question, when a passenger leaps from a moving street car in front of his vehicle, he is not chargeable with negligence merely because of his failure to stop or slacken the speed of his machine when meeting or passing the street car.<sup>2</sup>

#### **Sec. 425. Driving past street car — statutory and municipal requirements.**

Statutes and municipal ordinances have been enacted in some jurisdictions which bear upon the operation of automobiles when passing street cars.<sup>3</sup> These regulations are of two general classes. One prescribes the distance from the street car which an automobile must take when passing.<sup>4</sup> The other

99. *Dugan v. Lyon*, 41 Pa. Super. Ct. 52.

1. *Caesar v. Fifth Ave. Stage Co.*, 45 Misc. (N. Y.) 331, 90 N. Y. Suppl. 359.

2. *Brown v. Brashear*, 22 Cal. App. 135, 133 Pac. 505; *Horowitz v. Gottwalt* (N. J. Law), 102 Atl. 930; *Starr v. Schenk*, 25 Mont. L. Rep. (Pa.) 18.

3. *Kling v. Thompson-McDonald Co.*,

127 Minn. 468, 149 N. W. 947; *Gronch v. Heffner*, 184 Mo. App. 365, 171 S. W. 23.

4. *Bannister v. H. Jevne Co.*, 28 Cal. App. 133, 151 Pac. 546; *Santina v. Tomlinson* (Cal. App.), 171 Pac. 437; *Kolankiewiz v. Burke*, 91 N. J. L. 567, 103 Atl. 249; *Lorenzo v. Manhattan Steam Bakery*, 178 App. Div. 706, 165 N. Y. Suppl. 847.

class regulates the speed of the machine, in some cases being so drastic as to require the stopping of the automobile.<sup>5</sup> Thus, it has been enacted by statute that, "When a motor vehicle meets or overtakes a street passenger car which has stopped for the purpose of taking on or discharging passengers, the motor vehicle shall not pass said car on the side on which passengers get on or off, until the car has started and any passengers who have alighted, shall have gotten safely to the side of the road."<sup>6</sup> It has also been held that a municipal corporation may enact an ordinance forbidding automobiles to pass street cars while they are receiving or discharging passengers, and that the violation of such an ordinance is negligence *per se*.<sup>7</sup> The effect of a violation of a statute or municipal ordi-

5. Mann v. Scott, 180 Cal. 550, 182 Pac. 281; Hartnett v. Tripp, 231 Mass. 382, 121 N. E. 17; Meenach v. Crawford (Me.), 187 S. W. 879; Horowitz v. Gottwalt (N. J. Law), 102 Atl. 930; Kolankiewiz v. Burke, 91 N. J. Law 567, 103 Atl. 249; Schafer v. Rose-Gorman-Rose, 192 N. Y. App. Div. 860, 183 N. Y. Suppl. 161; Lewis v. Wood, 247 Pa. St. 545, 93 Atl. 605; Ward v. Cathey (Tex. Civ. App.), 210 S. W. 289; Zimmermann v. Mednikoff, 165 Wis. 333, 162 N. W. 349.

6. Pennsylvania Statutes, Act of April 27, 1909 (p. L. 265). See Lewis v. Wood, 247 Pa. St. 545, 93 Atl. 605; Frankel v. Norris, 252 Pa. 14, 97 Atl. 104. "It will be observed that the defendant in violation to the statute passed the street car after it had stopped and on the side on which passengers were getting off. It is clear, therefore, that the defendant was guilty of negligence which resulted in the plaintiff's injuries. Aside from the act of assembly, it was a reckless and negligent act of the defendant in driving his machine at such speed and so close to the street car when the passengers were alighting and would necessarily proceed to cross the street to the sidewalk. His conduct was clearly a viola-

tion of duty which made him responsible for any resultant injury. He not only disregarded a plain duty which he owed to the 12 or 15 passengers alighting from the street car, but violated the positive command of a statute which required him not to pass the street car while it was at rest. He, therefore, not only failed to observe a plain duty imposed by the civil law, but was also an offender against a criminal statute of the commonwealth. The court was manifestly correct in conceding that the defendant's conduct resulting in the plaintiff's injuries was actionable negligence." Lewis v. Wood, 247 Pa. St. 545, 93 Atl. 605. See also Carson v. Raifman, 27 Que. K. B. (Canada) 337; Evans v. Lalonde, 47 Que. S. C. (Canada) 374.

7. Schell v. DuBois, 94 Oh. St. 93, 113 N. E. 664, wherein it was said: "In this case the ordinance made it unlawful for a person to drive an automobile past a street car, standing for the purpose of receiving or discharging passengers. It is inconceivable that, in the midst of daily experiences which arrest attention, any argument is needed to show the wisdom of such an ordinance or that it is within the police power of the State whose exercise has been dele-

nance regulating the conduct of automobile drivers, is considered more at length at another place in this work.<sup>8</sup> Regulations of this character may apply to persons intending to become passengers as well as those leaving the car.<sup>9</sup> And pedestrians, who are crossing the street close to a standing street car, as well as the passengers of the car, are entitled to rely on the obedience by motorists of regulations and can avail themselves of the benefit thereof in case of a collision.<sup>10</sup> If the street car does not stop at its usual stopping place, but at a point prohibited by a city ordinance, it may be error to submit the violation of it to the jury.<sup>11</sup> The government may well be said to be as interested in protecting the lives and limbs of non-passengers as it is in protecting those who are passengers; and it is recognized that the former are in no better position to protect themselves than are the latter.<sup>12</sup>

**Sec. 426. Driving past street car — assisting passenger on car.**

Due precautions should be taken by the operator of an automobile to avoid injury to one who is assisting a passenger to board a street car or who is moving towards the sidewalk after giving such assistance. Thus, where it appeared that the plaintiff, having assisted friends to board a street car, started to cross the street; that she looked up and down the street when crossing the first and second car tracks and saw nothing, but was struck by an automobile when she had nearly reached the curb; and the chauffeur testified that the plaintiff

gated to the city. Such an ordinance must be reasonable, and must not conflict with general laws. The right of the driver of an automobile to the use of the public thoroughfares must be recognized and not unreasonably interfered with. But the rights of pedestrians and others must be equally respected. All must realize that this comparatively new and more dangerous method of travel, which has become a permanent and essential factor in the life of the country, has imposed in-

creased mutual obligations of care on drivers and pedestrians."

8. Sections 397-402.

9. *Crombie v. O'Brian*, 178 App. Div. 807, 165 N. Y. Suppl. 858; *Zimmermann v. Mednikoff*, 165 Wis. 333, 162 N. W. 349.

10. *Meenach v. Crawford* (Mo.), 187 S. W. 879; *Kolankiewiz v. Burke*, 91 N. J. L. 567, 103 Atl. 249.

11. *Horn v. Berg*, 210 Ill. App. 238.

12. *Meenach v. Crawford* (Mo.), 187 S. W. 879.

ran from behind the street car in front of his machine and that he did what he could to avoid her, but was unable to do so, while disinterested witnesses testified that the automobile was running from twenty to thirty miles an hour and made no effort to avoid the plaintiff, and that the impact threw her ten or fifteen feet, and it appeared that it was windy with a flurry of snow, it was held that the negligence of the chauffeur and the contributory negligence of the plaintiff were questions for the jury.<sup>13</sup>

**Sec. 427. Driving past street car — auto on wrong side of street.**

The fact that an automobile passes on the wrong side of a street car discharging passengers has a material bearing on the rights of the parties.<sup>14</sup> In the first place, the violation of the law of the road is considered to constitute a *prima facie* case of negligence which calls upon the driver to explain his conduct in violating the rule.<sup>15</sup> Then, again, on the question of contributory negligence of the person injured, it is generally held that one is not required to anticipate a violation of the law of the road by the driver of an automobile, and that the pedestrian is not required to look out for motor vehicles which may be proceeding on the wrong side of the street with

13. *Baker v. Close*, 137 N. Y. App. Div. 529, 121 N. Y. Suppl. 729.

14. *Harris v. Johnson*, 174 Cal. 55, 161 Pac. 1155; *Hart v. Roth*, 186 Ky. 535, 217 S. W. 893. "Defendant's auto truck was being driven at a great rate of speed, without lights; and the driver gave no signal as he approached the intersection of these two streets, and, without slackening his speed, he ran his auto on the wrong side of the street, through a narrow way between a stationary electric car and the neutral ground, over a place which he well knew to be used by passengers in getting on and off street cars, and where he might expect traffic to be congested,

with a noisy steam train making the crossing at the same time. All of this was done in total disregard of the rights of others using the street. Such conduct was gross negligence on the part of the driver, and it resulted in the death of plaintiffs' son." *Kelly v. Schmidt*, 142 La. 91, 76 So. 250.

15. Sections 267, 433.

**Greater vigilance.**—When an auto driver is proceeding along the wrong side of the highway, a greater degree of care is imposed on him to avoid injury to persons on the street. *New York Transp. Co. v. Garside*, 157 Fed. 521, 85 C. C. A. 285.

the same degree of vigilance as for vehicles proceeding in accordance with the recognized custom of travel.<sup>16</sup>

**Sec. 428. Driving past street car — liability of street railway company.**

There is a conflict of authority on the question of the duty of street railways in furnishing passengers a safe way to the sidewalk after they have alighted from a street car. But it is clear that the company must exercise the highest degree of care to see that its passengers alight in safety, its duty requiring it to warn them of danger, if any, at the place of alighting.<sup>17</sup> Thus, there may be a question for the jury whether a street car company has fulfilled its duty when it permits a passenger to alight immediately in front of an approaching motor vehicle, without giving him any warning of the impending danger.<sup>18</sup> If a trespassing boy is frightened off a moving car in the path of a motor vehicle, the company may be liable.<sup>19</sup> The fact that the driver of the vehicle was also guilty of negligence does not excuse the negligence of the company.<sup>20</sup>

16. Section 473.

17. *Woods v. North Carolina Public Service Co.*, 174 N. Car. 697, 94 S. E. 459, 1 A. L. R. 942. See also *Loggins v. Southern Pub. Utilities Co.* (N. Car.), 106 S. E. 822.

18. *Woods v. North Carolina Public Service Co.*, 174 N. Car. 697, 94 S. E. 459, 1 A. L. R. 942. See also *Ellis v. Hamilton St. Ry.*, 18 O. W. N. (Canada) 226.

19. *Thomas v. Southern Penn. Tract. Co. (Pa.)*, 112 Atl. 918.

20. *Woods v. North Carolina Public Service Co.*, 174 N. Car. 697, 94 S. E. 459, 1 A. L. R. 942, wherein it was said: "The negligence of the driver of the automobile is established by the evidence, but this does not relieve the defendant from liability, if it was also negligent, as there may be two proximate causes of an injury, and where

this condition exists, and the party injured is not negligent, those responsible for the causes must answer in damages, each being liable for the whole damage, instead of permitting the negligence of one to exonerate the other. It is in the application of this principle it is held, except where the doctrine of comparative negligence prevails, that the plaintiff cannot recover if his own contributory negligence concurs with the negligence of the defendant in causing the injury, because as his negligence is one of the proximate causes, he as well as the defendant is liable for the whole damage, and as there is no contribution among tortfeasors, he cannot recover anything from the defendant." See to same effect: *Thomas v. Southern Penn. Tract. Co. (Pa.)*, 112 Atl. 918.

**Sec. 429. Driving on walk or place reserved for pedestrians — in general.**

When a foot traveler, while occupying a part of the street or highway which is devoted exclusively to the use of pedestrians, is struck by a motor vehicle, it can usually be said with some degree of assurance that the driver of the machine has been guilty of negligence. Thus, when one is on the side of the road outside of the ordinary course for vehicular traffic and is there struck by an automobile, the negligence of the driver is generally at least a question for the jury.<sup>21</sup> Similarly, where a person seated on a park bench is injured by a vehicle driving over his foot, a finding of negligence on the part of the driver will be sustained.<sup>22</sup> And, where a State, through a State fair commission, permits a race of high powered automobiles to be held on fair grounds on a track originally made for horse races, and only protected by a wooden fence of flimsy construction which is not capable of resisting the impact of such machines, it has been held liable for injuries caused by a racing machine which leaves the track and plunges through the fence into a crowd of spectators.<sup>23</sup> So, too, where one was injured by an automobile while passing through the rear portion of an automobile repair and farm implement shop in order to transact business in the front, it was held that the fact that he reached the place where

21. *Brogini v. Steyner*, 124 Md. 369, 92 Atl. 806, where it was said: "The injury here, as thus shown, was not suffered by a pedestrian who was crossing a public thoroughfare, but by one who was on the edge of the road, where it was not likely that he would be in the way of those using other means of travel. The negligence charged here consisted in driving an automobile so close to a person thus situated, as to bring the side of the car in collision with him as he was pursuing his course in obvious ignorance of its approach. There can be no doubt that such an undue appropriation of a highway to the injury of one who, like the plain-

tiff, was lawfully entitled to, and was merely availing himself of, its reasonable use would amount to actionable negligence. This is the theory of the declaration filed in the case, and, as there was some testimony in its support, we must hold that the trial court ruled correctly in refusing to direct a verdict for the defendant." See also *Kinmore v. Cresse*, 53 Ind. App. 693, 102 N. E. 403; *Young v. Bacon* (Mo. App.), 183 S. W. 1079.

22. *Silverman v. City of New York*, 114 N. Y. Suppl. 59.

23. *Arnold v. State*, 163 N. Y. App. Div. 253, 148 N. Y. Suppl. 479.

he was injured by passing through a rubbish-strewn alley and the rear entrance to the building, did not, upon the facts of the case, constitute him a bare licensee, so as to preclude him from invoking the rights of one upon the premises by invitation.<sup>24</sup> Likewise, where a child playing in a lot at the side of the road, was struck by an automobile which was diverted from the highway by reason of a collision with another vehicle, negligence may be charged against the driver of the latter vehicle.<sup>25</sup>

### Sec. 430. Driving on walk or place reserved for pedestrians — sidewalk.

When one is standing on or walking along a sidewalk or side path at a place where vehicles are not expected to run, and is injured by an automobile, as a general proposition, the circumstances permit a charge of negligence against the driver of the vehicle.<sup>26</sup> As was said in one case,<sup>27</sup> "When a defendant is shown to have so driven his automobile rapidly over a part of the space allotted to the use of pedestrians as a sidewalk as to have inflicted injury on a person or property and it does not appear from the plaintiff's case that his action was without fault on his part, it is incumbent on him to show that it was not practicable in the exercise of care under the circumstances to have prevented any part of his vehicle from occupying the sidewalk space."

As automobiles ordinarily travel on the part of the street within the curbs assigned to vehicular traffic, the mere fact

24. *Jewison v. Dieudonne*, 127 Minn. 163, 149 N. W. 20.

25. *Dilger v. Whittier*, 33 Cal. App. 15, 164 Pac. 49.

26. *Jacob v. Ivins*, 250 Fed. 431; *Brown v. Des Moines Bottling Works*, 174 Iowa, 715, 156 N. W. 829; *Murray v. Liebmann*, 231 Mass. 7, 120 N. E. 79; *Rogles v. United Rys. Co. (Mo.)*, 232 S. W. 93; *Work v. Philadelphia Supply Co. (N. J.)*, 112 Atl. 185; *Philpot v. Fifth Ave. Coach Co.*, 142 N. Y. App. Div. 811, 128 N. Y. Suppl. 35; *Flynn v. Siezega (R. I.)*, 113 Atl. 1.

"Proof that the driver permitted his machine to be diverted from its main course of travel on the street to the sidewalk, without any warning to the people standing there of the fact of its coming, would be proof of such negligence, *prima facie*, as would, in and of itself, entitle the one injured by the act to recover as for negligence." *Brown v. Des Moines Steam Bottling Works*, 174 Iowa, 715, 156 N. W. 829.

27. *McGettigan v. Quaker City Automobile Co.*, 48 Pa. Super. Ct. 602.

that one was run upon the sidewalk, to the hurt of pedestrian lawfully there, may bring into the play the doctrine of *res ipsa loquitur*.<sup>28</sup> The fact that a person on the sidewalk is struck by an automobile has been said to cast upon its driver the burden of showing that the accident did not result from negligence on his part.<sup>29</sup> Considerable prudence should be exercised when one is driving a motor vehicle in or out of a private driveway across a sidewalk, the nature of the crossing being an element to be considered on the care to be exercised by the driver.<sup>30</sup> Thus, when one is standing on the edge of the pavement with one foot on the curb, and the driver of an automobile either through reckless management or inexperience drives his machine on the curb, the question of negligence is for the jury.<sup>31</sup> When a motor vehicle skids so as to injure a

28. *Ivins v. Jacob*, 245 Fed. 892; *Lazarowitz v. Levy*, 194 N. Y. App. Div. 400, 185 N. Y. Suppl. 359; *Brown v. Des Moines Bottling Works*, 174 Iowa, 715, 156 N. W. 829. "It was the duty of the driver of the automobile upon the traveled part of the street to control and manage his automobile with such reasonable care and prudence as not to divert or permit its course to be diverted from the main street onto the sidewalk upon which people were standing. Therefore, when it is shown that one who is traveling upon the portion of the street set apart for the use of vehicles, suddenly, and without warning, diverts his course and comes upon the sidewalk upon which people are standing, he violates that duty which he owes to those rightfully on the sidewalk, and thus, *prima facie*, becomes involved in negligence. This involves the doctrine of *res ipsa loquitur*, and says: 'You violated your duty to those rightfully standing upon the sidewalk by allowing your car to be diverted suddenly from its course and to come upon the sidewalk, without warning to those rightfully congregated there.' It would be a doc-

trine against all reason to hold that one driving upon the traveled portion of a street with a dangerous, heavy, and fast-moving vehicle may permit his vehicle to be suddenly diverted from its course upon the traveled street onto and over a sidewalk set apart for the use of pedestrians. It is not going too far to say that such an act, not only involves negligence, but it would have a tendency to show a reckless and wanton disregard to the rights of those upon the sidewalk, and a violation of a palpable duty, which the law enjoins upon every man to so exercise his own right that he may not, unreasonably or unnecessarily, imperil the safety of others in the exercise of their rights." *Brown v. Des Moines Steam Bottling Works*, 174 Iowa, 715, 156 N. W. 829.

29. *Trauerman v. Oliver's Adm'r*, 125 Va. 458, 99 S. E. 647.

30. *J. F. Darmody Co. v. Reed* (Ind.), 111 N. E. 317; *Crawley v. Jermain*, 218 Ill. App. 51; *Tuttle v. Briscoe Mfg. Co.*, 190 Mich. 22, 155 N. W. 724.

31. *May v. Allison*, 30 Pa. Super. Ct. 50. See also *Benjamin v. McGraw*, 208 Mich. 75, 175 N. W. 394.



person on the sidewalk, the driver thereof may be liable for the ensuing damages.<sup>32</sup> Similarly, where an automobile skidded on a turn so that its top projected over the sidewalk and struck a boy, the owner was held liable, it appearing that there were no conditions making it necessary for the driver to make such a short turn on such a high speed.<sup>33</sup> So, too, when one standing inside of the curb was struck by a spare tire carried on the running board of an automobile, it was held that there was sufficient to charge the automobilist with negligence.<sup>34</sup> And when a tire blew out and by reason thereof the locking ring was released and struck a pedestrian, and it appeared that the accident could have been avoided had the driver stopped the machine more promptly, a question of negligence was presented for the jury.<sup>35</sup> Likewise, when a person, who was leaning against a pole on the inside of the curb, was struck and killed by an automobile, liability for his death was sustained.<sup>36</sup>

#### **Sec. 431. Driving on walk or place reserved for pedestrians — safety zone.**

When one reaches a "safety zone" in a street, out of which vehicles are expected to remain, he may reasonably rely on the security thereby expected to be afforded. If he is struck by an automobile while he is in such a location, it is reasonable to charge the driver thereof with the results of the collision.<sup>37</sup>

#### **Sec. 432. Passing pedestrian walking along road.**

The situation with reference to pedestrians on a village or city street is somewhat different than as to pedestrians traveling along a rural highway. In the latter case, the pedestrian does not generally have the benefit of a sidewalk or other path

32. *Philpot v. Fifth Ave. Coach Co.*, 142 N. Y. App. Div. 811, 128 N. Y. Suppl. 35; *Core v. Resha* (Tenn.), 204 S. W. 1149.

33. *McGettigan v. Quaker City Automobile Co.*, 48 Pa. Super. Ct. 602.

34. *Murray v. Liebmann*, 231 Mass. 7, 120 N. E. 79.

35. *Regan v. Cummings*, 228 Mass. 414, 117 N. E. 800.

36. *Mehegan v. Faber*, 158 Wis. 645, 149 N. W. 397.

37. See also *Crombie v. O'Brien*, 178 N. Y. App. Div. 807; *Jeffares v. Wolenden*, 31 W. L. R. (Canada) 428.

especially devoted to his needs. As in other cases of fellow travelers, it is the duty of the driver of an automobile to exercise reasonable care to avoid injury to one walking along the highway.<sup>38</sup> If the foot traveler is oblivious of the approach of the vehicle, the driver should give a warning of his approach.<sup>39</sup> But the law of the road does not, as a general proposition, have much importance in cases of this kind. A statute providing that vehicles shall turn to the right upon meeting, does not have any application as between an automobile and a pedestrian meeting on the highway.<sup>40</sup> Nor does a statutory enactment providing a rule of the road for the overtaking and passing of vehicles on the highway necessarily apply as between an automobile and a pedestrian.<sup>41</sup> A statutory provision may limit the speed at which a motor vehicle shall pass a person walking along the highway.<sup>42</sup> Foot travelers have equal rights upon the highway with the drivers of vehicles, and the usual statement of their obligation is that they must use what amounts to reasonable care in the particular circum-

38. *Dozier v. Woods*, 190 Ala. 279, 67 So. 283; *Scheuermann v. Kuete-meyer* (Cal.), 199 Pac. 13; *Griffen v. Wood*, 93 Conn. 99, 105 Atl. 354; *Dodge v. Toth* (Conn.), 110 Atl. 454; *Van Rensselaer v. Chism*, 174 N. Y. Suppl. 751, 186 App. Div. 557. See also *Brown v. City of Wilmington*, 4 Boyce (Del.) 42, 90 Atl. 44; *King v. Brillhart* (Pa.), 114 Atl. 515. "Travelers upon a public highway owe a duty to others traveling upon such highway, and that duty requires them to so reasonably conduct themselves in the use of the highway as that they will not injure others who are also traveling upon such highway." . . . In this case each simple negligence count shows that the defendant was traveling in an automobile upon a public highway, and that the plaintiff was lawfully walking along such highway. The law therefore cast the duty upon the defendant to drive his automobile in such a reasonable way as not to in-

jure the defendant. *Dozier v. Woods*, 190 Ala. 279, 67 So. 283. "It requires no discussion to demonstrate that it might have been found negligent on the part of one driving an automobile at night to overtake and run into a pedestrian traveling so far as appears continuously in a direct path on the right of a road, without veering to one side or the other." *Powers v. Loring*, 231 Mass. 458, 121 N. E. 425.

39. *Alpert v. Ellis* (Mass.), 128 N. E. 634; *Dignum v. Weaver* (Mo. App.), 204 S. W. 566.

40. *Apperson v. Lazro*, 44 Ind. App. 186, 88 N. E. 99. And see section 244.

41. *Randolph v. Hunt* (Cal. App.), 183 Pac. 358; *Brown v. Thayer*, 212 Mass. 392, 99 N. E. 237; *Marton v. Pickrell* (Wash.), 191 Pac. 1101. See also *Feehan v. Slater*, 89 Conn. 697, 96 Atl. 159.

42. *Eames v. Clark* (Kan.), 177 Pac. 540.

stances. It may be that as a matter of law reasonable care requires a pedestrian who is about to be overtaken by an automobile to step to one side and allow it to pass, so that it will not have to turn out and go around him. And if the road, or the traveled portion, is so narrow that one or the other must get outside of it in order that the car may pass, doubtless this should be done by him who is on foot, because he can do it the more easily. But, where the beaten track is wide enough for several vehicles to pass, there can be no hard and fast rule that pedestrians must get completely outside of the highway or of the traveled portion of it.<sup>43</sup>

### Sec. 433. Motor vehicle on wrong side of street.

When a motor vehicle strikes a pedestrian in the street, if the vehicle is traveling on the wrong side of the highway, a presumption sometimes arises that the driver thereof is guilty of negligence.<sup>44</sup> In other words, the evidence that the machine was on the side of the road forbidden by the law of the road creates a *prima facie* case of negligence.<sup>45</sup> The presumption created by violation of the law of the road is not conclusive.<sup>46</sup> It may be rebutted by evidence affording some excuse for the automobilist proceeding on the wrong side of the road.<sup>47</sup> Thus, he may pass to the left side of the road and proceed there for a reasonable distance in order to avoid an

43. *Eames v. Clark* (Kan.), 177 Pac. 540.

44. *Slaughter v. Goldberg*, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90; *McGee v. Young*, 132 Ga. 606, 64 S. E. 689; *Buxton v. Ainsworth*, 138 Mich. 532, 101 N. W. 817, 11 Det. Leg. N. 684, 5 Ann. Cas. 177; *Moy Quon v. M. Furuya Co.*, 81 Wash. 526, 143 Pac. 99. See also *Trzetiatowski v. Evening American Pub. Co.*, 185 Ill. App. 451; *Devine v. Ward Baking Co.*, 188 Ill. App. 588; *Vos v. Franke*, 202 Ill. App. 133; *Wortman v. Troft*, 202 Ill. App. 528; *Fitzsimmons v. Isman*, 166 N. Y. App. Div. 262, 151 N. Y. Suppl. 551.

And see section 267.

45. *Coonan v. Straka*, 204 Ill. App. 17; *Carpenter v. Campbell Automobile Co.*, 159 Iowa, 52, 140 N. W. 225; *Steele v. Burkhardt*, 104 Mass. 59; *Grier v. Samuel*, 4 Boyce (27 Del.) 74, 85 Atl. 759; *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876.

46. *Todd v. Oreutt* (Cal. App.), 183 Pac. 963.

47. *Conder v. Griffith*, 61 Ind. App. 218, 111 N. E. 816; *Riepe v. Elting*, 89 Iowa, 82, 56 N. W. 285, 26 L. R. A. 769; *Carpenter v. Campbell Automobile Co.*, 159 Iowa, 52, 140 N. W. 225; *Mickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160. And see sections 270-274.

obstruction in the street; and, in case of a collision with a pedestrian, he will not necessarily be charged with negligence.<sup>48</sup> Or, if he turns to the wrong side of the road in an emergency to avoid an accident he may not be liable.<sup>49</sup> And, when there is little or no travel upon the highway, the automobile may properly be driven on the left-hand side of the highway, though a higher degree of care is thereby imposed on the driver.<sup>50</sup> Neither at common law nor under some of the State statutes is negligence to be inferred from the fact that the vehicle was driven along the center of the road.<sup>51</sup> When an automobile overtakes a slower vehicle, it is the general rule of the road that it shall pass to the left of the forward vehicle,<sup>52</sup> but the driver of the machine must exercise due care in making the passage so as to avoid injuries to persons or other conveyances which he might strike by passing to the left side of the highway. He must exercise care to see if he can pass to the left with safety to travelers on such side of the highway.<sup>53</sup> But the driver of a motor vehicle when turning to the right to pass a wagon is not necessarily bound to anticipate that a boy sitting on the rear of the wagon will jump off and run toward the machine.<sup>54</sup> If he passes the vehicle on the wrong side, and thereby strikes a pedestrian, he may be charged with negligence.<sup>55</sup>

48. *Clark v. Van Vleck*, 135 Iowa, 194, 112 N. W. 648. See also *Hood & Wheeler Furniture Co. v. Royal* (Ala. App.), 76 So. 965.

49. *Burlie v. Stephens* (Wash.), 193 Pac. 684.

50. *Segerstrom v. Lawrence*, 64 Wash. 245, 116 P. 876; *Moy Quon v. M. Furuya Co.*, 81 Wash. 526, 143 Pac. 99; *Osborne v. Landis*, 34 W. L. R. (Canada) 118. See also *New York Transportation Company v. Garside*, 157 Fed. 521, 85 C. C. A. 285.

51. *Linstroth v. Peper* (Mo. App.), 188 S. W. 1125.

52. Section 252.

53. *Pool v. Brown*, 89 N. J. L. 314, 98 Atl. 262. "Under the traffic law of this State, the driver of a vehicle is

required to pass the vehicle ahead of him to the left. That requirement, however, is subject to the conditions existing in the highway and does not relieve the driver of the passing vehicle from the duty of exercising reasonable care to ascertain whether he can pass the vehicle ahead with safety to other vehicles or pedestrians which or who may happen to be on the left side of the street." *Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262. And see section 254.

54. *Bishard v. Engelbeck*, 180 Iowa, 1132, 164 N. W. 203.

55. *Brautigan v. Union Overall Laundry Supply Co.*, 211 Ill. App. 354; *Hanser v. Youngs* (Mich.), 180 N. W. 409.

**Sec. 434. Turning corner.**

Statutory enactments or municipal ordinances generally prescribe that warning shall be given when an automobilist seeks to turn a corner over a crosswalk.<sup>56</sup> In some cases provisions are made as to the distance which shall exist between the automobile and the curb.<sup>57</sup> A provision of this character is designed for the protection of pedestrians seeking to cross the street at the corner. Or the law makers may take an entirely different view of the duty of the drivers of motor vehicles at corners and require that they keep as close to the curb as possible.<sup>58</sup> Such a regulation is intended to decrease the hazard of a collision with another vehicle. Where an ordinance required a person driving an automobile, upon turning the corner of any street "to leave a space of at least six feet between the curb and the automobile," and it appeared that on a lot fronting the street a building was in the course of erection and that debris was piled on the corner of the street around which a fence or barricade had been constructed, compelling pedestrians to leave the regular walk, step into the street and walk around the outside of the fence or barricade, it was held that the fence became the "curb" within the meaning of the ordinance.<sup>59</sup> When making a turn toward the left, the law of the road, as frequently fixed by statutes and municipal ordinances, requires that the driver of the vehicle shall not cut the corner but shall pass around the center of the intersection.<sup>60</sup> Independently of statutory regulations as to the conduct of automobile drivers when turning corners, a duty of exercising such care as is commensurate with the great danger at such places is imposed on the operator of a motor vehicle.<sup>61</sup> "Those who handle these machines, which are

56. Section 330.

57. *City of Oshkosh v. Campbell*, 151 Wis. 567, 139 N. W. 316.

58. *Pemberton v. Army* (Cal. App.), 183 Pac. 356, affirmed, 182 Pac. 964.

59. *Domke v. Gunning*, 62 Wash. 629, 114 Pac. 436.

60. *Pemberton v. Army* (Cal.), 182 Pac. 964; *Unmacht v. Whitney*

(Minn.), 178 N. W. 886; *Rule v. Claar Transfer & Storage Co.*, 102 Neb. 4, 165 N. W. 883; *White v. East Side Mill & Lumber Co.*, 84 Oreg. 224, 161 Pac. 969, 164 Pac. 736. And see section 259.

61. *Anderson v. Schorn*, 189 App. Div. 495, 178 N. Y. Suppl. 603; *Doyle v. Holland* (R. I.), 100 Atl. 466.

highly dangerous if driven rapidly, especially along a crowded thoroughfare, and more especially when turning at the angle of two intersecting streets or roads, should strictly obey the law and exercise that degree of care generally which is commensurate with the great hazard produced by a failure to do so. They should hold their cars well in hand and give timely signals at points where people should reasonably be expected to be, and where they have a right to be.'<sup>62</sup>

### Sec. 435. At street crossing — in general.

At a street crossing, a pedestrian has equal rights with the driver of a motor vehicle.<sup>63</sup> It is the duty of each to exercise reasonable care.<sup>64</sup> While ordinary care is said to measure to vigilance of the driver of an automobile,<sup>65</sup> the vigilance of the driver must vary according to the danger naturally anticipated from the operation of his machine. What would not be an excessive or even moderate speed under some conditions, would be considered as reckless under others. When approaching a street intersection or crossing which is much frequented by vehicles and pedestrians, a much less speed and much greater amount of vigilance is required than between

62. *Manly v. Abernathy*, 167 N. Car. 220, 83 S. E. 343.

63. *Weihe v. Rathjen Mercantile Co.*, 34 Cal. App. 302, 167 Pac. 287; *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44; *Crandall v. Krause*, 165 Ill. App. 15; *Wortman v. Trott*, 202 Ill. App. 528; *Switzer v. Baker*, 178 Iowa, 1063, 160 N. W. 372; *Miller v. New York Taxicab Co.*, 120 N. Y. Suppl. 899. "The automobile must use only the carriage way of the street, while the pedestrian, except at street crossings, uses generally only the sidewalk. But the pedestrian, in the use of the street at a regular crossing, has the same right to its use as vehicles and is under no legal duty to give way to automobiles. The automobile can go around him as well as he can go around it. It can get out of the way

of the pedestrian about as easily and quickly as he can get out of its way, although it is usually the case, and rightfully so, that the pedestrian endeavors to keep out of the way of vehicles at street crossings; but, if he does not, this does not excuse the driver of that vehicle who runs him down, unless it be that the driver was free from negligence, and the pedestrians by his want of care was to blame for the collision." *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335. And see section 414.

64. *Weihe v. Rathjen Mercantile Co.*, 34 Cal. App. 302, 167 Pac. 287; *Switzer v. Baker*, 178 Iowa, 1063, 160 N. W. 372; *Shields v. Fairchild*, 130 La. 648, 58 So. 497.

65. Section 277.

crossings or at crossing where the traffic is less.<sup>66</sup> The degree of care which the driver of the vehicle must exercise is that which a reasonably prudent man would exercise under the same circumstances, considering the nature and extent of the traffic and the surrounding circumstances. Following this line of reasoning, it is sometimes said that the driver of an automobile is required to exercise a "greater" degree of care at street intersections.<sup>67</sup>

In using the streets and highways an automobilist does so with knowledge that at street intersections other vehicles may approach to cross or turn into the one over which he is traveling, and that at such points crosswalks are ordinarily provided for the use of pedestrians. He should, therefore, operate his car with that degree of care which is consistent with the conditions thus existing, the rate of speed and his control over the car varying according to the traffic at the particular place. Under all circumstances he should at such points keep a careful watch ahead to avoid injury to pedestrians using the crosswalks.<sup>68</sup> He should maintain such control of his machine that, on the shortest notice, he can stop it so as to prevent injury to pedestrians.<sup>69</sup> It is the duty of the operator of an automobile, when approaching a street crossing used by pedestrians, to keep a lookout, to give reasonable and timely warning of the movement of the machine by the usual and cus-

66. *Weihe v. Rathjen Mercantile Co.*, 34 Cal. App. 302, 167 Pac. 287; *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44. "Those who handle these machines, which are highly dangerous if driven rapidly, especially along a crowded thoroughfare, and more especially when turning at the angle of two intersecting streets or roads, should strictly obey the law and exercise that degree of care generally which is commensurate with the great hazard produced by a failure to do so. They should hold their cars well in hand and give timely signals at points where people should reasonably be expected to be and where they have a

right to be." *Manley v. Abernathy*, 167 N. Car. 220, 83 S. E. 343.

67. *Weihe v. Rathjen Mercantile Co.*, 34 Cal. App. 302, 167 Pac. 287; *Cecchi v. Lindsay*, 1 Boyce (Del.) 185, 75 Atl. 376, reversed 80 Atl. 523; *Grier v. Samuel*, 4 Boyce (Del.) 106, 86 Atl. 209; *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44; *Arnold v. McKelvey*, 253 Pa. 324, 98 Atl. 559; *Virgilio v. Walker*, 254 Pa. 241, 98 Atl. 815.

68. *Rowe v. Hammond*, 172 Mo. App. 203, 157 S. W. 880; *Lyons v. Volz* (N. J.), 114 Atl. 318.

69. *Virgilio v. Walker*, 254 Pa. 241, 98 Atl. 815.

tomary signals, and to operate it at a reasonable rate of speed, considering the amount of foot and vehicular traffic at the crossing.<sup>70</sup> If the pedestrian is upon the crosswalk at the time of the arrival of the motor vehicle, the driver should slacken or stop the machine; but he is not necessarily bound to stop until the pedestrian has passed over the entire crosswalk and reached the opposite sidewalk.<sup>71</sup> Between crossings, the same standard of care is not required of the operator of an automobile; although he must exercise reasonable care and constantly be on the lookout for the safety of others.<sup>72</sup> Positive regulations may affect the duty of the automobilist at street crossings, such as limitations as to speed, requirements as to signals or warning; or regulations may give the pedestrian the right of way at street crossings.<sup>73</sup> If, owing to the different methods of locomotion and travel, the law recognizes a right of precedence in the use of a crossing, it does not mean that the persons having such right may loiter upon or obstruct the crossings to the exclusion of others or to the interruption of street traffic, but rather that, when two or more persons moving in different directions approach a crossing at the same time or in such manner that if both or all continue their respective courses there is danger of collision, then the one having the preference is entitled to the first use of such crossing, and it is the duty of others to give him reasonable opportunity to do so.<sup>74</sup>

70. *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335.

71. *Switzer v. Baker*, 178 Iowa, 1063, 160 N. W. 372.

72. *Virgilio v. Walker*, 254 Pa. 241, 98 Atl. 815. See also *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335. "The law requires that every person shall take due care for the safety of himself and others according to the circumstances in which he is placed. Vehicles have the right of way on the portion of the highway set apart for them, but at crossings all drivers, particularly of motor vehicles, must be highly vigilant

and maintain such control that, on the shortest possible notice, they can stop their cars so as to prevent danger to pedestrians; on the other hand, between crossings drivers are not held to the same high standard of care, although, of course, they must be constantly on the lookout for the safety of others." *Virgilio v. Walker*, 254 Pa. 241, 98 Atl. 815.

73. *Switzer v. Baker*, 178 Iowa, 1063, 160 N. W. 372; *Elmberg v. Pielow* (Wash.), 194 Pac. 549.

74. *Switzer v. Baker*, 178 Iowa, 1063, 160 N. W. 372.



**Sec. 436. At street crossing — unfavorable weather conditions.**

Among the circumstances to be considered by the driver of an automobile at a street crossing are the weather conditions. Thus, in a blinding snow storm, it may be difficult for either the pedestrian or the driver to see, less so for the former when he is protected by a wind shield. Under such circumstances more caution should be exercised by him in the management of the car, and consideration must be given to the less favorable conditions under which the pedestrian may be proceeding. A similar situation may exist in the case of a heavy rain storm.<sup>75</sup> And, if there is ice or snow upon a crosswalk making it more difficult for a person to walk and compelling him to proceed at a slower pace, the operator of the vehicle should exercise a degree of care which is consistent with the conditions presented.

**Sec. 437. At street crossing — view obstructed.**

Where there is an obstruction to an automobilist's view of a street crossing, he must exercise a degree of care such as a reasonably prudent man would exercise under the same circumstances to avoid injury to pedestrians or other vehicles at such point.<sup>76</sup>

**Sec. 438. Lookout for pedestrians.**

A motorist is bound to realize that other vehicles and pedestrians will use the streets and highways, and he is bound to anticipate that they will lawfully occupy portions of the street in his course. He must, therefore, keep a reasonably careful lookout for the presence of such other travelers in order that injury to them may be avoided.<sup>77</sup> He should keep

75. *Harting v. Knapwurst*, 178 Ill. App. 409. See also *Powers v. Wilson*, 138 Minn. 407, 165 N. W. 231. Ill. App. 255; *Smith v. Tappen*, 208 Ill. App. 433; *Arkin v. Page*, 212 Ill. App. 282.

76. *Deputy v. Kimmell*, 73 W. Va. 595, 80 S. E. 919. *Indiana*.—*Russell v. Scharfe*, 130 N. E. 437.

77. *United States*.—*Dennison v. McMorton*, 228 Fed. 401, 142 C. C. A. 631. *Iowa*.—*Holderman v. Witmer*, 166 Iowa, 406, 147 N. W. 926.

*Illinois*.—*Coppock v. Schlatter*, 193 *Kentucky*.—*Weidner v. Otter*, 171

a lookout for pedestrians, not only at street crossings, but between street intersections.<sup>78</sup> The duty to look implies the duty to see what is in plain view, unless some reasonable ex-

Ky. 167, 188 S. W. 335; *Major Taylor & Co. v. Harding*, 182 Ky. 236, 206 S. W. 285.

*Louisiana*.—*Reed v. Sievers*, 146 La. 391, 83 So. 685.

*Minnesota*.—*Noltmier v. Rosenberger*, 131 Minn. 369, 155 N. W. 618.

*Missouri*.—*Eisenman v. Griffith*, 181 Mo. App. 183, 167 S. W. 1142; *Hopfinger v. Young* (Mo. App.), 179 S. W. 747; *Weiss v. Sodemann Heat & Power Co.* (Mo. App.), 227 S. W. 837; *Schinogle v. Baughman* (Mo. App.), 228 S. W. 897.

*New Hampshire*.—*Hamel v. Peabody*, 78 N. H. 585, 97 Atl. 220.

*New Jersey*.—"The driver of the automobile was under a legal duty to use reasonable care to avoid colliding with other vehicles or persons in the public highway. His duty was to be on the alert to observe persons who were in the street or about to cross the street and to use reasonable care to avoid colliding with them. He was under a duty to have his automobile under proper control. He was under an obligation to take notice of the conditions existing in the public street and to propel his car in a manner suitable to those conditions. He was under a duty to observe the condition which existed at the crosswalk, in that for a distance of 12 feet the view of a person crossing from the east to the west side of Halsey street was obscured by the top of the wagon. *Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262.

*New York*.—*Keosayan v. Geiger*, 188 App. Div. 829, 176 N. Y. Suppl. 585; *Thies v. Thomas*, 77 N. Y. Suppl. 276.

*Pennsylvania*.—*Kuehne v. Brown*, 257 Pa. 37, 101 Atl. 77.

*Rhode Island*.—*Thomas v. Burdick*, 100 Atl. 398.

*Virginia*.—*Core v. Wilhelm*, 98 S. E. 27.

*Washington*.—*Adair v. McNeil*, 95 Wash. 160, 163 Pac. 393.

*Canada*.—*White v. Hegler*, 29 D. L. R. 480, 34 W. L. R. 1061.

And see sections 332-336.

**Not negligence per se.**—The failure to keep a lookout is not necessarily negligence *per se*. *Texas Motor Co. v. Buffington* (Ark.), 203 S. W. 1013.

**More lookout required of driver than of pedestrians.**—"It is, too, a familiar rule in the law of negligence that the care to be exercised must correspond with the capacity to injure, and accordingly the automobilist is under a much higher degree of care to look out for the pedestrian than the pedestrian is to look out for the automobilist. The pedestrian cannot merely by the manner in which he uses the street harm the automobilist, but the automobilist may by his manner of using the street kill the pedestrian; and so, generally speaking, the pedestrian is required only to look after his own safety, and not the safety of others, while the automobilist must look out for the safety of the pedestrian rather than his own." *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335.

**78.** *Ivy v. Marx* (Ala.), 87 So. 813, holding that the fact that an ordinance prohibits the crossing by the pedestrian does not relieve the driver of his duty to keep a lookout between crossings.

**Pedestrian crossing street not at regular crossing.**—In *White v. Hegler*, 29 D. L. R. (Canada) 480, 34 W. L. R. 1061, it was said: "I think it is the law that a pedestrian crossing not at a crossing and not looking, and therefore being very careless, would be entitled to damages from an automobile

planation is presented for a failure to see.<sup>79</sup> The driver of an automobile is bound to operate his conveyance with reference not only to the pedestrians and conditions he actually sees, but also as to such as he should see in the exercise of reasonable care.<sup>80</sup> In other words, negligence may be inferred from the failure to see a pedestrian as well as in the management of an automobile either before or after seeing him. "To have looked too late was not to have looked at all." Moreover, he is bound to take notice of such conditions in the street as obscure an approaching pedestrian, and to have his machine under proper control so as to avoid injury to one who is so obscured.<sup>81</sup> Testimony on the part of the driver of an automobile or of the occupants thereof that they did not see a pedestrian who was struck by the machine, may tend to inculcate rather than excuse their management of the automobile.<sup>82</sup> So, testimony on the part of the defendant that the automobile was proceeding slowly and that its lights were in proper order, while perhaps exonerating him as to the negligence in those respects, may afford ground for charging him with negligence in failing to keep a proper lookout for persons in the street.<sup>83</sup> Whether one is negligent in not seeing a pedestrian sooner, is generally a question for the jury.<sup>84</sup> The duty

driver who with no obstructed view could have seen the pedestrian at a sufficient distance to avoid him, but who for instance for no justifiable purpose kept his eyes either on his feet in the car or on a window at the side of the street and so did not see the pedestrian and ran over him—who, in other words, did not keep a lookout to see that he did not run into anyone. Also an automobile driver who does not keep a good lookout and does not see a pedestrian apparently going to cross his path without looking, is not entitled to go on and leave the responsibility upon the pedestrian. He must use reasonable care, when he sees the danger, to avoid him."

79. *Warner v. Berthoff*, 40 Cal. App. 776, 181 Pac. 808; *Stone v. Gill* (Cal.

App.), 198 Pac. 640; *Holderman v. Witmer*, 166 Iowa, 406, 147 N. W. 926.

**Question for jury.**—The reasonableness of the explanation for a failure to see, is a question for the jury. *Holderman v. Witmer*, 166 Iowa, 406, 147 N. W. 926.

80. *Walker v. Rodriguez*, 139 La. 251, 71 So. 499. See also *Coppock v. Schlatter*, 193 Ill. App. 255.

81. *Pool v. Brown*, 89 N. J. L. 314, 98 Atl. 262. And see section 326.

82. See *Holderman v. Witmer*, 166 Iowa, 406, 147 N. W. 926; *Gray v. Batchelder*, 208 Mass. 441, 94 N. E. 702; *McMonagle v. Simpers* (Pa. St.). 110 Atl. 83.

83. *Adair v. McNeil*, 95 Wash. 160, 163 Pac. 393.

84. *Booth v. Meagher*, 224 Mass. 472

to look for other persons is satisfied by looking in the direction in which the machine is proceeding; there is no duty cast upon the operator of looking behind to see that children do not attempt to climb on the machine,<sup>85</sup> or to see that pedestrians keep clear from the rear end of his vehicle or the load thereon.<sup>86</sup> But he must anticipate that pedestrians will approach from the side, and he should keep a lookout toward the side as well as the front, particularly at street crossings.<sup>87</sup>

### Sec. 439. Avoidance of person standing in street.

Where a person is standing still in the street and does not observe the approach of an automobile, it is the duty of the driver to turn out so as to avoid striking him.<sup>88</sup> Especially is this so, when there is ample room for the auto driver to pass the pedestrian in safety.<sup>89</sup> He is not permitted to run him down and then claim that such pedestrian was guilty of contributory negligence in not seeing and avoiding the automobile.<sup>90</sup> As was said in one case,<sup>91</sup> "While it is no doubt true that a person in a highway must use care, yet when one is rightfully in the highway, and standing there, another person certainly cannot run him down without being guilty of

113 N. E. 367; *Beno v. Kloka* (Mich.), 178 N. W. 646; *Marsters v. Isensee* (Oreg.), 192 Pac. 907.

85. *Hebard v. Mabie*, 98 Ill. App. 543. And see section 333.

86. *Barton v. Craighill* (Pa.), 112 Atl. 96.

87. *Thomas v. Burdick* (R. I.), 100 Atl. 398; *Bulger v. Olataka Yamoaka* (Wash.), 191 Pac. 786.

88. *Wells v. Shepard*, 135 Ark. 466, 205 S. W. 806; *Arnaz v. Forbes* (Cal. App.), 197 Pac. 364; *Nehing v. Charles M. Monroe Stationery Co.* (Mo. App.), 191 S. W. 1054; *Humes v. Schaller*, 39 R. I. 519, 99 Atl. 55; *Dervin v. Frenier*, 91 Vt. 398, 100 Atl. 760; *Stephenson v. Parton*, 89 Wash. 653, 155 Pac. 147; *Ouellette v. Superior Motor & M. Works*, 157 Wis. 531, 147 N. W. 1014. See also *Coffman v. Singh*

(Cal. App.), 193 Pac. 259. "For these defendants to proceed up the avenue, even at a speed of eight miles an hour (to say nothing of the evidence warranting the inference that they were going faster) all the time seeing this boy standing in the gutter with his back to them, and apparently unmindful of their approach, and to run him down without the slightest effort to warn or avoid him, is so indicative of carelessness as to afford abundant evidence to make a question for the jury." *Dervin v. Frenier*, 91 Vt. 398, 100 Atl. 760.

89. *Stephenson v. Parton*, 89 Wash. 653, 155 Pac. 147.

90. *Humes v. Schaller*, 39 R. I. 519, 99 Atl. 55.

91. *Stephenson v. Parton*, 89 Wash. 653, 155 Pac. 147.

negligence." Thus, it is held that one running an automobile is bound to take notice of a person standing in the roadway conversing with a friend, and is bound to use care not to injure him.<sup>92</sup> And, where it appeared that a "jumper" on a delivery wagon, after alighting and while taking some parcels from the wagon, was struck by an automobile, it was held that the negligence of the parties was properly submitted to the jury.<sup>93</sup>

#### Sec. 440. Sudden turning or backing without warning.

The driver of an automobile will be liable for injuries sustained by a pedestrian, where the machine makes a sudden turn without warning, thereby coming in collision with such pedestrian.<sup>94</sup> And, where one passing several feet back of a standing automobile is injured by reason of the sudden backing of the machine without warning, the jury is justified in charging the driver with negligence.<sup>95</sup> The backing of a machine over a crossing without warning in a direction contrary to the general traffic, permits an inference of negligence.<sup>96</sup> One backing a machine from a garage to the street should exercise reasonable diligence to give a warning of his approach or to ascertain the danger to which other travelers are exposed.<sup>97</sup> If the car strikes a person or other vehicle before reaching the crosswalk, the situation is different than when a pedestrian along the walk is injured.<sup>98</sup> But the law does not absolutely forbid the backing of a vehicle, and the jury may properly find in some cases that the driver exercised due care in the maneuver.<sup>99</sup> The mere fact that the chauffeur

92. *Kathmeyer v. Mehl* (N. J.), 60 Atl. 40. See also *Hanser v. Youngs* (Mich.), 180 N. W. 409.

93. *Gerhard v. Ford Motor Co.*, 155 Mich. 618, 119 N. W. 904, 20 L. R. A. (N. S.) 232.

94. *O'Dowd v. Newnham*, 13 Ga. App. 220, 80 S. E. 36. See also *Bohringer v. Campbell*, 154 N. Y. App. Div. 879, 137 N. Y. Suppl. 241.

95. *Estrom v. Neumoegen*, 126 N. Y. Suppl. 660. See also *Suddarth v. Kirkland Daley Motor Co.* (Mo. App.), 220

S. W. 699; *Glinco v. Wimer* (W. Va.), 107 S. E. 198.

96. *Wirth v. Burns Bros.*, 229 N. Y. 148, 128 N. E. 111.

97. *Texas Motor Co. v. Buffington* (Ark.), 203 S. W. 1013.

98. *Caplan v. Reynolds* (Iowa), 182 N. W. 641.

99. *Sheldon v. James*, 175 Cal. 474, 166 Pac. 8, 2 A. L. R. 1493; *Caplan v. Reynolds* (Iowa), 182 N. W. 641; *Glinco v. Wimer* (W. Va.), 107 S. E. 198.

cannot see over the back of the automobile while sitting would not, in and of itself, convict him of negligence in the backing of the car, if he took reasonable precautions before so doing by looking to the right and left, or by standing up and so looking over the back of his car.<sup>1</sup>

#### Sec. 441. Speed and control of automobile — control in general.

The driver of an automobile is bound to anticipate that other travelers, both in carriages and on foot, will use the highway, and hence it is his duty to have his machine under reasonable control so as to avoid injury to such travelers.<sup>2</sup> This requires that the speed of the car shall be reasonable

1. *Sheldon v. James*, 175 Cal. 474, 166 Pac. 8, 2 A. L. R. 1493.

2. *Alabama*.—*Hood & Wheeler Furniture Co. v. Royal* (Ala. App.), 76 So. 965.

*Illinois*.—*Kessler v. Washburn*, 157 Ill. App. 532; *Crandall v. Krause*, 165 Ill. App. 15.

*Iowa*.—*Brown v. Des Moines Steam Bottling Works*, 174 Iowa, 715, 156 N. W. 829; *Gilbert v. Vanderwall*, 181 Iowa, 685, 165 N. W. 165.

*Kentucky*.—*Baldwin's Adm'r v. Maggard*, 162 Ky. 424, 172 S. W. 674; *Major Taylor & Co. v. Harding*, 182 Ky. 236, 206 S. W. 285; *Ferris v. McAidle*, 92 N. J. L. 580, 106 Atl. 460.

*Louisiana*.—*Walker v. Rodriguez*, 139 La. 251, 71 So. 499.

*Michigan*.—*Levy v. Koppin*, 183 Mich. 232, 149 N. W. 993.

*Minnesota*.—*Johnson v. Johnson*, 137 Minn. 198, 163 N. W. 160; *Geiger v. Sanitary Farm Dairies*, 178 N. W. 501.

*New Jersey*.—*Pool v. Brown*, 89 N. J. L. 314, 98 Atl. 262.

*New York*.—*Bohringer v. Campbell*, 154 App. Div. 879, 137 N. Y. Suppl. 241; *Thies v. Thomas*, 77 N. Y. Suppl. 276; *Busacca v. McLaughlin Supply Co.*, 189 App. Div. 584, 178 N. Y. Suppl. 849.

*North Carolina*.—*Manley v. Abernathy*, 167 N. C. 220, 83 S. E. 343.

*Oregon*.—*Weygandt v. Bartle*, 88 Ore. 310, 171 Pac. 587; *Marsters v. Isensee*, 192 Pac. 907.

*Pennsylvania*.—*Lorah v. Rhinehart*, 243 Pa. St. 231, 89 Atl. 967; *Reese v. France*, 62 Pa. Super. Ct. 128; *Healy v. Shedaker*, 264 Pa. St. 512, 107 Atl. 842; *Schweitzer v. Quaker City Cab Co.* (Pa.), 112 Atl. 442; *Mackin v. Patterson* (Pa.), 112 Atl. 738; *Twinn v. Noble* (Pa.), 113 Atl. 686. "In a crowded city street, the dictates of common prudence clearly require that a heavy vehicle, such as an automobile, shall be kept under control so as to avoid, or at least minimize, the dangers of a collision. Common experience and observation show that the only adequate method of control is to run the machine slowly." *Lorah v. Rhinehart*, 243 Pa. St. 231, 89 Atl. 967; *Schoepp v. Gerety*, 263 Pa. St. 538, 107 Atl. 317; *Anderson v. Wood*, 264 Pa. St. 98, 107 Atl. 658.

*Virginia*.—*Core v. Wilhelm*, 124 Va. 150, 98 S. E. 27.

*Washington*.—*Deitchler v. Ball*, 99 Wash. 483, 170 Pac. 123; *Locke v. Greene*, 100 Wash. 397, 171 Pac. 245.

under the circumstances,<sup>3</sup> and that it shall not be greater than the rate prescribed by statute or municipal ordinance.<sup>4</sup> The control required of the driver of an automobile is not "absolute" control; all that is required is "reasonable" control.<sup>5</sup> He is not compelled at all times to run so slowly that he can stop instantly.<sup>6</sup> The test of control is the ability to stop quickly and easily. When this result was not accomplished, the inference is obvious that the car was running too fast or that a proper effort to control it was not made.<sup>7</sup> When the circumstances at a given point demand that the speed be slackened or that the car be stopped, the sounding of the horn or any other warning of approach will not be sufficient.<sup>8</sup> If, however, the machine is traveling at a reasonable speed and is under reasonable control, there will ordinarily be no liability for an injury to a pedestrian who unexpectedly jumps in front of the machine so close thereto that the driver by an exercise of due care is unable to avoid a collision.<sup>9</sup>

#### Sec. 442. Speed and control of automobile — stopping.

The duty to have an automobile under reasonable control naturally implies that the driver shall exercise the power of control whenever reasonably necessary for the avoidance of injuries to others.<sup>10</sup> If a pedestrian is crossing his course in

3. Sections 305, 443.

4. Section 444.

5. *Baldwin's Adm'r v. Maggard*, 162 Ky. 424, 172 S. W. 674.

6. *McMillen v. Shailhmann*, 264 Pa. 13, 107 Atl. 332.

7. *Lorah v. Rinehart*, 243 Pa. St. 231, 89 Atl. 967, holding that the jury may take into consideration in judging of the speed of an automobile, the distance it traveled after striking a pedestrian before it came to a stop.

8. *Kessler v. Washburn*, 157 Ill. App. 532.

9. *Lewis v. Steel*, 52 Mont. 300, 157 Pac. 575. And see section 416.

10. Instructions as to necessity for stopping.—It has been held error for the court to charge: "If you believe,

from all the evidence in this case, that as the driver of the defendant's truck at the time and place in question approached the place where the deceased was injured there was no apparent necessity appearing for the driver of said truck stopping or slackening the speed of the truck in order to prevent injury to the deceased, then the law did not require the driver of the truck to stop or slacken the speed of the truck." *Devine v. Brunswick-Balke-Collender Co.*, 270 Ill. 504, 110 N. E. 780, wherein the court said: "This instruction was clearly erroneous. It is not a question as to whether or not, in approaching the place in question, there was no 'apparent necessity appearing for the driver of said truck stopping or slack-

such proximity that a collision is possible, the speed of the car should be slackened.<sup>11</sup> But he is not required to begin stopping the machine as soon as he sees a pedestrian in front, irrespective of his being in a position of danger.<sup>12</sup> Moreover, the circumstances may be such, as when a collision is imminent, that reasonable care in the operation of the machine requires the stopping thereof.<sup>13</sup> The driver of an automobile does not necessarily fulfill his duty by proceeding very slowly, but he should bring his machine to a stop if it is necessary in order to prevent an injury to a pedestrian.<sup>14</sup> Thus, when one crossing a street becomes confused and vacillates as to the course he shall pursue, reasonable care may require that the driver stop his automobile in order to avoid the collision.<sup>15</sup> Likewise, if his vision is obscured by the glare of other lights, he should stop his machine instead of running the danger of a collision by proceeding.<sup>16</sup> And it may be the duty of the driver to stop when he meets or overtakes a street car which is receiving or discharging passengers.<sup>17</sup> But, in the absence of statute or other regulation on the subject, there is no rule of law which requires the driver of an automobile to slack its speed while he is passing a moving street car.<sup>18</sup>

ing the speed of the truck in order to prevent injury to the deceased,' but whether or not the driver was operating the car with that degree of care and skill which an ordinarily prudent and skillful driver would have exercised under the circumstances, having due regard to the location, circumstances and surroundings in which the driver was operating his car at the time."

11. *Levyn v. Koppin*, 183 Mich. 232, 149 N. W. 993.

12. *Selinger v. Cromer* (Mo. App.), 208 S. W. 871.

13. *New York Transp. Co. v. Gar-side*, 157 Fed. 521, 85 C. C. A. 285; *Silvia v. Scotten* (Del.), 114 Atl. 206;

*Kessler v. Washburn*, 157 Ill. App. 532; *Crawford v. McElhinney*, 171 Iowa, 606, 154 N. W. 310; *Walmer-Roberts v. Hennesey* (Iowa), 181 N. W. 798; *Kelly v. Schmidt*, 142 La. 91, 76 So. 250; *Thies v. Thomas*, 77 N. Y. Suppl. 276. See also *Clark v. Jones* (Oreg.), 179 Pac. 272.

14. *Crawford v. McElhinney*, 171 Iowa, 606, 154 N. W. 310; *Gagnon v. Robitaille*, 16 R. L. N. S. 235.

15. Section 421.

16. *Hammond v. Morrison*, 90 N. J. L. 815, 100 Atl. 154.

17. Section 423, *et seq.*

18. *Starr v. Schenk*, 25 Mont. L. Rep. (Pa.) 18.



**Sec. 443. Speed and control of automobile — speed.**

Independently of any statute or municipal regulation affecting the question, it is the duty of a motorist to run his automobile not faster than a reasonable rate of speed.<sup>19</sup> If an excessive speed is a proximate cause of injuries to a child or adult in the street, the jury may be warranted in holding the driver of the machine liable for the injuries thus received.<sup>20</sup>

**19. Section 305.**

**Evidence.**—The testimony of an occupant of an automobile that the pedestrian who was killed thereby appeared so suddenly that the collision could not have been avoided, even if the speed had not exceeded four miles an hour, is admissible as tending to show that the accident was not due to excessive speed. *Lewis v. Steel*, 52 Mont. 300, 157 Pac. 575.

**20. United States.**—*New York Transp. Co. v. Garside*, 157 Fed. 521, 85 C. C. A. 285.

*Arkansas.*—*Texas Motor Co. v. Bufington*, 203 S. W. 1013; *Hughey v. Lennox*, 219 S. W. 323.

*California.*—*Bannister v. H. Jevne Co.*, 28 Cal. App. 133, 151 Pac. 546; *Clohan v. Kelso* (Cal. App.), 183 Pac. 349.

*Connecticut.*—*Lynch v. Shearer*, 83 Conn. 73, 75 Atl. 88.

*Illinois.*—*Kessler v. Washburn*, 157 Ill. App. 532; *Kuchler v. Stafford*, 185 Ill. App. 199; *Trzietiatowski v. Evening American Pub. Co.*, 185 Ill. App. 451; *Osberg v. Cudahy Packing Co.*, 198 Ill. App. 551; *Brantigan v. Union Overall Laundry & Supply Co.*, 211 Ill. App. 354.

*Indiana.*—*Harker v. Gruhl*, 62 Ind. App. 177, 111 N. E. 457.

*Kentucky.*—*Buford v. Hopewell*, 140 Ky. 666, 131 S. W. 502; *Forgy v. Rutledge*, 167 Ky. 182, 180 S. W. 90; *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335.

*Massachusetts.*—*Rasmussen v. Whipple*, 211 Mass. 546, 98 N. E. 592; *Tripp*

*v. Taft*, 219 Mass. 81, 106 N. E. 578; *Creedon v. Galvin*, 226 Mass. 140, 115 N. E. 307; *French v. Moorar*, 226 Mass. 173, 115 N. E. 235; *Buoniconte v. Lee*, 234 Mass. 173, 124 N. E. 791; *Kaminski v. Fournier*, 126 N. E. 279.

*Michigan.*—*Levyn v. Koppin*, 183 Mich. 232, 149 N. W. 993; *Wilson v. Johnson*, 195 Mich. 94, 161 N. W. 924.

*Minnesota.*—*Johnson v. Johnson*, 137 Minn. 198, 163 N. W. 160.

*Missouri.*—*Sullivan v. Chauvonet* (Mo.), 222 S. W. 759; *Hopflinger v. Young* (Mo. App.), 179 S. W. 747.

*New Jersey.*—*Heckman v. Cohen*, 90 N. J. L. 322, 100 Atl. 695.

*New York.*—*Bohringer v. Campbell*, 154 App. Div. 879, 137 N. Y. Suppl. 241; *Fittin v. Sumner*, 176 App. Div. 617, 163 N. Y. Suppl. 443; *Dultz v. Fischowitz*, 104 N. Y. Suppl. 357.

*Oregon.*—*Weygandt v. Bartle*, 88 Oreg. 310, 171 Pac. 587.

*Pennsylvania.*—*Freel v. Wanamaker*, 208 Pa. St. 279, 57 Atl. 563; *Lorah v. Rinehart*, 243 Pa. St. 231, 89 Atl. 967; *Schoepp v. Gerety*, 263 Pa. St. 538, 107 Atl. 317; *Michalsky v. Putney*, 51 Pa. Super. Ct. 163; *Karaffa v. Ferguson*, 68 Pitts. Leg. Jour. 109.

*South Dakota.*—*Heidner v. Germ-schied*, 41 S. Dak. 430, 171 N. W. 208.

*Tennessee.*—*Lauterbach v. State*, 132 Tenn. 603, 179 S. W. 130.

*Washington.*—*Heath v. Seattle Taxi-cab Co.*, 73 Wash. 177, 131 Pac. 843; *Adair v. McNeil*, 95 Wash. 160, 163 Pac. 393; *Deitchler v. Ball*, 99 Wash. 183, 170 Pac. 123; *Locke v. Greene*, 100 Wash. 397, 171 Pac. 245.

The speed of the vehicle is the critical point in determining whether it is under control. Thus, it has been said, "Common experience and observation show that the only adequate method of control is to run the machine slowly."<sup>21</sup> What is a reasonable rate depends upon the circumstances of each particular case,<sup>22</sup> and is ordinarily a question for the jury.<sup>23</sup> With a clear track and plenty of room, the rate of twelve to fifteen miles an hour would, no doubt, be deemed very moderate, but in the thick of traffic where the streets are crowded with vehicles and pedestrians, a jury might conclude that a prudent person with due regard to the safety of himself and others, would drive a heavy automobile at a much slower rate.<sup>24</sup> A speed of five or six miles an hour when driving through a crowd of children playing in the street may be gross negligence.<sup>25</sup> But a speed of from five to eight miles an hour when approaching the crossing of a busy street, is not necessarily negligent.<sup>26</sup>

#### **Sec. 444. Speed and control of automobile — speed prescribed by statute or ordinance.**

Statutory and municipal regulations as to the speed of automobiles are to be obeyed, and, if an injury results to a pedestrian from a violation of such a regulation, the driver, as a general proposition, must answer for the damages.<sup>27</sup> It is

21. *Lorah v. Rinehart*, 243 Pa. St. 231, 89 Atl. 967.

22. *Hood & Wheeler Furniture Co. v. Royal* (Ala. App.), 76 So. 965; *Ginter v. O'Donoghue* (Mo. App.), 179 S. W. 732; *Lorah v. Rinehart*, 243 Pa. St. 231, 89 Atl. 967.

23. *LaDuke v. Dexter* (Mo. App.), 202 S. W. 254. And see section 325.

24. *Lorah v. Rinehart*, 243 Pa. St. 231, 89 Atl. 967.

25. *Haacke v. Davis*, 166 Mo. App. 249, 148 S. W. 450.

26. *Gilbert v. Vanderwall*, 181 Iowa, 685, 165 N. W. 165.

27. *Denison v. McNorton*, 228 Fed. 401, 142 C. C. A. 631; *Randolph v.*

*Hunt* (Cal. App.), 183 Pac. 358; *Heartsell v. Billows*, 184 Mo. App. 420, 171 S. W. 7; *McCown v. Muldrow*, 91 S. Car. 523, 74 S. E. 386; *Franey v. Seattle Taxicab Co.*, 80 Wash. 396, 141 Pac. 890; *Bruner v. Little*, 97 Wash. 319, 166 Pac. 1166.

And see section 297.

**Homicide.**—In case of a violation of a speed statute resulting in the death of a pedestrian, the circumstances may be such that a prosecution for homicide can be sustained. *Lauterbach v. State*, 132 Tenn. 603, 179 S. W. 130. And see section 759.

**Fire apparatus.**—As a general rule the fire apparatus of a municipality is

sometimes held that the violation of the prescribed speed is negligence *per se*;<sup>28</sup> in other jurisdictions and under regulations with different language, the violation is thought to be *prima facie* evidence of negligence.<sup>29</sup> Some regulations do not forbid a greater speed than that specified but merely make the greater speed *prima facie* evidence that the automobile was proceeding at an unreasonable speed; in such a case, the driver may show that under the circumstances in a particular case, the speed was not unreasonable though greater than the prescribed rate.<sup>30</sup> The fact that the operator of the car was proceeding within the prescribed limit of speed, does not necessarily require a holding that he was free from negligence.<sup>31</sup> Though the speed may be limited by statute or municipal ordinance, nevertheless the duty remains on the driver to operate his machine no faster than a reasonable speed under the circumstances, and the jury may be authorized to find that a speed below the limit was unreasonable.<sup>32</sup>

#### Sec. 445. Speed and control of automobile — auto turning corner.

When an automobile is turning a corner, the driver should take notice that pedestrians may be crossing the street; and,

exempted from the speed limitations, and a pedestrian injured by such apparatus cannot recover for his injuries merely because the speed exceeded the general limit prescribed by statute. *Hubert v. Granzow*, 131 Minn. 361, 155 N. W. 204.

28. *Weimer v. Rosen*, 100 Ohio, 361, 126 N. E. 307; *Whaley v. Ostendorff*, 90 S. Car. 281, 73 S. E. 186; *McCown v. Muldrow*, 91 S. Car. 523, 74 S. E. 386; *Ludke v. Buick*, 160 Wis. 440, 152 N. W. 190, L. R. A. 1915D 968. And see section 321.

29. *Bruhl v. Anderson*, 189 Ill. App. 461; *Forgy v. Rutledge*, 167 Ky. 182, 180 S. W. 90. And see section 322.

30. *Berg v. Michell*, 196 Ill. App. 509.

31. Section 324.

32. *Kessler v. Washburn*, 157 Ill.

App. 532; *Bohm v. Dalton*, 206 Ill. App. 374; *Forgy v. Rutledge*, 167 Ky. 182, 180 S. W. 90; *Ginter v. O'Donoghue* (Mo. App.), 179 S. W. 732; *Adair v. McNeil*, 95 Wash. 160, 163 Pac. 393. "No owner or operator of an automobile is necessarily exempt from liability for collision in a public street by simply showing that at the time of the accident he did not run at a rate of speed exceeding the limit allowed by the law or the ordinances. On the contrary, he still remains bound to anticipate that he may meet persons at any point in the public street and he must keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person, using proper care and caution." *Kessler v. Washburn*, 157 Ill. App. 532.

under such circumstances, the speed of the machine should be slowed and the car operated with care.<sup>33</sup> A pedestrian crossing the street at such a place has a right to assume that the driver of an automobile will operate his conveyance with due regard to the rights of pedestrians at such places.<sup>34</sup> Thus it is said: "Those who handle these machines, which are highly dangerous if driven rapidly, especially along a crowded thoroughfare, and more especially when turning at the angle of two intersecting streets or roads, should strictly obey the law and exercise that degree of care generally which is commensurate with the great hazard produced by a failure to do so. They should hold their cars well in hand and give timely signals at points where people should reasonably be expected to be, and where they have a right to be."<sup>35</sup> In some jurisdictions there have been enacted drastic regulations as to the speed of motor vehicles when turning corners, and their violation may form the basis for an action for injuries by a pedestrian.<sup>36</sup> Where the driver of an automobile traveling at the rate of ten or twelve miles an hour turned his car across the sidewalk into an alley, without having the machine under control so as to avoid striking persons passing along the street or crossing the alley, it was held that he was guilty of negligence.<sup>37</sup>

#### Sec. 446. Vehicle left standing in street.

The mere leaving of an automobile in the street for a reasonable length of time is not necessarily negligence.<sup>38</sup> Proper precautions should be taken, however, to the end that it will not automatically start and thereby cause injury to a person in the street. Thus, if the machine is stopped on a hill, the operator should set the brakes and use care to the end that the force of gravity will not set it in motion.<sup>39</sup> But, when the

33. *Buscher v. New York Transportation Co.*, 106 N. Y. App. Div. 493, 94 N. Y. Suppl. 798.

34. *Buscher v. New York Transportation Co.*, 106 N. Y. App. Div. 493, 94 N. Y. Suppl. 798.

35. *Manley v. Abernathy*, 167 N. C. 220, 83 S. E. 343.

36. *Heartsell v. Billows*, 184 Mo. App. 420, 171 S. W. 7.

37. *Kuchler v. Stafford*, 185 Ill. App. 199.

38. Section 340.

39. *Oberg v. Berg*, 90 Wash. 435, 156 Pac. 391.

starting of the machine is due to the unlawful act of children or other persons, an interesting question of proximate cause arises. As a general proposition, it is held that the unlawful act of such a trespasser is an intervening cause which the operator of the machine is not bound to anticipate, and hence he is not liable for injuries caused thereby.<sup>40</sup> Where it appeared that, while the defendant's automobile was at a standstill in the street, the plaintiff, after pulling out another boy's foot which was stuck between barrels on the machine jumped off, and the car then backed up a hill about five feet running over the plaintiff, it was held that the circumstances called for some explanation by the defendant.<sup>41</sup>

#### Sec. 447. Lights.

Independently of statute, it is held to be a neglect of due care for an automobile not to be equipped with a light sufficient for the driver to distinguish other travelers and objects in the highway sufficiently far in advance that he may avoid a collision therewith.<sup>42</sup> But, in any event, it is now almost universally required by statute that motor vehicles shall carry illumination, in some cases the statutes in detail providing the kind of equipment in this respect. A regulation relative to lights may be deemed to be for the protection of pedestrians as well as for other vehicles, so that a pedestrian injured by an automobile may ground his action on the failure of the

40. *Vincent v. Crandall & Godley Co.*, 131 N. Y. App. Div. 200, 115 N. Y. Suppl. 600; *Larzarowitz v. Levy*, 194 N. Y. App. Div. 400, 185 N. Y. Suppl. 359; *Berman v. Schultz*, 84 N. Y. Suppl. 292; *Sorrucea v. Hobson*, 155 N. Y. Suppl. 364; *Frashella v. Taylor*, 157 N. Y. Suppl. 381; *Rhad v. Duquesne Light Co.*, 255 Pa. St. 409, 100 Atl. 262. See also *Oberg v. Berg*, 90 Wash. 435, 156 Pac. 391. Compare, *Lee v. Van Buren, etc., Co.*, 190 App. Div. 742, 180 N. Y. Suppl. 295. And see section 342.

41. *Grudberg v. Ehret*, 79 Misc. 627, 140 N. Y. Suppl. 379, wherein it was

said: "It makes no difference whether the friend was a trespasser on the automobile, or whether plaintiff came to his assistance or not. The plaintiff had a right to be in the public street. The automobile of defendant was at a stop and the unexplained sudden backing of the automobile, without any warning, calls at least for some explanation on the part of the defendant."

42. *Walden v. Stone* (Mo. App.), 223 S. W. 136; *Lanuon v. Fond du Lac*, 141 Wis. 57, 123 N. W. 629, 25 L. R. A. (N. S.) 40. And see sections 344-348.

driver to have the machine properly equipped with lights.<sup>43</sup> In case of conflict as to whether the lamps were lighted, a question of fact for the jury is presented.<sup>44</sup> A statute relative to the lights on a motor vehicle has been held not applicable to a "dead" car towed by another.<sup>45</sup>

### Sec. 448. Signal of approach.

Due care may require, when the operator of a motor vehicle, sees that a pedestrian is in or is about to enter into his course, that he sound his horn or give some warning of his approach. If he fails to do so, and a pedestrian in the exercise of due care is thereby injured, he is properly chargeable with negligence rendering him liable for the injuries proximately resulting.<sup>46</sup> The giving of a signal to a traffic officer

43. *Stewart Taxi Service Co. v. Roy*, 127 Md. 70, 95 Atl. 1057; *Johnson v. Quinn*, 130 Minn. 134, 153 N. W. 267; *Thomas v. Stevenson (Minn.)*, 178 N. W. 1021. See also *Buford v. Hopewell*, 140 Ky. 666, 131 S. W. 502.

44. *Johnson v. Quinn*, 130 Minn. 134, 153 N. W. 267.

45. *Musgrave v. Studebaker Bros. Co.* of Utah, 48 Utah, 410, 160 Pac. 117.

46. *California*.—*Blackwell v. Ranwick*, 21 Cal. App. 31, 131 Pac. 94.

*Indiana*.—*J. F. Darmody Co. v. Reed*, 111 N. E. 317; *Russell v. Scharfe*, 130 N. E. 437.

*Iowa*.—*Wine v. Jones*, 183 Iowa, 1166, 162 N. W. 196, 168 N. W. 318.

*Kentucky*.—*Buford v. Hopewell*, 140 Ky. 666, 131 S. W. 502; *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335; *Collett v. Standard Oil Co.*, 186 Ky. 142, 216 S. W. 356; *Adams v. Parish*, 225 S. W. 467.

*Louisiana*.—*Kelly v. Schmidt*, 142 La. 91, 76 So. 250.

*Massachusetts*.—*Rasmussen v. Whipple*, 211 Mass. 546, 98 N. E. 592; *Tripp v. Taft*, 219 Mass. 81, 106 N. E. 578; *Buckley v. Sutton*, 231 Mass. 504, 121 N. E. 527.

*Michigan*.—*Levyn v. Koppin*, 183

Mich. 232, 149 N. W. 993; *Johnston v. Cornelius*, 200 Mich. 209, 166 N. W. 983, L. R. A. 1918D 880.

*Minnesota*.—*Johnson v. Quinn*, 130 Minn. 134, 153 N. W. 267.

*Missouri*.—*Reynolds v. Kenyon (Mo.)*, 222 S. W. 476; *Sullivan v. Chauvenet (Mo.)*, 222 S. W. 759; *Ginter v. O'Donoghue (Mo. App.)*, 179 S. W. 732; *Young v. Bacon (Mo. App.)*, 183 S. W. 1679; *Dignum v. Weaver (Mo. App.)*, 204 S. W. 566; *Brooks v. Harris (Mo. App.)*, 207 S. W. 293; *Rubick v. Sandler (Mo. App.)*, 219 S. W. 401; *Weiss v. Sodemann Heat & Power Co. (Mo. App.)*, 227 S. W. 837.

*New Hampshire*.—*Hamel v. Peabody*, 78 N. H. 585, 97 Atl. 220.

*New Jersey*.—*Pool v. Brown*, 89 N. J. Law 314, 98 Atl. 262; *Heckman v. Cohen*, 90 N. J. L. 322, 100 Atl. 695.

*New York*.—*Cowell v. Saperston*, 149 App. Div. 373, 134 N. Y. Suppl. 284; *Klosayian v. Geiger*, 188 App. Div. 829, 176 N. Y. Suppl. 585; *Bradley v. Jaekel*, 65 Misc. 509, 119 N. Y. Suppl. 1071; *Dultz v. Fischowitz*, 104 N. Y. Suppl. 357.

*North Carolina*.—*Manly v. Abernathy*, 167 N. Car. 220, 83 S. E. 343.

may not be sufficient.<sup>47</sup> The driver of a car is bound to assume that pedestrians will be using street crossings as he approaches them and he must give them, or be ready to give them, reasonable warning of his approach.<sup>48</sup> And, when passing a street car which is discharging passengers, he is bound to anticipate that passengers and other persons may pass behind the car in his course, and he must give a warning of his approach.<sup>49</sup> The common law duty in respect to warning other travelers is now generally affirmed by statutes or municipal regulations.<sup>50</sup> A statute requiring motor vehicles to be equipped with a horn or other signals, impliedly requires that such equipment shall be used for the warning of pedestrians and other travelers with whom a collision may be expected.<sup>51</sup> The fact that the horn was not sounded, however, does not conclusively establish the liability of an automobilist for injuries to a person in the street. For example, if a boy suddenly and unexpectedly darts in front of an automobile, the failure of the operator to sound the horn may not be sufficient proof of negligence to support an action for the injuries to the child.<sup>52</sup> The failure to sound the horn is not negligence

*Pennsylvania.*—*Cecola v.* 44 Cigar Co., 253 Pa. 623, 98 Atl. 775; *Kuehne v. Brown*, 257 Pa. 37, 101 Atl. 77.

*Washington.*—*Segorstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876; *Moy Quon v. M. Furraya Co.*, 81 Wash. 526, 143 Pac. 99; *Olsen v. Peerless Laundry (Wash.)*, 191 Pac. 756.

"The uncontradicted fact in the case is that the driver of the automobile gave no audible signal or warning of his approach to the obscured part of the crosswalk. From that fact alone the jury might properly have found that the driver's failure to sound a warning of the approach of his automobile to the crossing was negligent conduct." *Pool v. Brown*, 89 N. J. Law 314, 98 Atl. 262.

*47. Walmer-Roberts v. Hennessey* (Iowa), 181 N. W. 798.

*48. Coppock v. Schlatter*, 193 Ill. App. 255; *Raymen v. Galvin (Mo.)*, 229 S. W. 747.

*49. Johnson v. Johnson*, 137 Minn. 198, 163 N. W. 160.

*50. Rolfs v. Mullins*, 180 Iowa, 472, 163 N. W. 232; *Wine v. Jones*, 183 Iowa, 1166, 162 N. W. 196, 168 N. W. 318; *Creedon v. Galvin*, 226 Mass. 140, 115 N. E. 307; *Johnston v. Cornelius*, 200 Mich. 209, 166 N. W. 983, L. R. A. 1918D 880; *Benson v. Larson*, 133 Minn. 346, 158 N. W. 426; *Aiken v. Metcalf*, 92 Vt. 57, 102 Atl. 330. And see section 330.

*51. Forgy v. Rutledge*, 167 Ky. 182, 180 S. W. 90; *Johnston v. Cornelius (Mich.)*, 166 N. W. 983; *Vannett v. Colo (N. Dak.)*, 170 N. W. 663.

*52. Bishard v. Engelbeck*, 180 Iowa 1132, 164 N. W. 203; *Levesque v. Dumont*, 116 Me. 25, 99 Atl. 719; *Chiapone v. Grenebaum*, 189 App. Div. 579, 178 N. Y. Suppl. 854; *Winter v. Van Blareom*, 258 Mo. 418, 167 S. W. 493; *Feyrer v. Durbrow (Wis.)*, 178 N. W. 306.

*per se* under all circumstances.<sup>53</sup> But in some cases the violation of a regulation of this nature is thought to constitute negligence *per se*,<sup>54</sup> or *prima facie* negligence.<sup>55</sup> Except possibly where the requirements as to the horn are specially prescribed by statute, whether the equipment of the machine in this respect is sufficient, is generally a question for the jury.<sup>56</sup> The mere sounding of a signal of approach may not be sufficient evidence of due care, for the circumstances may be such that due caution requires the slacking of the machine or even the stopping of progress.<sup>57</sup> The fact, however, that a horn was sounded and as a result thereof a pedestrian was startled and became confused so that he sustained an injury, does not afford ground for rendering the operator of the machine liable.<sup>58</sup> The purpose of sounding a horn is to give a warning to other travelers of the approach of the vehicle; and, if the person injured has actual knowledge of the approaching car, the failure to give the signal will not generally afford basis for a charge of negligence. Under such circumstances, the failure to give the warning is said not to be a proximate cause of injury.<sup>59</sup> But, though the pedestrian is aware of the approach of the machine, if the driver intends to depart from the customary course of travel a warning may be required.<sup>60</sup>

#### Sec. 449. Towing disabled vehicle.

It sometimes happens, when a disabled automobile is towed through the streets by another vehicle, that a pedestrian seeking to cross the street trips over the connecting rope or cable

53. *Selinger v. Cromer* (Mo. App.), 208 S. W. 871; *Texas Motor Co. v. Buffington* (Ark.), 203 S. W. 1013; *Anderson v. Voetz* (Mo. App.), 206 S. W. 584.

54. *Collett v. Standard Oil Co.*, 186 Ky. 142, 216 S. W. 356.

55. *Darish v. Scott* (Mich.), 180 N. W. 435.

56. *Coppock v. Schlatter*, 193 Ill. App. 255.

57. *Kessler v. Washburn*, 157 Ill. App. 532; *Herald v. Smith* (Utah), 190

Pac. 932.

58. *Wall v. Merkert*, 166 App. Div. 608, 152 N. Y. Suppl. 293.

59. *Bruce's Adm'r v. Callahan*, 185 Ky. 1, 213 S. W. 557; *Collet v. Standard Oil Co.*, 186 Ky. 142, 216 S. W. 356; *Herzig v. Sandberg* (Mont.), 172 Pac. 132. See also, *Offerman v. Yellow Cab. Co.* (Minn.), 175 N. W. 537; *Feyrer v. Durbrow* (Wis.), 178 N. W. 306.

60. *Woodhead v. Wilkinson* (Cal.), 185 Pac. 851, 10 A. L. R. 291.



and is thereby injured.<sup>61</sup> It is not negligence *per se* for one vehicle to draw another in this manner, and thus a pedestrian injured must show some neglect of duty on the part of those operating the machine.<sup>62</sup> It is, of course, the duty of one towing a vehicle to exercise reasonable prudence to avoid injury to pedestrians and other travelers upon the highway.<sup>63</sup> But the fact that some other course might have involved less danger to other travelers is not necessarily decisive.<sup>64</sup> Whether a warning of the situation to pedestrians is necessary depends upon the surrounding circumstances, such as the light at the place, the size and color of the rope, and other pertinent facts.<sup>65</sup> Under the New York statute relative to the licensing of chauffeurs, liability is not imposed merely because the driver of the rear car was not licensed, for even if the failure to have a license could be construed as violation of the statute, it was not a cause of the accident, where there is no proof of his incompetency.<sup>66</sup> Nor can negligence be based merely on the fact that a system of signals was not arranged so that the driver of the rear vehicle could signal the forward driver for the stopping of his machine.<sup>67</sup> And, under the statutes in some

61. *Wolcott v. Renault Selling Branch*, 175 App. Div. 858, 162 N. Y. Suppl. 496.

62. *Steinberger v. California Elec. Garage Co.*, 176 Cal. 386, 168 Pac. 570; *Wolcott v. Renault Selling Branch*, 223 N. Y. 288, 119 N. E. 556, reversing 175 N. Y. App. Div. 858; *Canfield v. New York Transp. Co.*, 128 N. Y. App. Div. 450, 112 N. Y. Suppl. 854; *Wolcott v. Renault Selling Branch*, 175 App. Div. 858, 162 N. Y. Suppl. 496.

63. *Steinberger v. California Elec. Garage Co.*, 176 Cal. 386, 168 Pac. 570.

64. *Musgrave v. Studebaker Bros. Co. of Utah*, 48 Utah 410, 160 Pac. 117, wherein it was said: "It may well be conceded that so far as pedestrians were concerned there may have been a safer way to move automobiles through the streets of the city, but that is not the test. It might have been safer, per-

haps. to have moved the cars only between certain hours after midnight and before daylight. Again, it might have been safer to move them one at a time and by their own power to have handled only one at a time with a team, or to have moved them only on certain streets that were not being greatly used by pedestrians. The law does not prescribe any particular method by which vehicles may be moved on the streets. But in moving them it imposes the duty of exercising due or ordinary care."

65. *Steinberger v. California Elec. Garage Co.*, 176 Cal. 386, 168 Pac. 570.

66. *Wolcott v. Renault Selling Branch*, 175 App. Div. 858, 162 N. Y. Suppl. 496.

67. *Musgrave v. Studebaker Bros. Co. of Utah*, 48 Utah, 410, 160 Pac. 117.

jurisdictions, the absence of lights on the rear vehicle is not necessarily negligence, for the statute may be construed as applicable only to those vehicles which are proceeding under their own motive power.<sup>68</sup> But, when a car is being towed out of a garage across the sidewalk in the night time, the driver of the first car is under the duty of giving some warning to persons traveling along the sidewalk who might be expected to pass directly behind the first car.<sup>69</sup>

In accordance with the foregoing rules, it has been held that there can be no recovery for the death of a pedestrian, who, while attempting to cross a city street, tripped over a tow line ten feet in length, where it appears that he stopped after a warning from the driver of the first vehicle and then attempted to pass between the two vehicles, although warned by the driver of the second to look out for the rope, and the driver of the second machine unsuccessfully attempted to avoid striking him by running his car on the sidewalk.<sup>70</sup> So, too, where it appeared that an electric hansom was being

68. *Musgrave v. Studebaker Bros. Co. of Utah*, 48 Utah, 410, 160 Pac. 117.

69. *Rapetti v. Peugeot Auto Import Co.*, 97 Misc. 610, 162 N. Y. Suppl. 133, wherein it was said: "Upon these facts, it is claimed that no *prima facie* case of negligence was made out. The basis of this contention is that it could not have been reasonably anticipated by the chauffeur that the plaintiff would cross immediately behind the first automobile and trip over the tow-line under the circumstances existing. It seems to me that this is just what any person of ordinary intelligence would have anticipated. The automobiles were not going fast and it is a most common thing for pedestrians to pass in front of on-coming automobiles proceeding slowly at crossings where there is as much of a margin of safety as twelve feet. Particularly is this so where, as at the entrances to garages and to many apartment houses and hotels, automobiles are permitted

to cross the sidewalk. With the tens of thousands of automobiles that now swarm the city streets, it is second nature for a pedestrian to proceed on his way immediately after a blockading automobile has passed, and he has a right to do so unless halted by traffic rules or by the danger of a swiftly approaching vehicle. Otherwise in a stream of slowly moving traffic pedestrians would never get across the streets at all. So it cannot be said that the chauffeur could not reasonably anticipate that the plaintiff and his companion who were halted on the sidewalk by the first automobile, would not immediately proceed on their way once it had passed although another automobile was approaching slowly twelve feet away." See also *Young v. Herrman*, 119 N. Y. App. Div. 445, 104 N. Y. Suppl. 72, 192 N. Y. 554.

70. *Wolcott v. Renault Selling Branch*, 175 App. Div. 858, 162 N. Y. Suppl. 496.

towed by another hansom of the defendant with a rope six or seven feet in length, with a driver on a high seat on the rear of each machine, and that they stopped at a crossing at the signal of a traffic officer; that a pedestrian attempted to pass between the conveyances, when the driver on the rear carriage called out a warning which the pedestrian testified she did not hear, it was held that the defendant was not guilty of negligence and not liable for injuries sustained by the pedestrian in tripping over the rope.<sup>71</sup> When, upon an automobile becoming disabled along the road, a guest therein procured a rope fifty feet long and connected the disabled car with the car of another person who had offered to assist them, and such guest thereupon entered the forward car and, while they were driving along the city streets, the forward car turned a corner but the disabled car was not turned so that the connecting rope swept a portion of the street and caused injury to a bicyclist, it was held that the guest was not liable for the injuries, for assuming that he was guilty of negligence in fastening the two cars, such negligence was not the proximate cause of the injury, but that the cause of the injury was the negligence of the rear driver in failing to make the turn.<sup>72</sup> And, where it appeared that the owner of an automobile sent his hired chauffeur with the machine to haul a disabled car to a garage and such chauffeur requested the owner's son to steer the rear vehicle while he drove the forward car, and while the two cars were stalled in a blockade in the street, the son gave a pedestrian permission to pass between, but the forward car moved ahead about a foot and she was tripped by the raising of the connecting rope, it was held that the son was not to be charged with negligence in failing to warn the chauffeur that the pedestrian was about to pass where no facts were shown which could have led the son to anticipate that the forward car would be moved; and that the chauffeur was not negligent in moving the machine where he was ignorant that the movement would likely cause injury to any one; and that in

<sup>71</sup>. *Canfield v. New York Transp. Co.*, 128 N. Y. App. Div. 450, 112 N. Y. Suppl. 854.      <sup>72</sup>. *Herome v. Hawley*, 147 App. Div. 475, 131 N. Y. Suppl. 897.

any event the son would not be liable for the negligence of the chauffeur as the relation of master and servant did not exist between them.<sup>73</sup> But where one crossing the street stumbled over the connecting rope and was killed by the second car, and it appeared that no warning was given of the tow and there was nothing in the condition or operation of the second car to show that it was not under its own power, it was held that the question of negligence was for the jury.<sup>74</sup>

### Sec. 450. Pleading.

In an action by a pedestrian for injuries sustained by reason of a collision with a motor vehicle, as a general proposition, the complaint should allege the respect in which the defendant was negligent. That is to say, a complaint alleging generally that the plaintiff, without fault and while exercising due care, was injured through the negligence of the defendant, without specifying any duty owing by the defendant to the plaintiff, or the act or omission by the defendant which caused the injuries, would be demurrable.<sup>75</sup> But, under the liberal construction of pleadings in force in *New York*, it has been held that where the only allegations tending to charge the defendant with negligence are that the plaintiff was struck and injured in the public street by the defendant's automobile which was under his control and operated by him at the time, and that her injuries were caused solely by the negligence and carelessness of the defendant, the complaint is sufficient.<sup>76</sup>

73. *Titus v. Tangeman*, 116 N. Y. App. Div. 487, 101 N. Y. Suppl. 1000.

74. *Wolcott v. Renault Selling Branch*, 223 N. Y. 288, 119 N. E. 556, reversing 175 N. Y. App. Div. 858.

75. *Silvia v. Scotten* (Del.), 114 Atl. 206; *Peterson v. Eighmie*, 175 App. Div. 113, 161 N. Y. Suppl. 1065. *Compare*, *Jackson v. Vaughn* (Ala.), 86 So. 469.

**Variance.**—Where the complaint alleges that the machine struck the plaintiff and threw him to the ground, and the proof shows that the plaintiff was

not thrown but slipped and fell in attempting to avoid the machine, the variance is not substantial. *Ainslie v. Biggs*, 211 Ill. App. 463.

76. *Peterson v. Eighmie*, 175 App. Div. 113, 161 N. Y. Suppl. 1065, wherein it was said: "The question depends upon whether the plaintiff has charged the defendant with negligence in operating the automobile. Of course a complaint which merely alleged generally that the plaintiff without fault on his part and while exercising due care was injured through the negligence

General charges of negligence are deemed limited by those charges particularly alleged in the complaint.<sup>77</sup> Thus, where, in an action to recover for injuries to the plaintiff who was run over by the defendant's electric cab while waiting for a street car to pass, the only specific charges of negligence on the part of the defendant were the excessive speed of the cab and the failure to give warning of its approach, it is reversible error for the court to refuse to charge in effect that, unless the plaintiff establishes one of the two specific charges of negligence alleged, there can be no recovery.<sup>78</sup>

A complaint in a negligence case alleging that plaintiff was traveling in a buggy driven by her uncle upon a public highway, that she saw defendant approaching behind them in an automobile, and that when the machine was about 300 or 400 feet distant plaintiff requested her uncle to stop the horse so she could get out, and while getting out she signalled defendant to stop the automobile, which was then about 200 feet away and running slowly, and that plaintiff had crossed the highway and was standing on the other side of the traveled part, when defendant negligently ran the automobile against her, is not open to the objection that it leaves an inference of contributory negligence on plaintiff's part.<sup>79</sup>

### Sec. 451. Damages.

In an action by a pedestrian to recover damages resulting from his being struck by an automobile, it is said that the verdict should be for such sum as will reasonably compensate

of the defendant without specifying any duty owing by the defendant to the plaintiff or the act of omission or commission by the defendant which caused the injuries would be demurrable, for it would merely state a conclusion of law with respect to negligence on the part of the defendant without setting forth the act of the defendant which it was claimed was negligently performed; but here the particular act is stated, and it consists in the operation of the automobile along the street, bringing it into collision with plaintiff, and the

general charge of negligence following relates to that, and in effect is a charge that the automobile was negligently operated by the defendant which is sufficient."

77. *Capell v. New York Transp. Co.*, 150 N. Y. App. Div. 723, 135 N. Y. Suppl. 691.

78. *Capell v. New York Transp. Co.*, 150 N. Y. App. Div. 723, 135 N. Y. Suppl. 691.

79. *Kinmore v. Cresse*, 53 Ind. App. 693, 102 N. E. 403.

him for his pain and suffering in the past and such as may come to him in the future resulting from the accident.<sup>80</sup> But damages are not generally permitted for mere fright unattended by any physical injury.<sup>81</sup> In some jurisdictions, punitive damages are allowed where the operator of the motor vehicle was guilty of gross negligence.<sup>82</sup> But, in an action for the death of a pedestrian in a collision with an automobile, it was held that, there being no evidence of an intent to inflict the injury or of negligence of such a high degree as would be deemed equivalent to a wilful or wanton act, it being undisputed that the defendant put on the brakes as soon as the intestate came into the range of defendant's vision, an instruction that there could be no recovery under a count alleging wanton and wilful conduct on the part of the defendant was proper.<sup>83</sup>

#### Sec. 452. Function of jury.

In an action by a pedestrian for injuries sustained by a collision with a motor vehicle, the burden is on the plaintiff of establishing the negligence of the defendant, and ordinarily it is a question for the jury to determine whether he has sufficiently proved the issue.<sup>84</sup>

80. *Cecchi v. Lindsay*, 1 Boyce (Del.) 185, 75 Atl. 376, *per* Hastings, J.; judgment reversed in *Lindsay v. Cecchi*, 3 Boyce (Del.) 133, 80 Atl. 523.

81. *Bachelder v. Morgan*, 179 Ala. 339, 60 So. 815. And see section 356.

82. *Williams v. Benson*, 87 Kans. 421, 124 Pac. 531; *Buford v. Hopewell*, 140 Ky. 666, 131 S. W. 502.

83. *Gordon v. Stadelman*, 202 Ill. App. 255.

84. *Arkansas*.—*Bona v. S. R. Thomas Auto Co.*, 137 Ark. 217, 208 S. W. 306; *Breashears v. Arnett*, 222 S. W. 28; *Terry Dairy Co. v. Parker*, 223 S. W. 6.

*California*.—*Pemberton v. Army*, 182 Pac. 964; *Webster v. Motor Parcel Delivery Co.* (Cal. App.) 183 Pac. 220; *Kuhns v. Marshall* (Cal. App.), 186 Pac. 632; *Potter v. Back County*

*Transp. Co.*, 33 Cal. App. 24, 164 Pac. 342.

*Colorado*.—*Louthan v. Peet*, 66 Colo. 204, 179 Pac. 135.

*Connecticut*.—*Butterly v. Alexander Dallas, Inc.*, 93 Conn. 95, 105 Atl. 340.

*Illinois*.—*Rasmussen v. Drake*, 185 Ill. App. 526; *Smith v. Tappen*, 208 Ill. App. 433.

*Iowa*.—*Brown v. Des Moines Steam Bottling Works*, 174 Iowa, 715, 156 N. W. 829.

*Kentucky*.—*Matlach v. Sea*, 144 Ky. 749, 139 S. W. 930.

*Massachusetts*.—*Dudley v. Kingsbury*, 199 Mass. 258, 85 N. E. 76; *Rasmussen v. Whipple*, 211 Mass. 546, 98 N. E. 592; *Roach v. Hinchcliff*, 214 Mass. 267, 101 N. E. 383; *Brown v. Thayer*, 212 Mass. 392, 99 N. E. 237;

And, speaking in general terms, the plaintiff's contributory

*French v. Moar*, 226 Mass. 173, 115 N. E. 235; *Cowles v. Springfield Gaslight Co.*, 234 Mass. 421, 125 N. E. 589; *Noonan v. Leavitt Co.* 131 N. E. 297.

*Michigan*.—*Bouma v. Dubois*, 169 Mich. 422, 135 N. W. 322; *Czarniski v. Security Storage & Transfer Co.*, 204 Mich. 276, 170 N. W. 52; *Barger v. Bissell*, 204 Mich. 416, 170 N. W. 76; *Patterson v. Wagner*, 204 Mich. 593, 171 N. W. 356; *Van Goosen v. Barlum*, 183 N. W. 8.

*Minnesota*.—*Smith v. Bruce*, 131 Minn. 51, 154 N. W. 659; *Noltmier v. Rosenberger*, 131 Minn. 369, 155 N. W. 618; *Benson v. Larson*, 133 Minn. 346, 158 N. W. 426; *Johnson v. Johnson*, 137 Minn. 198, 163 N. W. 160; *Archer v. Skahen*, 137 Minn. 432, 163 N. W. 784; *Powers v. Wilson*, 138 Minn. 407, 165 N. W. 231; *Hefferon v. Reeves*, 140 Minn. 505, 167 N. W. 423; *Plasch v. Fass*, 144 Minn. 44, 174 N. W. 438; 10 A. L. R. 1446; *Allen v. Johnson*, 144 Minn. 333, 175 N. W. 545; *Bursaw v. Plenge*, 144 Minn. 459, 175 N. W. 1004; *Gibson v. Grey Motor Co.*, — Minn. —, 179 N. W. 729.

*Missouri*.—*Hodges v. Chambers*, 171 Mo. App. 563, 154 S. W. 429; *Eisenman v. Griffith*, 181 Mo. App. 183, 167 S. W. 1142; *LaDuke v. Dexter*, — Mo. App. —, 202 S. W. 254; *Brooks v. Harris*, — Mo. App. —, 207 S. W. 293; *Rubick v. Sandler*, — Mo. App. —, 219 S. W. 401; *Schinogle v. Baughman* (Mo. App.), 228 S. W. 897.

*Nebraska*.—*Rule v. Claar Transfer & Storage Co.*, 102 Neb. 4, 165 N. W. 883.

*New Hampshire*.—*Hamel v. Peabody*, 78 N. H. 585, 97 Atl. 220.

*New York*.—*Wolcott v. Renault Selling Branch*, 223 N. Y. 288, 119 N. E. 556; *Fitzgerald v. Russel*, 155 App. Div. 854, 140 N. Y. Suppl. 519; *Haas v. Newbery*, 190 App. Div. 275, 179 N. Y. Suppl. 816; *Gindberg v. Ehret*, 79

Misc. R. 627, 140 N. Y. Suppl. 379; *Baker v. Close*, 137 N. Y. App. Div. 529, 121 N. Y. Suppl. 729; *Miller v. New York Taxicab Co.*, 120 N. Y. Suppl. 899.

*North Dakota*.—*Vannett v. Cole*, 170 N. W. 663.

*Oregon*.—*Ahonen v. Hryszke*, 90 Oreg. 451, 175 Pac. 616.

*Pennsylvania*.—*Miller v. Tiedemann*, 249 Pa. 234, 94 Atl. 835; *Rowand v. Germantown Trust Co.*, 248 Pa. 341, 93 Atl. 1070; *Edelman v. Connell*, 257 Pa. 317, 101 Atl. 653; *Schoepp v. Gerety*, 263 Pa. St. 538, 107 Atl. 317; *Lamont v. Adams Express Co.*, 264 Pa. 17, 107 Atl. 373; *O'Brien v. Bieling*, 110 Atl. 89; *Reese v. France*, 62 Pa. Super. Ct. 128; *Bailey v. Borchers*, 66 Pitts Leg. Journ. 530; *Banks v. M. L. Shoemaker & Co.*, 260 Pa. 375, 103 Atl. 734; *Maynard v. Barrett*, 261 Pa. 378, 104 Atl. 612; *Petrie v. E. A. Myers Co. (Pa.)*, 112 Atl. 240; *King v. Brillhart (Pa.)*, 114 Atl. 515.

*Rhode Island*.—*Gouin v. Ryder*, 87 Atl. 185; *Thomas v. Burdick*, 100 Atl. 398; *Doyle v. Holland*, 100 Atl. 466.

*Texas*.—*Vesper v. Lavender*, — Tex. Civ. —, 149 S. W. 377; *Merchants' Transfer Co. v. Wilkinson*, — Civ. App. —, 219 S. W. 891.

*Utah*.—*Sorenson v. Bell*, 51 Utah, 262, 170 Pac. 72.

*Washington*.—*Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 898; *Coughlin v. Weeks*, 75 Wash. 568, 135 Pac. 649; *Brunner v. Little*, 97 Wash. 319, 166 Pac. 1166; *Bulgere v. Olataka Yamoaka*, 191 Pac. 786; *Almberg v. Pielow*, 194 Pac. 549; *Truva v. Good-year Tire & Rubber Co.*, 194 Pac. 386.

*Wisconsin*.—*Quellette v. Superior Motor & M. Works*, 157 Wis. 531, 147 N. W. 1014.

**Error to dismiss complaint.**—Where, in an action to recover for personal injuries to an eleven year old boy, who, while attempting to cross the Bowery

negligence is a question for the jury.<sup>85</sup> Negligence is peculiarly a question for the jury to solve when the evidence is conflicting, so that the credibility of the witnesses is of paramount importance.<sup>86</sup> And, where the liability depends on whether the motor vehicle was traveling at a reasonable rate of speed, the question is one which is ordinarily within the province of the jury.<sup>87</sup>

in the city of New York, was knocked down by an automobile which was going very fast and which did not stop within forty or fifty feet of the scene of the accident, the evidence raises questions of fact both as to the negligence of the defendant and the contributory negligence of the plaintiff, a judgment dismissing the complaint at the close of the plaintiff's case will be reversed and a new trial ordered. *Pen-nige v. Reynolds*, 98 Misc. (N. Y.) 239, 162 N. Y. Suppl. 966.

85. Section 487.

86. *Holroyd v. Gray Taxi Co.*, 39 Cal. App. 693, 179 Pac. 709; *Fong Lin v. Probert* (Cal. App.), 195 Pac. 437; *Louthan v. Peet*, 66 Colo. 204, 179 Pac. 135; *Crandall v. Krause*, 165 Ill. App. 15; *Osberg v. Cudahy Packing Co.*, 198 Ill. App. 551; *American Ex-*

*press Co. v. State of Use of Denowitch*, 132 Md. 72, 103 Atl. 96; *Degens v. Langridge* (Mich.), 183 N. W. 28; *Bailey v. Borchers*, 66 Pitts. Leg. Journ. (Pa.) 530; *Thomas v. Burdick* (R. I.), 100 Atl. 398; *Coughlin v. Weeks*, 75 Wash. 568, 135 Pac. 649; *Oberg v. Berg*, 90 Wash. 435, 156 Pac. 391.

87. *Simmons v. Stephens*, — Cal. App. —, 191 Pac. 978; *Merkel v. Jersey City H. & P. Co.*, 75 N. J. L. 654, 68 Atl. 74; *Brewster v. Barker*, 129 N. Y. App. Div. 724, 113 N. Y. Suppl. 1026; *Ackerman v. Stacey*, 157 N. Y. App. Div. 835, 143 N. Y. Suppl. 227; *McClure v. Wilson*, — Wash. —, 186 Pac. 302; *Kellner v. Christiansen*, 169 Wis. 390, 172 N. W. 796; *Luethe v. Schmidt-Gaertner Co.*, 170 Wis. 590, 176 N. W. 63.



## CHAPTER XVIII.

## CONTRIBUTORY NEGLIGENCE OF PEDESTRIANS.

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### Sec. 453. General duty of pedestrian.

In an action by a pedestrian to recover damages for an injury from an automobile, there can be, as a general proposition, no recovery unless the plaintiff was free from negligence which contributed to the injury.<sup>1</sup> The pedestrian is under the

1. *Alabama*.—*Racine Tire Co. v. Grady* (Ala.), 88 So. 337; *Terrill v. Walker*, 5 Ala. App. 535, 59 So. 775.

*California*.—*Steinberger v. California Elec. Garage Co.*, 176 Cal. 386, 168 Pac. 570; *Regan v. Los Angeles Ice & Cold Storage Co.* (Cal. App.), 189 Pac. 474.

*Delaware*.—*Hannigan v. Wright*, 5 Penn. 537, 63 Atl. 234; *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44.

*Indiana*.—*Cole Motor Co. v. Lendorff*, 61 Ind. App. 119, 111 N. E. 447.

*Kentucky*.—*Major Taylor Co. v. Harding*, 182 Ky. 236, 206 S. W. 285.

*Michigan*.—*Deal v. Snyder*, 203 Mich. 273, 168 N. W. 973.

*New Jersey*.—*Conrad v. Green*, 94 Atl. 390.

*New York*.—*Larner v. New York Transp. Co.*, 149 App. Div. 193, 133 N. Y. Suppl. 743; *Willis v. Harby*, 150 N. Y. App. Div. 94, 144 N. Y. Suppl. 154; *Shakowitz v. J. M. Horton Ice Cream Co.*, 172 N. Y. App. Div. 211, 158 N. Y. Suppl. 519; *Goldman v. Lanigan Bros. Co.*, 185 App. Div. 742, 173 N. Y. Suppl. 777.

*Oregon*.—*Weygandt v. Bartle*, 88 Oreg. 310, 171 Pac. 587.

*Vermont*.—*Aitken v. Metcalf*, 92 Vt. 57, 102 Atl. 330.

**Contributory negligence as defense to gross negligence.**—In some jurisdictions when the operator of a motor vehicle has been guilty of "gross" negligence which is a proximate cause of an

injury to a pedestrian, contributory negligence of an ordinary degree on the part of the pedestrian is not a defense. *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594; *Ludke v. Burek*, 160 Wis. 440, 152 N. W. 190, L. R. A. 1915 D. 968. To establish such "gross" negligence on the part of the operator of the machine, the pedestrian must show intentional conduct on the part of the operator having a tendency to injure others which is known or ought to be known to the defendant, accompanied by a wanton and reckless disregard of its probable harmful consequences. *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594. But the mere operation of the machine at a speed in excess of the legal limit, though such conduct may be negligence *per se*, is not necessarily gross negligence or as a wilful causing of the injury. *Ludke v. Burek*, 160 Wis. 440, 152 N. W. 190, L. R. A. 1915 D. 968, wherein it was said: "The law regulates the conduct of persons who are exercising the common right of using public highways as travelers, for the purpose of compelling greater care for the protection and safety of all travelers. The operation of motor vehicles on streets is as lawful a use thereof as that of any other traveler; and the object of the statute is to restrict this use to such ways as will lessen the dangers to travelers from high speed and other hazardous practices. Such regulations are not intended to abrogate the duties of

obligation of using reasonable prudence to avoid automobiles and other vehicles in the street. That is to say, the pedestrian must use such care for his own safety as a reasonably prudent man would exercise under the same circumstances.<sup>2</sup>

travelers recognized by the common law for their mutual safety and leaves them subject to its accepted rules of ordinary care and the duties that spring from their relations as travelers on a public highway. In the light of this relation and the duties arising therefrom, it may well be that a person operating a motor vehicle at a speed much less than that denounced by the statute, on a street crowded with men, women, and children, and thereby inflict some personal injuries on another, would be guilty of wilfully injuring such persons, while another operating such a vehicle slightly in excess of the statutory speed might do so under conditions and circumstances as to show that the care exercised, in the light of such conditions and circumstances, did not constitute a wanton and reckless disregard of the rights of another who suffered an injury by colliding with such motor vehicle. This court has held that a violation of the commands of a statute of this class, causing personal injury to another, is not to be treated as a wilful injury, as matter of law, but that the fact of such violation is negligence *per se*, and that the defense of contributory negligence is not abrogated"

**Wanton injury.**—In some States it is held that contributory negligence is no defense to a wanton injury. *Davis v. Barnes*, 201 Ala. 120, 77 So. 612; *Krug v. Walldren Express & Van Co.*, 214 Ill. App. 18, affirmed, 126 N. E. 97.

**Defense to prosecution for homicide.**—In a criminal prosecution for homicide for the killing of a pedestrian by an automobile running in excess of the speed limit, the defendant is not re-

lieved by any contributory negligence of the deceased. *Lauterbach v. State*, 132 Tenn. 603, 179 S. W. 130. See section 765.

**2. United States.**—*Taxi Service Co. v. Phillips*, 187 Fed. 734, 109 C. C. A. 482; *Lane v. Sargent*, 217 Fed. 237.

**Arkansas.**—*Millsaps v. Brogdon*, 97 Ark. 469, 134 S. W. 632.

**California.**—*Sheldon v. James*, 175 Cal. 474, 166 Pac. 8, A. L. R. 1493; *Weihe v. Rathjen Mercantile Co.*, 34 Cal. App. 302, 167 Pac. 287; *Parb v. Orbison* (Cal. App.), 184 Pac. 428; *Owens v. W. J. Burt Motor Car Co.* (Cal. App.), 186 Pac. 821; *Fisk v. Poplin* (Cal. App.), 189 Pac. 722.

**Connecticut.**—*Russell v. Vergason*, 111 Atl. 625.

**Delaware.**—*Grier v. Samuel*, 4 Boyce, 106, 86 Atl. 209; *Brown v. City of Wilmington*, 4 Boyce, 492, 90 Atl. 44.

**Indiana.**—*Rump v. Woods*, 50 Ind. App. 347, 98 N. E. 369; *Harker v. Gruhl*, 62 Ind. App. 177, 111 N. E. 457; *Craft v. Stone* (Ind. App.), 124 N. E. 469.

**Iowa.**—*Wine v. Jones*, 183 Iowa 1166, 162 N. W. 738, 168 N. W. 318; *Rolfs v. Mullins*, 179 Iowa, 1223, 162 N. W. 783; *Livingstone v. Dole*, 167 Iowa, 639, 167 N. W. 639.

**Kansas.**—*Johnson v. Kansas City Home Telephone Co.*, 87 Kan. 441, 124 Pac. 528; *Cusick v. Miller*, 204 Mich. 276, 171 Pac. 599.

**Kentucky.**—*Baldwin's Adm'r v. Maggard*, 162 Ky. 424, 172 S. W. 674; *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335; *Major Taylor Co. v. Harding*, 182 Ky. 236, 206 S. W. 285.

**Michigan.**—*Tuttle v. Briscoe Mfg. Co.*, 190 Mich. 22, 155 N. W. 724.

It has been said that on account of the increased danger of traveling upon the highways, his duty is far heavier than formerly.<sup>3</sup> In most cases it is generally easy to look back after an accident and see how a little more watchfulness on the part of a pedestrian would have saved him from injury, but this is not conclusive against him on the issue, for he is to be judged by the situation as it appeared or ought to have appeared to him at the time.<sup>4</sup> Moreover, one placed suddenly in a situation of great danger is not required to use the deliberate judgment of a man under no apprehension of danger.<sup>5</sup> Of course, one may not suddenly step in front of a moving vehicle in plain sight and recover for the injuries thereby sustained.<sup>6</sup> Outside of the question of contributory negligence in such a case which will preclude the injured from recovery, there may exist a serious doubt of any negligence on the part of the driver of the vehicle which can be said to contribute to

*Missouri.*—McKenna v. Lynch (Mo.), 233 S. W. 175; Loury v. Smith (Mo. App.), 198 S. W. 437.

*New Jersey.*—Conrad v. Green, 94 Atl. 390; Pool v. Brown, 89 N. J. Law, 314, 98 Atl. 262.

*New York.*—Brewster v. Barker, 129 N. Y. App. Div. 724, 113 N. Y. Suppl. 1026; Jessen v. J. L. Kesner Co., 159 App. Div. 898, 144 N. Y. Suppl. 407; Hall v. Dilworth, 94 Misc. Rep. 240, 157 N. Y. Suppl. 1091.

*Oregon.*—White v. East Side Mill & Lumber Co., 84 Oreg. 224, 161 Pac. 969, 164 Pac. 736; Weygandt v. Bartle, 88 Oreg. 310, 171 Pac. 587; Marsters v. Isensee, 192 Pac. 907.

*Pennsylvania.*—Lewis v. Wood, 247 Pa. St. 545, 93 Atl. 605; Arnold v. McKelvey, 253 Pa. 324, 98 Atl. 559; Twinn v. Noble (Pa.), 113 Atl. 686.

*Vermont.*—Aiken v. Metcalf, 90 Vt. 196, 97 Atl. 669.

*Virginia.*—Core v. Wilhelm, 124 Va. 150, 98 S. E. 27.

*Washington.*—Mickelson v. Fischer, 81 Wash. 423, 142 Pac. 1160; Stephenson v. Parton, 89 Wash. 653, 155

Pac. 147; Crowl v. West Coast Steel Co., 109 Wash. 429, 186 Pac. 866.

*Wisconsin.*—Zimmermann v. Mednikoff, 165 Wis. 333, 162 N. W. 349; Klokow v. Harbrough, 166 Wis. 262, 164 N. W. 999.

“When a pedestrian is about to cross a street he must use the care of a prudent man, but the law does not undertake to further define this standard. The law does not say how often he must look, or precisely how far, or when or from where.” Aiken v. Metcalf, 90 Vt. 196, 97 Atl. 669.

3. Russell v. Vergasson (Conn.), 111 Atl. 625.

4. Kuchler v. Stafford, 185 Ill. App. 199; Heartsell v. Bellow, 184 Mo. App. 420, 171 S. W. 7; Aiken v. Metcalf, 90 Vt. 196, 97 Atl. 669.

5. Section 486.

6. Wine v. Jones, 179 Iowa, 1223, 162 N. W. 196, 168 N. W. 318; Elmendorf v. Clark, 143 Lo. 971, 79 So. 557; Levesque v. Dumont, 116 Me. 25, 99 Atl. 719; Rasmussen v. Whipple, 211 Mass. 546, 98 N. E. 592; Tuttle v. Briscoe Mfg. Co., 190 Mich. 22, 155 N. W. 724.

the accident.<sup>7</sup> Under the common law rules relative to contributory negligence, the burden was generally placed upon the plaintiff to show, not only the negligence of the defendant, but also his own absence from contributory negligence.<sup>8</sup> In many jurisdictions, however, the burden of proof as to contributory negligence is now cast upon the defendant.<sup>9</sup>

#### Sec. 454. As dependent on surrounding circumstances.

Whether a pedestrian has taken due care of his own safety depends necessarily upon the circumstances surrounding the accident.<sup>10</sup> That is, the care to be taken is commensurate with

7. *Capell v. New York Transp. Co.*, 150 N. Y. App. Div. 723, 135 N. Y. Suppl. 691; *Stahl v. Sollenberger*, 246 Pa. St. 525, 92 Atl. 720. And see section 416.

8. *Cowles v. Springfield Gaslight Co.*, 234 Mass. 421, 125 N. E. 589; *Amley v. Saginaw Milling Co.*, 195 Mich. 189, 161 N. W. 832; *McMillen v. Shathmann*, 264 Pa. 13, 107 Atl. 332; *Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669.

9. *Arkansas*.—*Millsaps v. Brogdon*, 97 Ark. 469, 134 S. W. 632.

*California*.—*Randolph v. Hunt* (Cal. App.), 183 Pac. 358; *Lewis v. Tanner* (Cal. App.), 193 Pac. 287.

*Louisiana*.—*Mequet v. Algiers Mfg. Co.*, 147 La. 364, 84 So. 904.

*Massachusetts*.—*Creedon v. Galvin*, 226 Mass. 140, 115 N. E. 307; *Chaplin v. Brookline Taxi Co.*, 230 Mass. 155, 119 N. E. 650; *Patrick v. Deziel*, 223 Mass. 505, 112 N. E. 223; *Sarmiento v. Vance*, 231 Mass. 310, 120 N. E. 848; *Burns v. Oliver Whyte Co.*, 231 Mass. 519; *Quinlan v. Hugh Nawn Contracting Co.*, 126 N. E. 369; *Powers v. Loring*, 231 Mass. 458, 121 N. E. 425.

*Missouri*.—*Raymen v. Galvin*, 229 S. W. 747.

**Pleading.**—When plea of contributory negligence by the defendant is insufficient. *Coffman v. Singh* (Cal. App.), 193 Pac. 259.

10. *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44; *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335; *White v. East Side Mill & Lumber Co.*, 84 Ore. 224, 161 Pac. 969, 164 Pac. 736; *Franey v. Seattle Taxicab Co.*, 80 Wash. 396, 141 Pac. 890; *Mickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160; *Zimmerman v. Mednikoff*, 165 Wis. 332, 162 N. W. 349. "Of course, what is ordinary care as we have defined it on the part of the pedestrian depends on the character of the crossing and the number and kind of vehicles that use it, as well as other attending circumstances. But all this is matter to be determined by the jury in considering whether the pedestrian exercised the care we have described. What is ordinary care is a relative term, depending upon the facts and circumstances of each particular case in which it is endeavored to ascertain whether ordinary care was exercised. In certain states of case the exercise of ordinary care might, in the estimation of the jury, require the pedestrian to stop and look and listen, or to stop or look or listen; while at other crossings a foot traveler might be in the exercise of ordinary care, although he did not take any pains to discover the approach of vehicles. In short, he must at all times exercise a degree of care

the danger.<sup>11</sup> While the same degree of care is imposed on both the auto driver and the pedestrian, the amount of care may be different, for it may be said that the autoist is bound to exercise a greater amount of care.<sup>12</sup> Prominent among the circumstances to be considered is the extent of the traffic at the crossing selected by the pedestrian. Conduct which would be perfectly reasonable when one is crossing a remote highway with few travelers, might be gross negligence when crossing a main thoroughfare in a large city.<sup>13</sup> As was said in one case,<sup>14</sup> "The look and listen rule . . . and the constant vigilance rule . . . do not apply to a pedestrian using the public highway. The law does not impose upon him these hard and fast rules of conduct. It simply requires that he shall exercise for his own safety the measure of care that a prudent man would exercise in the same circumstances. But as circumstances vary, so do the practical requirements of the rule vary. What is prudence in one case may be negligence in another, recklessness in another, and downright foolhardiness in still another. The farmer on a back and unfrequented highway is not held to the same degree of vigilance when he crosses the road to his barn as is the man who at-

corresponding with the condition of traffic in the street at the time of the use under investigation, and whether he has done this or not is for the jury to say under the facts and circumstances of the case, after being advised by the court as to the measure of care required." *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335. "What will amount to want of ordinary care depends, as said, on the circumstances of each particular case. As a better lookout is likely at street intersections, it would seem that greater care should be exercised by a pedestrian in crossing elsewhere; for it is elementary that the care to be exercised is necessarily commensurate with the dangers of the situation. But whether in going out into the street, as plaintiff did, was careless, need not be determined. 'Negligence' is a relative term, and it cannot

be said that as to defendant the failure of plaintiff to look north before or after leaving the sidewalk amounted to want of ordinary care." *Wine v. Jones*, 183 Iowa, 1166, 162 N. W. 196, 163 N. W. 318. "While the pedestrian must bear in mind the dangers he may encounter in the street, he is only bound to use such precautions for his own safety as the danger to be apprehended would reasonably suggest to a person of ordinary prudence." *Core v. Wilhelm*, 124 Va. 150, 93 S. E. 27.

11. *Crombie v. O'Brian*, 178 App. Div. 807 165 N. Y. Supp. 858.

12. *Weihe v. Rathjen Mercantile Co.*, 34 Cal. App. 302, 167 Pac. 287.

13. *Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669.

14. *Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669.

tempts to cross a busy city street crowded with traffic. The circumstances and dangers are always to be taken into account in determining what is due care or the evidence of it."

#### **Sec. 455. Place of crossing — in general.**

Pedestrians and drivers of vehicles have equal rights at street crossings, and hence the mere fact that a pedestrian attempts to cross the street does not convict him of negligence.<sup>15</sup> But a pedestrian is bound to exercise care for his safety although the passage is made at a regular street crossing. He is bound to anticipate that automobiles as well as other vehicles may be approaching the crossing, and, while his right at the crossing is equal to that of the other classes of travelers, yet he must exercise his rights, not recklessly, but with a degree of care commensurate with the existing dangers.<sup>16</sup> One is not necessarily guilty of negligence because he attempts to cross a street in proximity to an automobile standing in the street. He is not bound in all events to anticipate that the car will go forward or backward without warning. So, where the plaintiff, a lady about thirty years of age, who was on her way home, had taken her position at the usual stopping place of the cars in order to enter the car when it stopped, and the car was approaching and in close proximity to her and her attention was directed to such car and an automobile was standing at rest against the pavement eight or ten feet away, when the chauffeur, without warning, suddenly backed it upon her, it was held that she was not guilty of contributory negligence as a matter of law and a verdict for her was affirmed.<sup>17</sup>

#### **Sec. 456. Place of crossing — crossing street at other than usual crossing.**

It is not negligence as a matter of law for a pedestrian to attempt to cross a street between crossings or at some point

15. *Harker v. Gruhl*, 62 Ind. App. 347, 98 N. E. 369.  
 177, 111 N. E. 457; *Ginter v. O'Donoghue* (Mo. App.), 179 S. W. 732.  
 16. See *Rump v. Woods*, 50 Ind. App. 567, 121 S. W. 770.  
 17. *Shamp v. Lambert*, 142 Mo. App. 567, 121 S. W. 770.

other than a regular crossing.<sup>18</sup> However, if he elects to cross a street at a place where pedestrians do not ordinarily go, he is required to exercise the degree of prudence and care which would be required of an ordinarily prudent man crossing the street at such a place.<sup>19</sup> The fact that he attempts to cross in the middle of a block instead of at a regular crossing, is a circumstance to be considered by the jury in passing on the question of contributory negligence.<sup>20</sup> The danger being greater at some distance from the usual crossing, it may well be said that the pedestrian is required to use greater prudence at such place than if he were using the regular crossing.<sup>21</sup> Where a statute provided that, "Any person crossing a street at any place other than the crosswalk shall do so at his own risk. Nothing in this regulation, however, shall relieve the drivers of vehicles from being constantly vigilant, exercising all reasonable care to avoid injuring either person or property," it was held that a person crossing the street at a place other than the regular crossing was barred from maintaining an action against the owner of a vehicle, not himself driving, for damages caused by a collision, but was not barred as against a driver of the vehicle whether the owner thereof or a servant

18. *Florida*.—Goldring v. White, 62 Fla. 162, 58 So. 367.

*Indiana*.—Craft v. Stone (Ind. App.), 124 N. E. 469.

*Illinois*.—Berg v. Fisher, 182 Ill. App. 449; Vos v. Franke, 202 Ill. App. 133.

*Iowa*.—Wine v. Jones, 162 N. W. 196.

*Missouri*.—Ginter v. O'Donoghue (Mo. App.), 179 S. W. 732; Lory v. Smith, (Mo. App.), 198 S. W. 437.

*New Jersey*.—Schriner v. Grinnell, 39 N. J. L. 37, 97 Atl. 781; Lyons v. Volz, 114 Atl. 318.

*Pennsylvania*.—Anderson v. Wood, 264 Pa. St. 98, 107 Atl. 658.

*Washington*.—Collins v. Nelson, 191 Pac. 819.

*Canada*.—See White v. Hagler, 29 D. L. R. (Canada) 480, 34 W. L. R. 1061.

19. Wine v. Jones, 183 Iowa 1166, 162 N. W. 176, 163 N. W. 318; Fox v. Great Atlantic & P. T. Co., 84 N. J. L. 726, 87 Atl. 339; Arnold v. McKelvey 253 Pa. St. 324, 98 Atl. 559; Vesper v. Lavender (Tex. Civ. App.), 149 S. W. 377. See also, Mequet v. Algiers Mfg. Co., 147 La. 364, 84 So. 904.

20. Ginter v. O'Donoghue (Mo. App.), 179 S. W. 732.

21. Ivy v. Marx (Ala.), 87 So. 813; Lory v. Smith (Mo. App.), 198 S. W. 437; Lyons v. Volz (N. J.), 114 Atl. 318; Virgilio v. Walker, 254 Pa. 241, 98 Atl. 815; Twinn v. Noble (Pa.), 113 Atl. 686. "She was attempting to cross the street at a place other than the regular crossing, and while she had a right to cross at that point, having elected to do so rather than go to the



of the owner.<sup>22</sup> And under an ordinance providing that pedestrians shall cross only at crosswalks and giving vehicles a right of way between street intersections, it has been held that a pedestrian attempting to cross between street intersections is guilty of negligence as a matter of law.<sup>23</sup> Where it appeared that the defendant's automobile at the time of the accident was being driven recklessly out of the path of vehicular traffic in the street, so that if the plaintiff had been originally negligent in selecting a point for crossing, he had, when struck, escaped from the path where the automobile

regular crossing, she will be required to exercise a higher degree of care for her own safety than if she was crossing at a regular crossing." *George Weidman Brewing Co. v. Parmlee*, 167 Ky. 303, 180 S. W. 350. "While conditions have not, as yet, arisen in any case brought before us where we have felt called upon to rule that it was negligence *per se* for a pedestrian to traverse a public highway between the regular crossing places, nevertheless, when one does so, he is bound to a high degree of care." *Virgilo v. Walker*, 254 Pa. St. 241, 98 Atl. 815. See also, *Anderson v. Wood*, 264 Pa. St. 98, 107 Atl. 658; *Lamont v. Adams Express Co.*, 107 Atl. 373. "That greater care should be observed by a pedestrian in crossing a street at other than at the street intersections is generally recognized for the danger usually is greater. People ordinarily cross streets at the intersections, and drivers of vehicles are on the lookout for them there. As they do not usually cross over between the intersections, the lookout quite naturally is somewhat relaxed, and for this reason greater danger is involved in passing over at such localities and corresponding increase of care exacted." *Livingstone v. Dole*, 167 Iowa 639, 167 N. W. 639.

Instruction as to care. held not re-

versible error.—The Supreme Court of Pennsylvania has held that the following instruction relative to crossing between regular crossings, was not reversible error: "The pedestrian must use such care and caution as an ordinarily careful and prudent man would exercise under the circumstances in the case, and more care and caution would be required of a pedestrian attempting to cross a street where automobiles and other vehicles are run, between crossings than should be exercised at a crossing, because more care is required to be exercised by an automobile about to pass over a crossing than between crossings. Crossings are prepared especially for pedestrians, and automobiles must bear this in mind; therefore, more care is required of a driver of a car at crossings than between crossings. Nevertheless, ordinary care must be observed by drivers and pedestrians at all times, at and between crossings. Therefore, we say that more care is required of pedestrians between crossings than at crossings; but the rule of ordinary care applies."

22. *Schriner v. Grinnell*, 89 N. J. L. 37, 97 Atl. 781.

Kentucky statute.—*Ferris v. McAidle*, 92 N. J. L. 58, 106 Atl. 460.

23. *Crowl v. West Coast Steel Co.*, 109 Wash. 426, 186 Pac. 866.

should have been driven, it was held that he was not guilty of contributory negligence as a matter of law.<sup>24</sup>

### Sec. 457. Place of crossing — walking along highway.

Pedestrians are not necessarily confined to the use of the sidewalk or footpath provided for them, and it is not negligence *per se* for them to use the part generally devoted to vehicles. In fact such a user may in some cases be necessary. In this as in other instances due care is required of the pedestrian.<sup>25</sup> Greater caution may, however, be required of one walking along a road than of one using a sidewalk where motor vehicles are not expected.<sup>26</sup> Even in a city or village where a sidewalk is maintained especially for the use of pedestrians, it is not negligence as a matter of law for a pedestrian to walk along the road. Thus, in one case it was said: "As to the contention that the act of walking upon the street was negligent because a sidewalk had been provided for pedestrians, it is sufficient to say that the matters as to whether a sidewalk in fact existed, or whether its condition, if one did exist, was such as to warrant pedestrians in the exercise of ordinary care in using the street, instead of such walk, were matters of fact which, upon the conflicting evidence submitted, were for the trial court sitting as a jury to determine, and, even though it had appeared that there was a sidewalk customarily used by pedestrians, that fact alone would not warrant the deduction that as a matter of law plaintiff was guilty

24. *Vos v. Franke*, 202 Ill. App. 133.

25. *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44; *O'Dowd v. Newnham*, 13 Ga. App. 220, 80 S. E. 56; *McKenna v. Lynch* (Mo.), 233 S. W. 175. See also *Pacific Hardware & Steel Co. v. Monical*, 205 Fed. 116, 123 C. C. A. 348; *Moffatt v. Link* (Mo. App.), 229 S. W. 836; *Petrie v. E. A. Myers Co.* (Pa.), 112 Atl. 240.

26. "While conditions have not, as yet, arisen in any case brought before us where we have felt called upon to rule that it was negligence *per se* for

a pedestrian to traverse a public highway between the regular crossing places, nevertheless, when one does so, he is bound to a high degree of care, and if a pedestrian goes further and deliberately selects the roadway of a city street for the purpose of walking longitudinally thereon, he is obligated to still greater care; in fact, one placing himself in such danger must be most vigilant to look after his own safety." *Virgilio v. Walker*, 254 Pa. St. 241, 98 Atl. 815.

of contributory negligence in using the street, instead of such sidewalk."<sup>27</sup>

When conditions are unfavorable for walking on the sidewalk, as in case of mud or ice, one may be justified in walking along the road.<sup>28</sup> And one is not necessarily negligent in pushing a hand cart along a highway.<sup>29</sup> And it cannot be ruled as a matter of law that the failure of a pedestrian to carry a lantern when walking upon a highway after dark, is negligence.<sup>30</sup> In a rural community, where a sidewalk is not provided for foot travelers, there can be no ground for charging one with negligence merely because he was walking along the road.<sup>31</sup> Even the duty of looking for motor vehicles is less strict on a farm road.<sup>32</sup> Negligence will not necessarily be charged against the pedestrian because he does not walk nearer the outside of the road, especially if it is muddy there.<sup>33</sup> But it is to be recognized that a foot traveler along a highway should give way to an approaching vehicle so as to permit a passage.<sup>34</sup>

#### **Sec. 458. Duty to look for approaching automobiles — railroad rule — to stop, look and listen.**

In many States in this country, the rule is established that a person must stop, look and listen before crossing a railroad track, and that his failure to take such prudence is negligence as a matter of law.<sup>35</sup> But this doctrine does not apply to a pedestrian about to cross a public highway, and it is held that a person who fails to "stop, look and listen," or who fails continuously to be looking when crossing a street is not thereby

27. *Backwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94.

28. *Mears v. McElfish* (Md.), 114 Atl. 701. See *Booth v. Meagher*, 224 Mass. 472, 113 N. E. 367.

29. *Mauchle v. Panama-Pacific International Exposition Co.*, 37 Cal. App. 715, 174 Pac. 400.

30. *Powers v. Loring*, 231 Mass. 458, 121 N. E. 425.

31. See *Dozier v. Woods*, 190 Ala.

279, 67 So. 283; *Gardner v. Vance*, 63 Ind. App. 27, 113 N. E. 1006; *Marton v. Pickrell* (Wash.), 191 Pac. 1101.

32. As to the duty of lookout, see section 332, *et seq.*

33. *Petrie v. E. A. Myers Co.* (Pa.), 112 Atl. 240

34. *White v. Metropolitan St. Ry. Co.*, 195 Mo. App. 310, 191 S. W. 1122.

35. Section 568.

guilty of negligence as a matter of law.<sup>36</sup> One crossing the track of a steam railroad is required to look in both directions for an approaching train, but when crossing a highway, the duty of looking is generally satisfied if he looks in the direction whence motor vehicles obeying the law of the road may be expected. The distinction is properly laid on account of the difference in the use made of the streets by automobiles and by steam engines.<sup>37</sup>

### Sec. 459. Duty to look for approaching automobiles — duty to look before crossing street.

A pedestrian about to cross a street frequented by motor vehicles is bound to exercise care for his safety.<sup>38</sup> In case of

36. *United States*.—New York Transp. Co. v. Garside, 157 Fed. 521, 85 C. C. A. 285; Tiffany & Co. v. Drummond, 168 Fed. 47, 93 C. C. A. 469; Taxi Service Co. v. Phillips, 187 Fed. 734, 109 C. C. A. 482.

*Alabama*.—Barbour v. Shebor, 177 Ala. 304, 58 So. 276; Bachelder v. Morgan, 179 Ala. 339, 60 So. 815; Ivy v. Marx (Ala.), 87 So. 813.

*Arkansas*.—Millsaps v. Brogon, 97 Ark. 469, 134 S. W. 632.

*California*.—Mann v. Scott, 180 Cal. 550, 182 Pac. 281.

*Georgia*.—O'Dowd v. Newnham, 13 Ga. App. 220, 80 S. E. 36.

*Indiana*.—Craft v. Stone (Ind. App.), 124 N. E. 469.

*Kansas*.—Williams v. Benson, 87 Kan. 421, 124 Pac. 531; Cusick v. Miller, 102 Kans. 663, 171 Pac. 599.

*Michigan*.—Winckowski v. Dodge, 183 Mich. 303, 149 N. W. 1061; Hill v. Lappley, 199 Mich. 496, 165 N. W. 657.

*Missouri*.—Bongner v. Ziegenheim, 165 Mo. App. 328, 147 S. W. 182; Hodges v. Chambers, 171 Mo. App. 563, 154 S. W. 429; Carradine v. Ford, 195 Mo. App. 684, 187 S. W. 285; Sullivan v. Chauvenet (Mo. App.), 186 S. W. 1090; Lory v. Smith (Mo. App.),

198 S. W. 437.

*New York*.—Jessen v. J. L. Kesner Co., 159 App. Div. 898, 144 N. Y. Suppl. 407.

*Pennsylvania*.—Lorah v. Rinehart, 243 Pa. St. 231, 89 Atl. 967; Dugan v. Lyon, 41 Pa. Super. Ct. 52.

*Texas*.—Vesper v. Lavender, 149 S. W. 377.

*Vermont*.—Aiken v. Metcalf, 90 Vt. 196, 97 Atl. 669.

*Virginia*.—Core v. Wilhelm, 124 Va. 150, 98 S. E. 27.

*Washington*.—Mosso v. Stanton Co., 75 Wash. 220, 134 Pac. 941; Hillebrant v. Manz, 71 Wash. 250, 128 Pac. 892; Mickelson v. Fischer, 81 Wash. 423, 142 Pac. 1160; Adair v. McNeil, 95 Wash. 160, 163 Pac. 393.

*Wisconsin*.—Klokow v. Harbaugh, 166 Wis. 262, 164 N. W. 999.

**Listening**.—While a pedestrian may not be required to stop before crossing a street, it has been said that he should listen for automobiles. Lorah v. Rinehart, 243 Pa. St. 231, 89 Atl. 967.

37. Sullivan v. Chauvenet (Mo. App.), 186 S. W. 1090; Lory v. Smith (Mo. App.), 198 S. W. 437; Humes v. Schaller, 39 R. I. 519, 99 Atl. 55.

38. Livingstone v. Dole, 167 Iowa,

a city street where there is considerable traffic, reasonable care may require that a person shall look for automobiles before starting across the street.<sup>39</sup> And, if he fails to look before crossing some of the streets in populous centers, contributory negligence as a matter of law may be charged against him.<sup>40</sup> In the city of New York, it is clearly negligence *per se* on the part of a pedestrian to fail to look before attempting to cross

639, 167 N. W. 639; *Todesco v. Maas*, 8 Alta. (Canada) 187, 23 D. L. R. 417. "When a pedestrian is about to cross a street he must use the care of a prudent man, but the law does not undertake to further define this standard. The law does not say how often he must look, or precisely how far, or when or from where." *Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669. "No pedestrian has a right to pass over a public thoroughfare without regard to approaching vehicles, nor has any vehicle driver a right to appropriate the public street without regard to its use by pedestrians. The test to be applied in this case as in others is: What would a person of ordinary prudence have done under the circumstances shown? Would reasonable minds differ in answering that question? Some are more cautious than others, and though some would hesitate to start without looking up and down the street and keeping a continuous outlook for approaching vehicles, others are content with a glance about and immediately proceed. We sometimes think the latter class are less likely to be injured than the former. At any rate the law does not lay down precisely what must be done to constitute due care or omitted to render a person negligent. This depends on the facts of each particular case, and in this cause conditions were such as to carry the issue as to whether decedent was at fault in any respect to the jury." *Rolfs v. Mullins*, 179 Iowa 1223, 162 N. W. 783.

39. *Russell v. Vergason* (Conn.), 111 Atl. 625.

40. *California*.—*Davis v. Breuner Co.*, 167 Cal. 683, 140 Pac. 586; *Mayer v. Anderson* (Cal. App.), 173 Pac. 174; *Moss v. H. R. Boynton* (Cal. App.), 186 Pac. 631; *Spring v. Tawa* (Cal. App.), 192 Pac. 1051.

*Iowa*.—*Wine v. Jones*, 183 Iowa, 1166, 162 N. W. 176, 168 N. W. 318.

*Kentucky*.—*Melville v. Rollwage*, 171 Ky. 607, 188 S. W. 638.

*Massachusetts*.—See *Rasmussen v. Whipple*, 211 Mass. 546, 98 N. E. 592.

*Michigan*.—*Fulton v. Mohr*, 200 Mich. 538, 166 N. W. 851; *Deal v. Snyder*, 203 Mich. 273, 168 N. W. 973.

*New York*.—*Chiappone v. Greenbaum*, 189 App. Div. 579, 178 N. Y. Suppl. 845; *Wilkins v. New York Transp. Co.*, 52 Misc. 167, 101 N. Y. Suppl. 650; *Curro v. Barrett*, 156 N. Y. Suppl. 289. See also *Capell v. New York Transp. Co.*, 150 N. Y. App. Div. 723, 135 N. Y. Suppl. 691; *Signet v. Werner*, 159 N. Y. Suppl. 894. "It is held to be contributory negligence as a matter of law if the plaintiff blindly walks in front of a moving vehicle without looking to see if he could make a safe passage and without using any care to avoid injury." *Curro v. Barrett*, 156 N. Y. Suppl. 289.

*Virginia*.—*Stephen Putney Shoe Co. v. Ornsby's Adm'r*, 105 S. E. 563.

*Washington*.—*Jones v. Wiese*, 88 Wash. 346, 153 P. 330.

*Canada*.—*Todesco v. Maas*, 23 D. L.

a street.<sup>41</sup> But, as was said in one case,<sup>42</sup> "If a pedestrian, in crossing a street, exercise such care as a person of ordinary

R. 417, 8 A. L. R. 187, 7 W. W. R. 1373.

*Sufficiency of look.*—If a pedestrian looks at all, the sufficiency of his look would present a question for the jury; but, if he fails to take any precaution, there is nothing for the jury to consider upon this point, and the law decides against the recovery. *Jones v. Wise*, 88 Wash. 356, 153 Pac. 330.

*Relative duties of chauffeur and foot traveler as to looking.*—"It is . . . a familiar rule in the law of negligence that the care to be exercised must correspond with the capacity to injure, and accordingly the automobilist is under a much higher degree of care to look out for the pedestrian than the pedestrian is to look out for the automobilist. The pedestrian cannot merely by the manner in which he uses the street harm the automobilist, but the automobilist may by his manner of using the street kill the pedestrian; and so, generally speaking, the pedestrian is only required to look after his own safety, and not the safety of others, while the automobilist must look out for the safety of the pedestrian rather than his own. *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335.

41. *Knapp v. Barrett*, 216 N. Y. 226, wherein it was said: "The jury were told in effect that even if the plaintiff left the car without looking where it was going, and then walked blindly in the path of the wagon, they might still acquit him of negligence. The law, we think, is otherwise. A wayfarer is not at liberty to close his eyes in crossing a city street. His duty is to use his eyes, and thus protect himself from danger (*Barker v. Savage*, 45 N. Y. 191). The law does not say how often he must look, or precisely how far, or when or from where. If, for example,

he looks as he starts to cross, and the way seems clear, he is not bound as a matter of law to look again. The law does not even say that because he sees a wagon approaching he must stop till it has passed. He may go forward unless it is close upon him; and whether he is negligent in going forward will be a question for the jury. If he has used his eyes and has miscalculated the danger, he may still be free from fault (*Buhrens v. Dry Dock, E. B. & B. R. R.*, 53 Hun, 571, 125 N. Y. 702). But it is a very different thing to say that he is not bound to look at all. We have repeatedly held that one who crosses a city street without any exercise of his faculty of sight is negligent as a matter of law (*Barker v. Savage, supra*; *Peterson v. Ballantine & Sons*, 205 N. Y. 29, 39 L. R. A. (N. S.) 1147; *Perez v. Sandrowitz*, 180 N. Y. 397, 73 N. E. 228; *McClain v. Brooklyn City R. R.*, 116 N. Y. 459, 470, 22 N. E. 1062; *Reed v. Met. St. Ry.*, 180 N. Y. 315, 73 N. E. 41; *Volosko v. Interurban St. Ry.*, 190 N. Y. 206, 15 L. R. A. (N. S.) 1117; *Zueker v. Whitridge*, 205 N. Y. 50, Ann. Cas. 1913 D. 1250; *Mastin v. City of New York*, 201 N. Y. 81). To escape the consequences of such negligence he must prove that even if he had looked, the accident would still have happened. He is not entitled to damages where it appears that 'unconscious and unobservant of the situation he walked into the approaching team.' (*Perez v. Sandrowitz*, 400. *supra*.)"

Compare the earlier decisions by the Appellate Division in this State of *Townsend v. Brooklyn Heights R. Co.*, 168 App. Div. 449; *Woodward v. New York Railways*, 164 App. Div. 658, 149 N. Y. Suppl. 1003.

See also *Harder v. Matthews*, 67 Wash. 487, 121 Pac. 983.

42. *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335.

prudence would use in looking after his own safety, considering the surrounding condition, he has done all that the law expects him to do. There is no other reasonable standard by which to measure the care required of him. If this standard of care required that he stop and look and listen, then he must stop and look and listen. If it required that he must look and listen, or look alone, then he must do these things."<sup>43</sup> To some extent the question necessarily depends on the amount of traffic to be expected at the place where he is crossing.<sup>44</sup> The failure to look cannot be said to be negligence *per se* under all circumstances, and thus frequently a question is presented by the jury.<sup>45</sup> What might be considered a reasonable precaution when crossing a highway in a rural community, might be considered as gross negligence in the case of a pedestrian crossing a crowded thoroughfare in a large city. But a pedestrian's failure to look for an automobile approaching in a blinding and tempestuous rain storm, with its lights difficult to distinguish from street lights, has been held not to constitute contributory negligence as a matter of law.<sup>46</sup>

Where an aged man was injured by an automobile while trying to cross a crowded street, and, in an action to recover for the injuries thus sustained, he testified that he did not see any wagons or automobiles in front nor the machine that struck him until after the accident, and did not look for any except the people in front of him, and there was no evidence that he tried to avoid the various vehicles that filled the street, it was held that he failed to establish his freedom from contributory negligence and a judgment in his favor should be reversed.<sup>47</sup> And, where a large automobile was proceeding at a moderate rate on the proper side of the street with a clear roadway in front of it, when a boy who could have seen the machine had he looked, but who was interested in catching a ball, ran from the sidewalk immediately in front of the ma-

43. See also *Loury v. Smith* (Mo. App.), 198 S. W. 437.

44. *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335; *Aiken v. Motealf*, 90 Vt. 196, 97 Atl. 669.

45. *Bohm v. Falton*, 206 Ill. App. 374.

46. *Bruhl v. Anderson*, 189 Ill. App. 461.

47. *Wilkins v. New York Transp. Co.*, 52 Misc. 167, 101 N. Y. Suppl. 650.

chine, at a distance of four to twelve feet, and the automobile was stopped so that its wheels skidded and proceeded only five feet beyond the boy's body, it was held that the driver's negligence was not shown, but rather contributory negligence on the part of the boy.<sup>48</sup> Where a pedestrian started to cross the street, and halted to let a street car pass, and then stepped back toward the sidewalk and was struck by an automobile, it was held that he was guilty of contributory negligence, for it was negligence to step in front of the machine if he looked, and, if he didn't look, that also was negligence.<sup>49</sup> A boy has also been held guilty of negligence in jumping off the rear of a wagon, with his face towards the driver and starting to run across the street, when he is struck by an automobile coming from behind.<sup>50</sup> And where the court charged the jury, in an action to recover damages by a person struck by an automobile as he was crossing the street, that the plaintiff was bound to use due care, and that if he was familiar with the street and its traffic and knew that automobiles and other vehicles were passing and repassing, and in alighting from the trolley car did not look in either direction but started across the street in a hurried walk with his head down, the jury would be warranted in finding and ought to find him guilty of contributory negligence, it was decided that this was sufficiently favorable to the defendant.<sup>51</sup> And where a pedestrian, in the middle of a block of a narrow street thirty feet in width, suddenly and unexpectedly stepped from behind another car where he could not be seen by the driver of defendant's car, with his back turned towards the portion of the highway that would necessarily be traveled by an automobile on that side of the street, with his coat collar turned up and his head down; and it appeared further that he not only failed to look, but apparently was so engrossed with other thoughts that he failed to hear either the noise of the car or the shout of warning from the

48. *Jordon v. Am. Sight Seeing Coach Co.*, 129 N. Y. App. Div. 313, 113 N. Y. Suppl. 786.

49. *Todesco v. Maas*, 23 D. L. R. (Canada) 417, 8 A. L. R. 187, 7 W. W. R. 1373.

50. *Mills v. Powers*, 216 Mass. 36, 102 N. E. 912; *compare Bartley v Marino* (Tex. Civ. App.). 158 S. W. 1156.

51. *Wolfe v. Ives*, 83 Conn 174. 75 Atl. 526, 19 Ann. Cas. 752.



companion of the driver, it was held that he was guilty of negligence.<sup>52</sup>

**Sec. 460. Duty to look for approaching automobiles — looking for vehicles on wrong side of street.**

As a general proposition, it is not contributory negligence *per se* for a pedestrian to look only in the direction from which vehicular traffic may be expected to move in accordance with the law of the road;<sup>53</sup> and, if such a person looks in one direction and judging the highway reasonably safe for passage starts across but is struck by a motor vehicle proceeding along the wrong side of the street, his negligence is not to be decided as a matter of law, but should be left for the jury.<sup>54</sup> One has the right, to some extent, to assume that the drivers of automobiles will obey the recognized law of the road as to the side on which they will proceed.<sup>55</sup> Whether one is guilty of negli-

<sup>52</sup> *Fulton v. Mohr*, 200 Mich. 538, 166 N. W. 851.

<sup>53</sup> *Buckley v. Suttan*, 231 Mass. 504, 121 N. E. 527; *New York Transp. Co. v. Garside*, 157 Fed. 521, 85 C. C. A. 285.

**Contrary view.**—"It is the duty of a foot passenger to look both ways before starting to cross a street, particularly when, as in this instance, the street over which he intends to pass is a busy thoroughfare in the heart of the business district of a great city." *Davis v. Breuner Co.*, 167 Cal. 683, 140 Pac. 586.

<sup>54</sup> *United States*.—*New York Transp. Co. v. Garside*, 157 Fed. 521, 85 C. C. A. 285.

*California*.—*Lewis v. Tanner* (Cal. App.), 193 Pac. 287.

*New York*.—*Bradley v. Jaekel*, 65 Misc. 509, 119 N. Y. Suppl. 1071; *Hall v. Dilworth*, 94 Misc. Rep. 240, 157 N. Y. Suppl. 1091. "Especially would it be unwarranted to hold that, when a person steps from the curb of a city street, particularly one not constituting an important artery of traffic, he must look, not only in the direction

from which vehicles may rightfully be traveling on that side of the street, but that he must look back, as well, in order to be sure that nothing is approaching from the rear on the side of the street prohibited by the rule of the road to vehicles traveling from that direction." *Bradley v. Jaekel*, 65 Misc. 509, 119 N. Y. Suppl. 1071, *per Giegerich, J.*

*Vermont*.—*Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669.

*Washington*.—*Nickelson v. Fischer*, 81 Wash. 423, 143 Pac. 1160. "Plaintiff was not bound to anticipate a car or other vehicle coming south on the left-hand side of the street. There are certain rules or laws of the road, the observance of which or reliance upon become instinctive. The care of a pedestrian, situated as plaintiff was, would be to look to her right for cars or vehicles, relying upon the fact that traffic upon that side of the street would be from that direction." *Nickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160.

<sup>55</sup> Section 473.

gence in failing to look for a violation of the law of the road, depends upon whether a person would reasonably apprehend danger in such direction, and the question is one which is left to the jury.<sup>56</sup> When one is passing from the east side toward the west side of a street, after passing beyond the center line of the road, the jury may properly infer that a reasonably prudent man would shift his attention from cars approaching from the south to those approaching from the north.<sup>57</sup>

**Sec. 461. Duty to look for approaching automobiles — obstructed view.**

The law does not require one to do the impossible, and hence if a pedestrian's view in a certain direction is obstructed by a street car or other barrier, he is not necessarily guilty of contributory negligence because he fails to look in such direction.<sup>58</sup> Thus, where it appeared that a street railway passenger alighted from a car and passed to the rear thereof and in front of a car on the other track, and as she cleared the front of the latter car, was struck by an automobile driving close to the car without giving a signal, it was held that she was not guilty of negligence as a matter of law in failing to look in the direction whence the automobile came, for the street car obstructed any view in that direction.<sup>59</sup> But after passing an obstruction, reasonable care may require that the pedestrian look for danger.<sup>59a</sup> Thus, where a boy playing in the street started to cross and passed behind a wagon into the path of an automobile so near to it that the accident could not be avoided, it was held that he was negligent.<sup>60</sup>

56. *Park v. Irbyson* (Cal. App.), 184 Pac. 428; *Hall v. Dilworth*, 94 Misc. (N. Y.) 240, 157 N. Y. Suppl. 1091.

57. *Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669.

58. *Regan v. Los Angeles Ice & Cold Storage Co.* (Cal. App.), 189 Pac. 474; *Sternfield v. Willison*, 174 App. Div.

842, 161 N. Y. Suppl. 472; *Kaplan v. Posner*, 192 App. Div. 59, 182 N. Y. Suppl. 612.

59. *Sternfield v. Willison*, 174 App. Div. 842, 161 N. Y. Suppl. 472.

59a. *Moss v. Boynton* (Cal. App.), 186 Pac. 631.

60. *Levesque v. Dumont*, 116 Me. 25, 99 Atl. 719.

## Sec. 462. Duty to look for approaching automobiles — continuing to look.

It is very generally held that a pedestrian about to cross a street is not required to look continuously for the approach of motor vehicles.<sup>61</sup> If, as he leaves the curb, he looks for the approach of machines, he is not necessarily guilty of negligence in failing to keep a continuous outlook, or in looking a second time, but whether he has exercised a reasonable degree of prudence is a question for the jury.<sup>62</sup> Circumstances may exist, however, when one who fails to look a second time is guilty of negligence as a matter of law.<sup>63</sup> Even if he sees an

61. *United States*.—*Phillips v. Taxi Service Co.*, 183 Fed. 869, affirmed 187 Fed. 734, 109 C. C. A. 482.

*California*.—*Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94; *Beltinger v. Hughes*, 31 Cal. App. 464, 160 Pac. 838; *Sheldon v. James*, 175 Cal. 474, 166 Pac. 8, 2 A. L. R. 1493; *McMullen v. Davenport* (Cal. App.), 186 Pac. 796.

*Indiana*.—*Harker v. Gruhl*, 62 Ind. App. 177, 111 N. E. 457. "As a matter of law, a pedestrian who is lawfully using a public thoroughfare need not be constantly looking or listening to ascertain if automobiles are approaching under the penalty that if he fails to do so and is injured that his failure conclusively charges him with negligence." *Harker v. Gruhl*, 62 Ind. App. 177, 111 N. E. 457.

*Iowa*.—*Wine v. Jones*, 183 Iowa, 1166, 162 N. W. 196, 168 N. W. 318.

*Kentucky*.—*Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335.

*Michigan*.—*Gerhard v. Ford Motor Co.*, 155 Mich. 618, 119 N. W. 904, 20 L. R. A. (N. S.) 232. "There is no imperative rule of law requiring a pedestrian when lawfully using the public ways to be continuously looking or listening to ascertain if auto cars are approaching, under the penalty that upon the failure so to do, if he is injured, his own negligence must be con-

clusively presumed." *Gerhard v. Ford Motor Co.*, 155 Mich. 618, 119 N. W. 904, 20 L. R. A. (N. S.) 232.

*Missouri*.—*Carradine v. Ford*, 195 Mo. App. 684, 187 S. W. 285; *Ginter v. O'Donoghue* (Mo. App.), 179 S. W. 732; *Loury v. Smith* (Mo. App.), 198 S. W. 437.

*New York*.—*O'Neill v. Everett*, 189 App. Div. 221, 178 N. Y. Suppl. 506.

*Pennsylvania*.—*Lewis v. Wood*, 247 Pa. St. 545, 93 Atl. 605.

*Virginia*.—*Core v. Wilhelm*, 124 Va. 150, 98 S. E. 27.

*Washington*.—*Yanse v. Seattle Taxi-cab & Transfer Co.*, 91 Wash. 415, 157 Pac. 107; *Olsen v. Peerless Laundry*, 191 Pac. 756. See also *Crowl v. West Coast Steel Co.*, 186 Pac. 866.

62. *Taxi Service Co. v. Phillips*, 187 Fed. 734, 109 C. C. A. 482, affirming 183 Fed. 869; *Harker v. Gruhl*, 62 Ind. App. 177, 111 N. E. 457; *Johnson v. Brastad*, 143 Minn. 332, 173 N. W. 668; *Ginter v. O'Donoghue* (Mo. App.), 179 S. W. 732; *Healy v. Shedaker*, 264 Pa. St. 512, 107 Atl. 842; *Mackin v. Patterson* (Pa.), 112 Atl. 738; *Core v. Wilhelm*, 124 Va. 150, 98 S. E. 27; *Redick v. Peterson*, 99 Wash. 368, 169 Pac. 804; *Moore v. Roddie*, 103 Wash. 386, 174 Pac. 648; *Westervelt v. Schwabacher* (Wash.), 176 Pac. 545.

63. *Moss v. Boynton* (Cal. App.), 186 Pac. 631; *Prince v. Clausen-Flana-*

automobile approaching he is not under the duty of continually watching its approach, but he may assume that he has sufficient time to cross the street and that the machine will not run him down.<sup>64</sup> Just where he should look depends upon shifting conditions and is a question of fact rather than of law.<sup>65</sup> He must, of course, exercise a reasonable degree of caution, and be on his guard to avoid injury and should use the same degree of alertness as a reasonably careful man would use.<sup>66</sup> If one seeking a street car steps off the curb after making observations concerning the traffic on the street and believing it to be safe, passes by one line and without taking further observations attempts to reach the further side of the other line, when he is struck by an automobile, his contributory negligence is a question for the jury.<sup>67</sup> And, where

gan Brewery, 177 N. Y. Suppl. 168; *Crowl v. West Coast Steel Co.*, 109 Wash. 426, 186 Pac. 866.

64. Section 467.

65. *Mackin v. Patterson* (Pa.), 112 Atl. 738.

66. *Lorah v. Rinehart*, 243 Pa. St. 231, 89 Atl. 967.

67. *Phillips v. Taxi Service Co.*, 183 Fed. 869, affirmed 187 Fed. 734, 109 C. C. A. 482; *Klokov v. Harbaugh*, 166 Wis. 262, 164 N. W. 999. "The point of the defendant below was that the law required the traveler across the street to look to the east after passing behind the standing car which had obstructed his view, and that in not doing it negligence resulted as a matter of law. The learned judge, while dealing with this phase of the situation, and while explaining to the jury that there was no absolute rule of law, like that which applies to railroad crossings, a place of universally recognized danger, where common prudence requires that travelers on the highway should use the precaution of looking, which applies itself as between automobile highway travelers and pedestrians at highways or street crossings, and therefore that the ques-

tion of fact was at large, to be determined upon the usual rules governing questions of fact, made the remark of which complaint is made, which, read in connection with what preceded it, must be accepted as meaning, and we think on the whole that the jury must have so understood it, that if after looking at the sidewalk the plaintiff below walked in the ordinary way, turning his head as he went along as a man naturally does who goes along in an ordinary walk, he was not in fault as matter of law simply because he did not stop again and look around the side of the car. It was evidently the purpose of the learned judge to say that he would not be at fault as a matter of law. Indeed, it would seem quite clear that the purpose was to state that there was no rule of law which operated upon the situation, because it was further explained by such expressions as, 'if the plaintiff while on the sidewalk looked, and then walked in the usual manner across the street, looking as he went, and then in an ordinary walk crossed to take the car,' he was not at fault simply because he failed to stop again and look around. We think it reasonable to ac-

it appeared that a "jumper" on a delivery wagon, before jumping off, looked back and saw no automobile approaching, but was struck by an automobile while standing beside the wagon, the machine having a clear space of thirty feet within which to avoid him and running 100 feet farther before it was stopped, it was held that the negligence of the parties was properly submitted to the jury.<sup>68</sup>

### Sec. 463. Duty to look for approaching automobiles — looking back.

One traveling along or crossing a street is not necessarily required to look back for the approach of vehicles; if struck by an auto his negligence presents a jury question.<sup>69</sup> When one is walking along that part of the road used by motor vehicles, he is not required to look back constantly to see whether such a machine is approaching.<sup>70</sup> And one crossing a street between the public crossings without looking back, is not necessarily guilty of negligence, whether he passes directly or diagonally.<sup>71</sup> So, too, one walking along with a street car with the intention of boarding it, is not necessarily negligent in failing to look back for approaching automobiles.<sup>72</sup> Thus, where it appeared that a woman was driving a cow and calf along a rural highway, and her entire attention was directed to such animals, so that she did not hear the automobile horn

cept this, not as an instruction upon the question of care, but as a statement and an illustration to the jury that the question of the plaintiff's care was not controlled against him by a rule of law which would of itself put him in fault. *Taxi Service Co. v. Phillips*, 187 Fed. 734, 109 C. C. A. 482.

68. *Gerhard v. Ford Motor Co.*, 155 Mich. 618, 119 N. W. 904, 20 L. R. A. (N. S.) 232.

69. *Sheldon v. James*, 175 Cal. 474, 166 Pac. 82 A. L. R. 1493; *Cusick v. Miller*, 102 Kans. 663, 171 Pac. 599; *Mears v. McElfish (Md.)*, 114 Atl. 701; *Creedon v. Galvin*, 226 Mass. 140, 115 N. E. 307; *Loury v. Smith (Mo. App.)*, 198 S. W. 437; *Anderson v.*

*Wood*, 264 Pa. St. 98, 107 Atl. 658.

70. *Blackwell v. Ranwick*, 21 Cal. App. 131, 131 Pac. 94; *Stone v. Gill (Cal. App.)*, 198 Pac. 640; *McKenna v. Lynch (Mo.)*, 233 S. W. 175; *King v. Brillhart (Pa.)*, 114 Atl. 515. "It certainly was not their duty to turn about constantly and repeatedly to observe the approach of possible vehicles from the rear where the drivers of such vehicles could plainly observe them in time to give warning, or to turn out and avoid a collision." *Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94.

71. *Lamont v. Adams Express Co.*, 264 Pa. 17, 107 Atl. 373.

72. *Warner v. Bertholf*, 40 Cal. App. 776, 181 Pac. 808.

if it was blown, and continued walking along the road with her back to the automobile until she was struck, it was held that there was no duty imposed on her of looking or listening for the approach of the automobile.<sup>73</sup> And where it appeared that one was walking along a sidewalk across a private driveway which led into a building, it was held that he was not necessarily guilty of negligence because he failed to look back and see if an automobile was coming through the driveway.<sup>74</sup> But, where a boy nearly twelve years old sitting on the tail-board of a moving wagon facing the rear, turned around, and, facing the driver, alighted and proceeded to cross the street in a diagonal direction forward toward his left, when he was struck by an automobile approaching from his rear, it was held that he was not in the exercise of due care.<sup>75</sup> And where one in crossing a street was struck by a machine backing into him, and it appeared that the machine made an extremely loud and raucous noise in backing which should have attracted his attention, but he did not look, the jury is justified in finding him guilty of negligence.<sup>76</sup>

#### **Sec. 464. Failure to see approaching machine after looking — in general.**

Though it may be negligence *per se* for a pedestrian to start heedlessly across a street without looking in either direction to see whether vehicles may be approaching,<sup>77</sup> yet, if he actually looks, his negligence in failing to see or appreciate the danger from a motor vehicle on the street may be a question for the jury.<sup>78</sup> In other words, the sufficiency of his con-

73. *Dozier v. Woods*, 190 Ala. 279, 67 So. 283.

74. *Tuttle v. Briscoe Mfg. Co.*, 190 Mich. 22, 155 N. W. 724.

75. *Mills v. Powers*, 216 Mass. 36, 102 N. E. 912.

76. *Sheldon v. James*, 175 Cal. 474, 166 Pac. 8, 2 A. L. R. 1493.

77. Section 459.

78. *Bohm v. Dalton*, 206 Ill. App. 374; *Perkins v. Holser* (Mich.), 182 N. W. 49; *Johnson v. Brastad*, 143

Minn. 332, 173 N. W. 668; *Fittin v. Sumner*, 176 App. Div. 617, 163 N. Y. Suppl. 443. See also *Bruner v. Little*, 97 Wash. 319, 166 Pac. 1166.

#### **Automobile ahead of street car.—**

Where it appeared that the plaintiff while crossing the street was struck by the defendant's automobile, which was proceeding without lights and at negligent rate of speed, and the plaintiff testified that he saw only a street car approaching, and when on the track

duct in looking and failing to see the danger, is a question within the province of the jury.<sup>79</sup> If the accident happens in the night time, the absence of statutory or sufficient lights on the machine, may amply excuse the failure to observe its approach.<sup>80</sup> Testimony on the part of one injured that he looked for approaching vehicles before attempting to cross the street, but that he did not see an automobile until it collided with him in the street, is not inconceivable, and the credibility of the witnesses is for the jury.<sup>81</sup> But, if the collision occurs almost immediately after the plaintiff steps from the curb, the court may refuse to believe that he looked and failed to see the car, and may charge him with negligence as a matter of law.<sup>82</sup> Thus, it was held that a person who was run down by an automobile could not recover for the injuries received where he testified that before stepping upon the roadway he looked and did not see the vehicle, and he had an unobstructed view for such a distance, and was struck within such a short distance after stepping upon the roadway, that the testimony would imply that the automobile was going at an impossible

was struck by the automobile which then had come ahead of the car, it was held that the failure of the plaintiff to observe the approaching automobile was not so clearly contributory negligence as to become a question of law. *Fittin v. Sumner*, 176 App. Div. 617, 163 N. Y. Suppl. 443.

**Reason for plaintiff's opinion that he looked.**—It is, perhaps, not proper for the plaintiff to testify on direct examination as to his reason for being certain that he stopped and looked for vehicles before attempting to cross the street, the subject being more properly a subject of cross-examination, but it is not reversible error to permit the plaintiff to so testify on direct examination, where the reason was that an accident had befallen his son while crossing the street a short time before and that this was in his mind when he reached the crossing. *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876.

<sup>79.</sup> *Kaplan v. Posner*, 192 App. Div.

59, 182 N. Y. Suppl. 612; *Jones v. Wiese*, 88 Wash. 356, 153 Pac. 330. "If respondent had looked at all, or taken the slightest heed to his surroundings, the sufficiency of his look or act would have been for the jury; but, where absolutely no precaution is taken, there is nothing for the jury to consider upon this point, and the law decides against recovery." *Jones v. Wiese*, 88 Wash. 356, 153 Pac. 330.

<sup>80.</sup> *Beleveau v. S. C. Lowe Supply Co.*, 200 Mass. 237, 86 N. E. 301.

<sup>81.</sup> *Ottaway v. Gutman*, 207 Mich. 393, 174 N. W. 127; *Archer v. Skahen*, 137 Minn. 432, 163 N. W. 784; *Miller v. New York Taxicab Co.*, 120 N. Y. Suppl. 899; *Woods v. North Carolina Public Service Co.*, 174 N. Car. 697, 94 S. E. 459, 1 A. L. R. 942.

<sup>82.</sup> *O'Reilly v. Davis*, 136 N. Y. App. Div. 386, 120 N. Y. Suppl. 883; *Stephen Putney Shoe Co. v. Ormsby's Adm'r.* (Va.), 105 S. E. 563.

rate of speed, as such testimony showed that the pedestrian did not look with the care required by law.<sup>83</sup>

Where, in an action by one struck by an automobile while crossing the street, the defendant relies upon a plea of contributory negligence, and the plaintiff testified that before starting to cross the street she looked and listened to see if there were any vehicles and neither saw or heard anything that would prevent her from crossing over, and did not see the automobile which struck her nor hear any whistle, horn or unusual noise at all, an instruction that each is presumed and held by law to have seen the other if both had an unobstructed view of the street for a sufficient distance and length of time to avoid a collision by the exercise of ordinary care, was held to be erroneous, as not only was there no evidence to support it, but it was a presumption against the evidence and the law does not presume facts which are disproved by the evidence.<sup>84</sup>

**Sec. 465. Failure to see approaching machine after looking — view obstructed.**

When the view of a pedestrian about to cross a street is obstructed, it is easier to excuse his failure to see an approaching motor vehicle.<sup>85</sup> One crossing a street is not bound to anticipate that behind a wagon standing in the street is an approaching automobile which may turn past the wagon as the pedestrian crosses the street.<sup>86</sup> Thus, if a street car intervenes so that one does not see an automobile approaching on the wrong side of the street, he is not guilty of contributory negligence as a matter of law.<sup>87</sup> Where one alighting from a south bound street car passed to the rear of such car and in front of a car bound in the opposite direction, and as she

83. *O'Reilly v. Davis*, 136 App. Div. (N. Y.) 386, 120 N. Y. Suppl. 883. See also *Suga v. Haase* (Conn.), 110 Atl. 837.

84. *Hough v. Kobusch Automobile Co.*, 146 Mo. App. 58, 123 S. W. 83. See also *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892.

85. See *Kurtz v. Tourison*, 241 Pa.

St. 425, 88 Atl. 656.

Elevated railroad pillars may constitute such an obstruction as to carry the case to the jury. *Paplan v. Posner*, 192 App. Div. 59, 182 N. Y. Suppl. 612.

86. *Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262.

87. *Nickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160.



cleared the front of such car was struck by the defendant's automobile, which was driven through a narrow space between the car and the curb without sounding a horn, it was held that the jury was justified in finding that she was free from contributory negligence.<sup>88</sup>

**Sec. 466. Failure to see approaching machine after looking — weather conditions.**

Weather conditions such as a blinding snow or rain storm may under some circumstances excuse the failure of a pedestrian to see a motor vehicle until too late to avoid a collision therewith.<sup>89</sup> Thus, where a pedestrian, in crossing a street in a blinding rain storm, looked up the intersecting street but failed to see a fast approaching automobile, or to distinguish its lights from other street lights, the question of contributory negligence is properly left with the jury.<sup>90</sup> Under such circumstances, even his failure to look for an approaching vehicle might not take the case from the jury.<sup>91</sup> So, too, one is not guilty of contributory negligence as a matter of law, when, owing to the storm and to an umbrella he is carrying, he fails to see an approaching vehicle.<sup>92</sup> And where, in an action to recover for personal injuries, it appeared that the plaintiff, having assisted friends to board a street car, started to cross the street; that she looked up and down when crossing the first and second car tracks and saw nothing and was struck

88. *Sternfield v. Willison*, 174 App. Div. 842, 161 N. Y. Suppl. 472, wherein it was said: "There can be no doubt of the defendant's negligence, and his attorney, while not conceding negligence, makes but little of that point in his brief; but he does contend vigorously that the plaintiff was palpably guilty of contributory negligence. He argues stoutly that she did not look south, the direction from which the auto came. But this argument seems to be utterly devoid of force. She could not look south. The trolley cars, particularly the north-bound car, completely obstructed her

view in that direction, and after she had passed the cars, and before she could look, the auto hit her. She did look in all other directions. Of course she was not compelled to accomplish the impossible. The law has never demanded that."

89. See *Booth v. Meagher*, 224 Mass. 472, 113 N. E. 367.

90. *Bruhl v. Amderson*, 189 Ill. App. 461.

91. *Bruhl v. Amderson*, 189 Ill. App. 461.

92. *Elliott v. O'Rourke*, 40 R. I. 187, 100 Atl. 314.

by an automobile when she had nearly reached the curb, and the chauffeur testified that plaintiff ran from behind the street car in front of his machine, and that he did what he could to avoid her, but was unable to do so, while disinterested witnesses testified that the automobile was going from twenty to thirty miles an hour and made no effort to avoid the plaintiff, who was walking, and that the impact threw her ten or fifteen feet, and it appeared that it was windy with a flurry of snow, both the negligence of the chauffeur and the contributory negligence of the plaintiff were held to be for the jury.<sup>93</sup>

**Sec. 467. Avoidance of machine which has been seen — right to cross street in front of approaching vehicle.**

One is not necessarily guilty of contributory negligence, if, when about to cross a street frequented by motor vehicles, he looks for approaching machines and sees one, but believes that it is safe for him to cross the street before the car passes over the crossing.<sup>94</sup> If the pedestrians on some busy streets were prohibited from passing over when a vehicle was in view, their right to cross the street would be practically abrogated.<sup>95</sup> It is, of course, true that in certain cases a pedestrian would exercise recklessness in attempting to cross in front of an approaching car; when such a situation is presented, the court can find him guilty of negligence as a matter of law.<sup>96</sup> And, when one is starting back of a standing automobile, he is not required to assume that the machine may be backed without warning, and he is not necessarily guilty of contributory negligence in going behind the car.<sup>97</sup> Where the

93. *Baker v. Close*, 137 App. Div. (N. Y.) 529, 121 N. Y. Suppl. 729, holding that under the circumstances it could not be said that had the plaintiff looked she would have seen the automobile, so as to be guilty of contributory negligence as a matter of law.

94. *Kessler v. Washburn*, 157 Ill. App. 532; *Harker v. Gruhl*, 62 Ind. App. 177, 111 N. E. 457; *Booth v.*

*Meagher*, 224 Mass. 472, 113 N. E. 367; *O'Neill v. Everet*, 189 App. Div. 221, 179 N. Y. Suppl. 506; *Lamont v. Adams Express Co.*, 264 Pa. 17, 107 Atl. 373.

95. *Harker v. Gruhl*, 62 Ind. App. 177, 111 N. E. 457.

96. *Folwell v. Demach Motor Car Co.*, 144 La. 783, 81 So. 313.

97. *Estrom v. Neumoegen*, 126 N. Y. Suppl. 660.

plaintiff, as he was about to alight from a street car, saw an automobile about twenty feet away and immediately upon alighting he was struck by the automobile which was stopped before its front wheel had gone over him, it was held that the evidence was insufficient to establish his freedom from contributory negligence.<sup>98</sup>

**Sec. 468. Avoidance of machine which has been seen — continual observation of approaching vehicle.**

Not only may one cross a street in front of a moving vehicle without his negligence being conclusively established, but it is also held that he need not, as a matter of law constantly observe the vehicle.<sup>99</sup> Whether one is warranted, after seeing an approaching automobile a short distance away, knowing that it will cross his line of travel, in not further watching the approach thereof, may be a question on which minds may well differ, and presents a problem for the jury.<sup>1</sup> Due care may require that he look out for defects in the street, for other pedestrians, for street cars, and for other vehicles, and he should not devote all his faculties to the observation of a particular vehicle which he saw when he left the curb.<sup>2</sup> He may properly assume that the approaching automobile will not exceed a reasonable rate of speed and that care will be used to avoid injury to persons in the street.<sup>3</sup>

98. *Vilicki v. New York Transportation Co.*, 65 Misc. (N. Y.) 43, 119 N. Y. Suppl. 220.

99. *Bellinger v. Hughes*, 31 Cal. App. 464, 160 Pac. 838; *Harker v. Gruhl*, 62 Ind. App. 177, 111 N. E. 457; *Carradine v. Ford*, 195 Mo. App. 684, 187 S. W. 285; *Curro v. Barrett*, 156 N. Y. Suppl. 289. "His duty is to use his eyes, and thus protect himself from danger. . . . The law does not say how often he must look, or precisely how far, or when, or from where. If, for example, he looks as he starts to cross, and the way seems clear, he is not bound as a matter of

law to look again. The law does not even say that, because he sees a wagon approaching he must stop till it has passed. He may go forward until it is close upon him; and whether he is negligent in going forward will be a question for the jury." *Knapp v. Barrett*, 216 N. Y. 226, 110 N. E. 428.

1. *Bellinger v. Hughes*, 31 Cal. App. 464, 160 Pac. 838; *O'Neill v. Everett*, 189 App. Div. 221, 178 N. Y. Suppl. 506.

2. See *Lewis v. Wood*, 247 Pa. St. 545, 93 Atl. 605.

3. *Kessler v. Washburn*, 157 Ill. App. 532. And see section 472.

**Sec. 469. Avoidance of machine which has been seen — miscalculation of danger.**

A pedestrian may not heedlessly step in front of a moving car;<sup>4</sup> but some latitude is allowed to a pedestrian who miscalculates the danger of crossing a street in front of the machine.<sup>5</sup> His error in judgment does not preclude a recovery if the machine is approaching at an unlawful rate of speed.<sup>6</sup> Whether he is guilty of contributory negligence in assuming that he can cross in safety, is generally a question for the jury.<sup>7</sup> Thus, where it appeared that an elderly woman in broad daylight attempted to cross a street in front of a heavy motor truck then fifty feet away, it was held that her negligence was a question for the jury.<sup>8</sup> But, where it appeared that a plaintiff and two other ladies were crossing a corner diagonally, when they saw a taxicab coming and stopped to let it pass, but the plaintiff becoming nervous lost her presence of mind and broke away from her companions and attempted to pass ahead of the machine when it was close upon her, it was held that a verdict for the defendant was proper.<sup>9</sup> Where

4. *Bruce's Adm'r v. Callahan*, 185 Ky. 1, 213 S. W. 557; *Rochfeld v. Clerkin*, 98 Misc. (N. Y.) 192, 162 N. Y. Suppl. 1056; *Shott v. Korn*, 1 Ohio App. 458, 34 Ohio Circuit Rep. 260; *Todesco v. Maas*, 23 D. L. R. (Canada) 417, 8 A. L. R. 187, 7 W. W. R. 1373.

5. *Russell v. Vergason* (Conn.), 111 Atl. 625; *Rochfeld v. Clerkin*, 98 Misc. (N. Y.) 192, 162 N. Y. Suppl. 1056; *Curro v. Barrett*, 156 N. Y. Suppl. 289. See also *Gerhard v. Ford Motor Co.*, 155 Mich. 618, 119 N. W. 904, 20 L. R. A. (N. S.) 232.

6. *Kessler v. Washburn*, 157 Ill. App. 532; *Emery v. Miller*, 231 Mass. 243, 120 N. E. 654.

7. Section 487.

8. *Rothfeld v. Clerkin*, 98 Misc. (N. Y.) 192, 162 N. Y. Suppl. 1056, where in it was said: "Of course it might well have been found by a jury that the plaintiff in attempting to cross the

street, even at a regular crossing, when a motor truck, going 'fast' was approaching at a distance of only two houses, say fifty feet away, was guilty of contributory negligence as a matter of fact. But the question is whether the plaintiff was guilty of contributory negligence as a matter of law. It has been very pointedly stated by the Court of Appeals, and I think it is generally understood by the bar, that in these street crossing cases the question of the pedestrian's contributory negligence is generally one of fact. Of course there are certain extreme cases where a pedestrian steps directly in front of a vehicle and in effect runs into it, in which the court is justified in determining the question of the pedestrian's negligence as a matter of law. These cases, however, are rare."

9. *Brand v. Taxi Cab Co.*, 129 La. 781, 56 So. 885.

a boy, who was riding in a cart proceeding on a street car track, jumped from the rear end, and, seeing an approaching automobile, either walked or ran into its side, a verdict for the injuries will be set aside and a new trial granted on the ground that it was contrary to the evidence, plaintiff having failed to sustain the burden of proof that his conduct did not in any way contribute to the accident.<sup>10</sup>

**Sec. 470. Avoidance of machine which has been seen — statements of companion as to safety in crossing.**

Where, in an action for injuries to a pedestrian struck by an automobile, there was evidence that he and his companions, while on the street, took precautions against injury, evidence that just before the accident one of the companions looked back, and stated that two street cars were coming, and that he looked back a second time, and said that if they hurried they could catch the second car, was admissible as bearing on the plaintiff's case, on the jury finding that the plaintiff was justified in relying on his companions.<sup>11</sup>

**Sec. 471. Reliance on proper conduct by automobilist — exercise of due care by chauffeur.**

In the absence of anything appearing to the contrary, a traveler in attempting to cross a street has a right to assume that others using the highway will exercise a proper degree of care to avoid injuring him.<sup>12</sup> His failure to anticipate neg-

10. *Smith v. Listman*, 96 Misc. Rep. 285, 160 N. Y. Suppl. 129.

11. *Beleveau v. S. C. Lowe Supply Co.*, 200 Mass. 237, 86 N. E. 301.

12. *Connecticut*.—*Russell v. Vergason*, 111 Atl. 625.

*Indiana*.—*Cole Motor Co. v. Ludorff*, 61 Ind. App. 119, 111 N. E. 447; *Gardner v. Vance*, 63 Ind. App. 27, 113 N. E. 1006.

*Massachusetts*.—*Rogers v. Phillips*, 206 Mass. 308, 92 N. E. 327, 28 L. R. A. (N. S.) 944; *Buoniconti v. Lee*, 234 Mass. 173, 124 N. E. 791.

*Missouri*.—*Cool v. Peterson*, 189 Mo.

App. 717, 175 S. W. 244.

*New Jersey*.—*Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262.

*New York*.—*Buscher v. New York Transportation Co.*, 106 N. Y. App. Div. 493, 94 N. Y. Suppl. 798; *Caesar v. Fifth Ave. Stage Co.*, 45 Misc. 331, 90 N. Y. Suppl. 359.

*Pennsylvania*.—*Lewis v. Wood*, 247 Pa. St. 545, 93 Atl. 605; *Oelrich v. Kent*, 259 Pa. 407, 103 Atl. 109; *Mackin v. Patterson (Pa.)*, 112 Atl. 738. "It is no defense for one who injures another by his negligent act that the injured party did not anticipate

ligence on the part of the driver of a motor vehicle does not render him negligent as a matter of law.<sup>13</sup> He may assume that the driver will operate his car not faster than a reasonable rate of speed,<sup>14</sup> and that he will keep a lookout for foot travelers and have the machine under reasonable control when he reaches a crossing where pedestrians may be passing.<sup>15</sup> When one is standing in the street in a place where he has a right to be, or is walking along the highway, he can properly assume that the driver of a motor vehicle will not run him down, but will avoid contact with him.<sup>16</sup> And he may also

the wrongdoer would not observe ordinary care, the failure of which resulted in the accident. The failure to anticipate negligence which results in injury is not negligence, and will not defeat an action for the injury sustained. A party is not bound to guard against the want of ordinary care on the part of another; he has a right to presume that ordinary care will be used to protect him and his property from injury." *Lewis v. Wood*, 247 Pa. St. 545, 93 Atl. 605.

*Rhode Island*.—*Marsh v. Boyden*, 33 R. I. 519, 82 Atl. 393, 40 L. R. A. (N. S.) 582.

*Utah*.—*Ferguson v. Reynolds*, 176 Pac. 267.

*Vermont*.—*Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669. "Moreover, the way-faring man has a right to assume, nothing to the contrary appearing, that the automobile driver will obey the law. . . . And this means, when applied to the case in hand, that the plaintiff had a right to assume that the defendant or any other automobile driver would not drive 'in a careless or negligent manner.' . . . He also had the right to assume that the usual road rules would be observed, and that automobiles would not, in ordinary circumstances, take the left-hand side of the roadway." *Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669.

*Canada*.—*Toronto General Trusts Corp. v. Dunn*, 20 Manitoba (Can.) 412.

13. *McMullen v. Davenport* (Cal. App.), 186 Pac. 796; *Owens v. W. J. Burt Motor Car Co.* (Cal. App.), 186 Pac. 821; *Rolfs v. Mullins*, 179 Iowa, 1223, 162 N. W. 783; *Kaminski v. Fournier* (Mass.), 126 N. E. 279; *Papic v. Freund* (Mo. App.), 181 S. W. 1161; *Oelrich v. Kent* (Pa. St.), 103 Atl. 109. "A person lawfully in a public highway may rely upon the exercise of reasonable care by drivers of vehicles to avoid injury, and the failure to anticipate the omission of such care does not render him negligent." *Lewis v. Wood*, 247 Pa. St. 545, 93 Atl. 605.

14. Section 472.

15. *McKenna v. Lynch* (Mo.), 233 S. W. 175; *Heckman v. Cohen*, 90 N. J. L. 322, 100 Atl. 695; *Jessen v. J. L. Kesner Co.*, 159 N. Y. App. Div. 898, 144 N. Y. Suppl. 407.

16. *Wells v. Shepard*, 135 Ark. 466, 205 S. W. 806; *Regan v. Los Angeles Ice & Coal Storage Co.* (Cal. App.), 189 Pac. 474; *Gardner v. Vance*, 63 Ind. App. 27, 113 N. E. 1006; *Burns v. Oliver Whyte Co.*, 231 Mass. 519, 121 N. E. 401; *Moffatt v. Link* (Mo. App.), 229 S. W. 836; *Dervin v. Frenier* (Vt.), 100 Atl. 760; *Franey v. Seattle Taxicab Co.*, 80 Wash. 396, 141 Pac. 890; *Stephenson v. Parton*, 89 Wash. 653, 155 Pac. 147; *Yanase v. Seattle Taxicab & Transfer Co.*, 91 Wash. 415, 157 Pac. 1076.

assume that the driver of an approaching machine will give a signal of warning so that an accident may be avoided.<sup>17</sup> One crossing a street is under no legal duty to anticipate that there is an approaching automobile behind a wagon which he sees; and, even though such duty of anticipation could be imposed on the foot traveler, he is not required to assume that the automobile may attempt to pass the wagon on the left side of the street at a place where persons may be crossing the street.<sup>18</sup>

**Sec. 472. Reliance on proper conduct by automobilist — excessive speed.**

A person crossing a street may assume, when he has no information to the contrary, that the driver of a motor vehicle will not operate his machine at a speed in excess of statutory or municipal regulations or at an unreasonable speed under the circumstances, and is not necessarily guilty of contributory negligence because he relies on such assumption.<sup>19</sup> When, however, the pedestrian has knowledge that an automobile is approaching at an excessive speed, the situation is changed. He is not entitled to rely on an assumption which he knows is contrary to the actual condition, but must exercise reasonable care under the circumstances.<sup>20</sup> Where an ordinance makes it unlawful for the driver of an automobile to pass over a crossing at a greater speed than four miles an hour, a pedestrian upon a crossing is entitled to the protection afforded thereby.<sup>21</sup>

17. *Dervin v. Frenier*, 91 Vt. 398, 100 Atl. 760; *Toronto General Trusts Corp. v. Dunn*, 20 Manitoba (Canada) 412.

18. *Pool v. Brown*, 89 N. J. Law. 314, 98 Atl. 262.

19. *Park v. Orbison* (Cal. App.), 184 Pac. 428; *Cole Motor Co. v. Ludorff*, 61 Ind. App. 119, 111 N. E. 447; *Rump v. Woods*, 50 Ind. App. 347, 98

N. E. 369; *Kaminski v. Fournier* (Mass.), 126 N. E. 279; *Franey v. Seattle Taxicab Co.*, 80 Wash. 396, 141 Pac. 890. See also *McKiernan v. Lehmaier*, 85 Conn. 111, 81 Atl. 969.

20. *Rump v. Woods*, 50 Ind. App. 347, 98 N. E. 369; *Becker v. West Side Dye Works* (Wis.), 177 N. W. 907.

21. *Ludwig v. Dumas*, 72 Wash. 68, 129 Pac. 903.

**Sec. 473. Reliance on proper conduct by automobilist — obedience to law of road.**

As a general proposition, a pedestrian is not required to anticipate that other travelers will violate the law of the road.<sup>22</sup> The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and, in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.<sup>23</sup> Until appearances are to the contrary, he may rely on the assumption that vehicles will travel only on the right-hand side of the road.<sup>24</sup> When leaving the curb on one side of the street, generally speaking, he need be on the lookout for automobiles coming from but one direction; and when he passes over next to the curb on the other side of the street, he need look only in the opposite direction.<sup>25</sup> Evidence that the vehicle causing the injury was proceeding along the wrong side of the street is, therefore, admissible, not only on the theory that it tends to show negligence on the part of the driver, but also on the ground that it relevantly bears on the contributory negligence of the person injured.<sup>26</sup> A pedestrian is not required to anticipate that an automobile proceeding along behind a wagon will turn to

22. *Harris v. Johnson*, 174 Cal. 55, 161 Pac. 1155.

23. *Harris v. Johnson*, 174 Cal. 55, 161 Pac. 1155.

24. *Harris v. Johnson*, 174 Cal. 55, 161 Pac. 1155; *Park v. Orbison* (Cal. App.), 184 Pac. 428; *Lewis v. Tanner* (Cal. App.), 93 Pac. 287; *Trzetiaowski v. Evening American Pub. Co.*, 185 Ill. App. 451; *Unmacht v. Whitney* (Minn.), 178 N. W. 886; *Hall v. Dilworth*, 94 Misc. (N. Y.) 240, 157 N. Y. Suppl. 1091; *Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669; *Mickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160. See also *Davis v. Breuner Co.*, 167 Cal. 683, 140 Pac. 586; *New York Transp. Co. v. Garside*, 157 Fed. 521, 85 C. C. A. 285; *Benoit v. Miller* (R. I.), 67

Atl. 87. "Plaintiff was not bound to anticipate a car or other vehicle coming south on the left-hand side of the street. There are certain rules or laws of the road, the observance of which or reliance upon become instinctive. The care of a pedestrian, situate as plaintiff was, would be to look to her right for cars or vehicles, relying upon the fact that traffic upon that side of the street would be from that direction." *Mickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160.

25. *Lewis v. Tanner* (Cal. App.), 193 Pac. 287; *Holdman v. Witmer*, 166 Iowa, 406, 147 N. W. 926; *Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669.

26. *Devine v. Ward Baking Co.*, 188 Ill. App. 588.



the left to pass such wagon at a place where foot travelers may be crossing the street,<sup>27</sup> or that two passing machines will be close together in violation of a statute requiring vehicles passing in opposite directions to give as nearly as possible one-half of the road.<sup>28</sup> A pedestrian is not entitled to rely on obedience by a motorist to a traffic signal when it is apparent that the motorist is not going to obey the signal.<sup>29</sup>

**Sec. 474. Reliance on proper conduct by automobilist — place reserved for pedestrian.**

One who is standing on the sidewalk or other place especially reserved for the use of foot travelers, may properly assume that he will not be struck by a vehicle.<sup>30</sup> A pedestrian on a sidewalk has a right to assume that the sidewalk is safe from automobiles crossing it, although he has impaired sight and hearing.<sup>31</sup> When one has reached a sidewalk, he has every reason to suppose, as a reasonably prudent person, that he has secured a place free from danger from contact with an automobile.<sup>32</sup> So, too, when one is standing in a "safety zone," he has every reason to believe that he will not be struck by a motor vehicle, and he may rely upon the apparent safety of such a place.<sup>33</sup>

**Sec. 475. Reliance on proper conduct by automobilist — person passing on or off street car.**

It is the duty of the operator of a motor vehicle, when passing a street car, to anticipate that persons will be passing on and off the car; and a passenger alighting from the car or boarding it has the right to assume that the operator will

27. *Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262.

28. *Off v. Crump*, 40 Cal. App. 173, 180 Pac. 360.

29. *O'Brien v. Bieling* (Pa.), 110 Atl. 89.

30. See *Young v. Bacon* (Mo. App.), 183 S. W. 1079. See also *Reames v. Heymanson*, 186 Wash. 325, 186 Pac. 325.

31. *Crawley v. Jermain* 218 Ill. App. 51.

32. *Brown v. Des Moines Steam Bottling Works*, 174 Iowa, 715, 156 N. W. 829.

33. *Crombie v. O'Brian*, 178 App. Div. 807, 165 N. Y. Suppl. 858. See also *Church v. Larned*, 206 Mich. 77, 172 N. W. 551.

exercise care to avoid injury to him.<sup>34</sup> The passenger is, therefore, not generally required to look for approaching motor vehicles, but the drivers thereof should exercise caution to avoid striking the passenger.<sup>35</sup> One getting off a street car may direct his attention toward alighting with safety and may watch his step rather than direct his attention to vehicles along the street.<sup>36</sup> Thus, it is generally held that where a street railway passenger is struck by an automobile while he is getting on or off the car or while he is crossing the street to or from the curb, his contributory neg-

**34. United States.**—New York Transp. Co. v. Garside, 157 Fed. 521, 85 C. C. A. 285.

**Arkansas.**—Minor v. Mapes, 102 Ark. 351, 144 S. W. 219.

**Connecticut.**—Naylor v. Haviland, 88 Conn. 256, 91 Atl. 186.

**Illinois.**—Kerchner v. Davis, 183 Ill. App. 600; Horn v. Berg, 210 Ill. App. 238.

**Massachusetts.**—Harnett v. Tripp, 231 Mass. 382, 121 N. E. 17.

**Minnesota.**—Kling v. Thompson-McDonald Lumber Co., 127 Minn. 468, 149 N. W. 947; Zimmerman v. Mednikoff, 165 Minn. 333, 162 N. W. 349.

**Missouri.**—Bongner v. Ziegenheim, 165 Mo. App. 328, 147 S. W. 182.

**New Jersey.**—Galenter v. Peti, 114 Atl. 408.

**New York.**—Brewster v. Barker, 129 N. Y. App. Div. 907, 113 N. Y. Suppl. 1026; Kalb v. Redwood, 147 N. Y. App. Div. 77, 131 N. Y. Suppl. 789; Cowell v. Saperston, 149 App. Div. 373, 134 N. Y. Suppl. 284; Caesar v. Fifth Ave. Stage Co., 45 Misc. 331, 90 N. Y. Suppl. 359.

**Rhode Island.**—Marsh v. Boyden, 33 R. I. 519, 82 Atl. 393.

**Texas.**—Ward v. Cathey (Civ. App.), 210 S. W. 289.

**Washington.**—Yanase v. Seattle Taxicab & Transfer Co., 91 Wash. 415, 157 Pac. 1076.

**Wisconsin.**—Klokow v. Harbaugh, 166 Wis. 262, 164 N. W. 999.

**Moving street car.**—There is, however, no duty on the driver of an automobile to anticipate that persons may jump from a moving street car, and such a person cannot assume that the driver will have his car under such control as to avoid an accident under the circumstances. Brown v. Brashers, 22 Cal. App. 135, 133 Pac. 505; Starr v. Schenck, 25 Mont. L. Rep. (Pa.) 18. See also Maryland Ice Cream Co. v. Woodburn, 133 Md. 295, 105 Atl. 269.

**35. McGourty v. De Marco.** 200 Mass. 57, 85 N. E. 891; Liechecht v. Crandall, 110 Minn. 454, 126 N. W. 69.

**36.** "Besides looking in the direction of the automobile, the plaintiff had other important duties to perform to protect himself from danger. While descending the steps he had necessarily to give his attention to them and to the place on the ground on which he was to alight. An equally imperative duty as he was leaving the car and moving across the street required the plaintiff to look to the rear of the car for approaching automobiles and other vehicles. Had he disregarded this duty and been struck by a horse-drawn vehicle and injured, his negligence would have prevented a recovery." Lewis v. Wood, 247 Pa. St. 545, 93 Atl. 605. And see Lithecht v. Crandall, 110 Minn. 454, 126 N. W. 69, wherein it was said: "While it is true that he did not, as he stepped from the car,

ligence is a question for the jury.<sup>37</sup> The passenger is, of course, required to exercise reasonable care under the circumstances.<sup>38</sup> And the passenger may pass around the rear of the street car and attempt to cross the street on the left side of the car, and he may assume that automobilists will exercise reasonable care to avoid a collision with him.<sup>39</sup> His position in such a case is very strong when the automobile which struck him was proceeding along the wrong side of the street.<sup>40</sup> And, particularly, when it is provided by statute that automobiles shall not pass a street car until it has started and the passengers have crossed the street, the passengers have a right to assume that chauffeurs will obey the statute; and contributory negligences will not be charged against one injured merely because he has relied on obedience to the statute.<sup>41</sup> Even if a passenger before alighting sees an automo-

tor in the direction from which the automobile was approaching, following the car, this alone is not sufficient to charge him, as a matter of law, with contributory negligence. His attention at the moment was directed toward alighting from the car in safety, and he was not required to anticipate the negligence of defendant in driving his automobile at a reckless rate of speed upon him."

37. *Mann v. Scott*, 180 Cal. 550, 182 Pac. 281; *Naylor v. Haviland*, 88 Conn. 256, 91 Atl. 186; *Rasmussen v. Drake*, 185 Ill. App. 526; *Walmer-Roberts v. Hennessey* (Iowa), 181 N. W. 798; *Metzler v. Gould* (Me.), 110 Atl. 686; *Hefferon v. Reeves*, 140 Minn. 505, 167 N. W. 423; *Joyce v. Smith* (Pa.), 112 Atl. 549; *Michalsky v. Putney*, 51 Pa. Super. Ct. 163.

38. *Becker v. West Side Dye Works* (Wis.), 177 N. W. 907.

39. *Hall v. Dilworth*, 94 Misc. (N. Y.) 240, 157 N. Y. Suppl. 1091. See also *Sternfeld v. Willison*, 174 N. Y. App. Div. 842, 161 N. Y. Suppl. 472.

**Duty to look for machine after passing in front of street car.**—Where one could have easily seen an approaching

motor vehicle after passing in front of a standing street car, but he failed to look for approaching vehicles, it was held that he was guilty of negligence. *Di Stephano v. Smith* (R. I.), 102 Atl. 817.

40. *Link v. Skeeles*, 207 Ill. App. 48; *Delohery v. Quinlan*, 210 Ill. App. 321; *Hall v. Dilworth*, 94 Misc. (N. Y.) 240, 157 N. Y. Suppl. 1091.

41. *Maun v. Scott*, 180 (Cal.) 550, 182 Pac. 281; *Zimmerman v. Mednikoff*, 165 Minn. 333, 162 N. W. 349; *Lewis v. Wood*, 247 Pa. St. 545, 93 Atl. 605; *Frankel v. Norris*, 252 Pa. 14, 97 Atl. 104. "Of course, if he saw the machine approaching at a high rate of speed, he was not justified in stopping in front of it, but, on the other hand, if he was looking in the opposite direction for an approaching vehicle, as he was required to do, he could act on the assumption that the driver of the automobile would obey the law by stopping until the street car was again in motion, and he would not be negligent in proceeding across the street." *Lewis v. Wood*, 247 Pa. St. 545, 93 Atl. 605.

bile approaching, he may assume in such a case that it will obey the statute and stop before passing the street car.<sup>42</sup>

Where a street car conductor testified that he stepped off the front end of his car while it was standing in the street for the purpose of going to the rear end thereof and that as he stepped off, he was struck by an automobile proceeding about three feet from the track at a rate of from three to five miles an hour, although there was a clear space of from twelve to fifteen feet between the track and the curb, it was held that he was entitled to rely on the presumption that the drivers of vehicles would exercise reasonable care to avoid causing injury to persons in the street, and that his failure to anticipate the omission of such care did not render him negligent as a matter of law.<sup>43</sup> And, in an action by a motor-man against the owner of an automobile to recover damages for personal injuries, the questions of defendant's negligence and the plaintiff's contributory negligence were held to be for the jury, where the evidence tended to show that the plaintiff alighted from his car, and while it was not in motion looked up and down the street, then passed behind the car to cross to the other side of the street and was immediately struck on the leg by defendant's automobile, which was being driven at a high rate of speed, within a few inches of the side

42. *Lewis v. Wood*, 247 Pa. St. 545, 93 Atl. 605.

43. *Caesar v. Fifth Avenue Coach Co.*, 45 Misc. (N. Y.) 331, 90 N. Y. Suppl. 359, wherein it was said: "The question of the plaintiff's contributory negligence was also properly left to the jury. Assuming that the car was at a standstill, as the jury could very well find from the evidence, the operator of the automobile could reasonably apprehend the departure of persons from the car. The plaintiff was at all times engaged in the performance of his duty and this required him to go from the forward end of the car to the rear. He chose the street as a means. look-

ing in the direction in which his car was to proceed, as any person would ordinarily do under the same circumstances, and so did not observe the automobile. According to the statements of his witnesses the automobile was then from twelve to fifteen feet distant to the north, and not breast of the car, with the clear space, already alluded, to west of the track. He had a right to rely upon the exercise of reasonable care of drivers of vehicles, to avoid causing injury to persons in the street, and his failure to anticipate the omission of such care did not render him negligent."

of the car, and in a narrow space between the car and the curb.<sup>44</sup>

But where a passenger alights from a street car, it is his duty to look where he is going, and not to rush blindly into danger. Such a person is not relieved from the charge of contributory negligence if, without looking, he takes two steps from the car and then suddenly, seeing an automobile, stops and is run down and injured.<sup>45</sup>

### Sec. 476. Stopping in street.

One is not necessarily guilty of contributory negligence because he is standing in the street when he is struck by a motor vehicle. When one is lawfully standing in the street, and no obstacle intervenes between such person and the driver of an approaching automobile, the duty is imposed on the driver to avoid a collision and not run down the foot traveler.<sup>46</sup> A person has the right to use the street for the purpose of boarding a street car,<sup>47</sup> or waiting for a train;<sup>48</sup> and his conduct in standing in the street for such a purpose, is not negligence *per se*.<sup>49</sup> While such a person cannot be entirely oblivious to his surroundings, he is not necessarily guilty of negligence because he does not look or see or hear the approaching machine.<sup>50</sup> Nor is one negligent in stopping in the street to permit a street car to pass, for the law does not require one to return to the sidewalk under such circumstances.<sup>51</sup>

44. *Dugan v. Lyon*, 41 Pa. Super. Ct. 52.

45. *Kauffman v. Nelson*, 225 Pa. St. 174, 73 Atl. 1105.

46. *Kathmeyer v. Mehl* (N. J.), 60 Atl. 40; *Lewis v. Seattle Taxicab Co.*, 72 Wash. 320, 130 Pac. 341; *Stephenson v. Parton*, 89 Wash. 653, 155 Pac. 147; *Ouellette v. Superior Motor & M. Works*, 157 Wis. 531, 147 N. W. 1014. And see section 439.

47. *Wellington v. Reynolds*, 177 Ind. 549, 97 N. E. 155.

48. *Fong Lin v. Robert* (Cal. App.), 195 Pac. 437.

49. *Ouellette v. Superior Motor & M.*

*Works*, 157 Wis. 531, 147 N. W. 1014.

50. *Walmer-Roberts v. Hennessey* (Iowa), 181 N. W. 798; *Arseneau v. Sweet*, 106 Minn. 257, 119 N. W. 46.

**Violation of ordinance.**—Where a person was struck while he was gathering kindling wood which had been dumped near the curb, it was held that he was barred from recovery on account of his violation of an ordinance requiring the display of a light over such a pile of wood. *Holst v. Cootware*, 169 Wis. 176, 170 N. W. 939.

51. *Arnaz v. Forbes* (Cal. App.), 197 Pac. 364; *Melville v. Rollwagen*, 171 Ky. 607, 188 S. W. 638.

He may, however, be guilty of negligence where he starts back to the curb and does not look for approaching vehicles.<sup>52</sup> So, too, a pedestrian is not negligent *per se* because he stands in the road conversing with the driver of a team,<sup>53</sup> or because he is standing beside a wagon of watermelons with the intention of purchasing one.<sup>54</sup> And, in case of rain, an automobilist may stop his machine and get out to put up the top; and, if he is struck by another machine while thus working in the road, and it appears that there is plenty of room for the latter to avoid the injury, contributory negligence is not to be charged as a matter of law.<sup>55</sup> Similarly, if an automobilist or his guest gets out of his machine because of a punctured tire or other difficulty, while standing in the road by the machine, he is not required to anticipate and be on his guard to avoid injury from another machine.<sup>56</sup> When one standing in the street heedlessly steps back in front of an approaching vehicle, he may be guilty of negligence as a matter of law;<sup>57</sup> but, when a collision results because both the pedestrian and the operator of the machine changed their course in several different ways to avoid the impending collision, the foot traveler is not necessarily guilty of negligence.<sup>58</sup> Where one crossing a street in a northwesterly direction toward an alley observed an automobile approaching from the west, and on reaching the curb he noticed that the automobile was about to turn into the alley, and instead of

52. *Todesco v. Maas*, 23 D. L. R. (Canada) 417, 8 A. L. R. 187, 7 W. W. R. 1373.

53. *Kathmeyer v. Mehl* (N. J.), 60 Atl. 40, wherein the court expressed its views as follows: "Certainly he had no reason to suppose that, merely because he was standing in the roadway, he would be run down by the recklessness of the driver of an automobile. He was lawfully there, and any person using the highway was bound to take notice of him, and to use care not to injure him, and the plaintiff had a right to assume that this would be done."

54. *Wells v. Shepard*, 135 Ark. 466, 205 S. W. 806.

55. *Deitchler v. Ball*, 99 Wash. 483, 170 Pac. 123.

56. *Coffman v. Singh* (Cal. App.), 193 Pac. 259; *Hanser v. Youngs* (Mich.), 180 N. W. 409; *Walder v. Stone* (Mo. App.), 223 S. W. 136; *Humes v. Schaller*, 39 R. I. 519, 99 Atl. 55.

57. *Stephenson v. Parton*, 89 Wash. 653, 155 Pac. 147.

58. *Heartsell v. Bellows*, 184 Mo. App. 420, 171 S. W. 7; *Coughlin v. Weeks*, 75 Wash. 568, 135 Pac. 649. And see section 421.

continuing his course in a northwesterly direction across the alley he stepped to a point on the sidewalk near a fence on the property line about two and one-half feet east of the alley curb, where he was struck by the machine, it was held that the fact that he could have avoided injury by stepping in another direction or by having continued in his original course did not render him guilty of contributory negligence.<sup>59</sup> And where one is sitting in a chair in the street near the curb and does not move when he sees an approaching car, he may be charged with negligence.<sup>60</sup>

#### **Sec. 477. Watching auto race.**

Where a spectator who was watching an auto race on fair grounds was injured by a car leaving the track and bursting through a wooden guard fence, it was held that he was not guilty of negligence in standing by the fence surrounding the track, where that was the only place, other than the grandstand, from which the races could be viewed.<sup>61</sup> And one attempting to cross a race track on the grounds may have his negligence submitted to the jury.<sup>62</sup>

#### **Sec. 478. Children — in general.**

A motorist should bear in mind the lack of judgment of children of immature years and is bound to operate his machine in accordance therewith.<sup>63</sup> And, on the question of their contributory negligence, judgment is not passed on their conduct with the same strictness as in the case of adults in the streets.<sup>64</sup> Children are not regarded as possessing the same mental capacity to appreciate the dangers incident to the use of the public thoroughfares as those of mature age. What is required of a child is that it shall exercise the same degree of care as would be exercised by a reasonably careful child of

59. *Kuchler v. Stafford*, 185 Ill. App. 199.

60. *Scott v. Dounson*, 148 La. —, 86 So. 821.

61. *Arnold v. State*, 163 N. Y. App. Div. 253, 148 N. Y. Suppl. 479.

62. *Mankin v. Bartley*, 266 Fed. 466.

63. Section 418.

64. *Indian Refining Co. v. Marerum* (Ala.), 88 So. 445; *Burlie v. Stephens* (Wash.), 193 Pac. 684; *Quinn v. Ross Motor Car Co.*, 157 Wis. 543, 147 N. W. 100.

the same age and intelligence.<sup>65</sup> The degree of care required is such as is commensurate with his years and intelligence.<sup>66</sup> This requirement may, of course, result in a finding that a child in the street was guilty of contributory negligence which contributed to its injury.<sup>67</sup> But generally the negligence of the child is a question for the jury.<sup>68</sup> Thus, whether a child six years old playing in the street is guilty of contributory negligence presents a question within the province of the jury.<sup>69</sup> And, it has been held that whether contributory negli-

**65. California.**—Todd v. Orcutt (Cal. App.), 183 Pac. 963.

**Connecticut.**—Kisbalaski v. Sullivan, 108 Atl. 538; Schroyer v. Bishop & Lyons, 92 Conn. 677, 104 Atl. 349; Streetman v. Bussey (Ga. App.), 104 S. E. 517.

**Kansas.**—Routh v. Weakley, 97 Kan. 74, 154 Pac. 218.

**Kentucky.**—Collet v. Standard Oil Co., 186 Ky. 142, 216 S. W. 356.

**Minnesota.**—Roberts v. Ring, 143 Minn. 151, 173 N. W. 437.

**New York.**—Jacobs v. Koehler, S. G. Co., 208 N. Y. 416, 102 N. E. 519; Gross v. Foster, 134 N. Y. App. Div. 243, 118 N. Y. Suppl. 889.

**Oregon.**—Ahonen v. Hryszko, 90 Ore. 451, 175 Pac. 616.

**Pennsylvania.**—Edelman v. Connell, 257 Pa. 317, 101 Atl. 653.

**Utah.**—Herald v. Smith, 190 Pac. 932.

**Wisconsin.**—Quinn v. Ross Motor Car Co., 157 Wis. 543, 147 N. E. 100.

**66. Miller v. Flash Chemical Co.**, 230 Mass. 419, 119 N. E. 702.

**67. Illinois.**—Carlin v. Clark, 172 Ill. App. 239.

**Maine.**—Moran v. Smith, 114 Me. 55, 95 Atl. 272.

**Massachusetts.**—Mills v. Powers, 216 Mass. 36, 102 N. E. 912.

**New York.**—Paul v. Clark, 161 App. Div. 456, 145 N. Y. Suppl. 985; Marius v. Motor Delivery Co., 146 App. Div.

608, 131 N. Y. Suppl. 357.

**Rhode Island.**—Curley v. Baldwin, 90 Atl. 1.

**Washington.**—Daugherty v. Metropolitan Motor Car Co., 85 Wash. 105, 147 Pac. 655.

**68. Alabama.**—Reaves v. Maybank, 193 Ala. 614, 69 So. 137.

**Connecticut.**—Lynch v. Shearer, 83 Conn. 73, 75 Atl. 88; Duff v. Husted, 111 Atl. 186.

**Illinois.**—Krug v. Walldren Express & Van Co., 214 Ill. App. 18.

**Kansas.**—Routh v. Weakley, 97 Kan. 74, 154 Pac. 218.

**Kentucky.**—Akers v. Fulkerson, 153 Ky. 228, 154 S. W. 1101.

**Massachusetts.**—Rasmussen v. Whipple, 211 Mass. 546, 98 N. E. 592; Patrick v. Deziel, 223 Mass. 505, 112 N. E. 223; Cowles v. Springfield Gaslight Co., 234 Mass. 421, 125 N. E. 589.

**New York.**—Gross v. Foster, 134 N. Y. App. Div. 243, 118 N. Y. Suppl. 889; Bohringer v. Campbell, 154 N. Y. App. Div. 879, 137 N. Y. Suppl. 241.

**Vermont.**—Dervin v. Frenier, 91 Vt. 398, 100 Atl. 760.

**Washington.**—Bruner v. Little, 97 Wash. 319, 166 Pac. 1166.

**69. Meserve v. Libby**, 115 Me. 282, 98 Atl. 754; Thies v. Thomas, 77 N. Y. Suppl. 276. See also Barger v. Bissell, 188 Mich. 366, 154 N. W. 107.



gence can be attributed to a child eleven years old, is a jury question.<sup>70</sup>

**Sec. 479. Children — application of rules.**

A child thirteen years of age who runs across a public street without looking for any vehicle which might be coming has been held to be guilty of contributory negligence precluding recovery for injuries received by being run down by an automobile,<sup>71</sup> as has also a child of eleven who while playing in the street suddenly turned and darted in front of an automobile.<sup>72</sup> So, too, where a child nine years old was playing in the street and having a good view in both directions started across the street passing from behind a wagon in the path of an automobile, it was held that he was negligent.<sup>73</sup> And where a child eight years of age left a place of safety and started to run across the street in front of an approaching automobile, which struck him, it was held that he was guilty of contributory negligence precluding a recovery.<sup>74</sup> Similarly, where a child, four years of age, accompanied by his sister ran from her into the street where he was struck by an automobile, the driver was held not to be negligent, it appearing that he made every effort to stop the car when he saw the act of the child.<sup>75</sup> Likewise, where a boy nearly twelve years old sitting on the tail board of a moving wagon facing the rear turns around and facing the driver alighted from the wagon and proceeded to cross the street in a diagonal direction forward toward his left, when he was struck by an automobile approaching from the rear, it was held that he was not in the exercise of due care.<sup>76</sup> In another case, where there was a large crowd gathered around a patrol wagon in a street and a boy hastening to the scene was struck as he had

70. *Rule v. Claar Transfer & Storage Co.*, 102 Neb. 4, 165 N. W. 883.

71. *Zoltovski v. Gzella*, 159 Mich. 620, 124 N. W. 527. 26 L. R. A. (N. S.) 435.

72. *Hargrave v. Hart*, 9 Dom. Law Rep. (Canada) 521.

73. *Levesque v. Dumont*, 116 Me.

25, 99 Atl. 719.

74. *Moran v. Smith*, 114 Me. 55, 95 Atl. 272.

75. *Paul v. Clark*, 161 N. Y. App. Div. 456, 145 N. Y. Suppl. 985.

76. *Mills v. Powers*, 216 Mass. 36, 102 N. E. 912.

stepped about three or four feet from the curb by an automobile going in the same direction but on the wrong side of the street, the court declared that had the defendant been duly observant he would have noticed that the course of the boy was convergent with his own; that there was no question of contributory negligence, and that even if there was contributory negligence the defendant would be responsible under the last clear chance doctrine, for had he been looking, as he was legally bound to be doing, he would have seen the boy and seen that he was unaware of the danger into which he was going.<sup>77</sup>

Where it appeared from the evidence that the automobile was on the proper side of the street, in the middle of the block, proceeding at a moderate rate; that the boy must have seen it if he had looked; that the roadway was clear in front of it; that the boy, interested in catching the ball, suddenly ran from the sidewalk on the south side of the street, where he was in a place of safety, immediately in front of the machine at a distance variously stated from four to twelve feet; that the automobile was stopped so that its wheels skidded and only proceeded five feet beyond the body of the boy, the court declared that it was unable to find any negligence on the part of the defendant, but did find contributory negligence on the part of the deceased.<sup>78</sup>

If an automobile comes upon a boy in such a way as to produce terror, and his fear causes an error of judgment by which he runs in front of the automobile, he is not guilty of contributory negligence.<sup>79</sup> In an action for the death of a boy run over by a motor car, the fact that the accident did not happen at a street crossing, but at a point between blocks, may be considered by the jury on the issue of negligence.<sup>80</sup> As bearing upon the question of the negligence of the driver of an automobile evidence is also properly admissible that

77. *Burvant v. Wolfe*, 126 La. 787, 52 So. 1025, 29 L. R. A. (N. S.) 677.

78. *Jordan v. American Sight-Seeing Coach Co.*, 129 N. Y. App. Div. 313, 113 N. Y. Suppl. 786.

79. *Thies v. Thomas*, 77 N. Y. Suppl. 276.

80. *Thies v. Thomas*, 77 N. Y. Suppl. 276.

there were a number of children in the street and that the machine approached them at a "very fast" rate.<sup>81</sup>

Where the plaintiff's evidence tended to show that his intestate, a boy eleven years old, started to run across the street, without looking in either direction; that he was struck and fatally injured by an automobile, running at an excessive speed, on the wrong side of the road, and that no signal had been sounded since it passed a point four hundred feet away, it was held that the jury were entitled to determine whether the boy exercised such care as could be reasonably expected of one of his age, judgment and experience.<sup>82</sup> But it has been held improper to instruct the jury, in an action for an injury to a boy seven years of age, that it is a question for them to settle "whether or not, having seen the boy as they say they did seventy-five feet away, it was not their duty to decrease the speed of the machine so as to have it under such reasonable control as would enable them to stop, if necessary, in order not to run against the boy, even if the boy was acting in the most careless way possible and running in front of the machine."<sup>83</sup> As to this charge it was said: "This instruction eliminated all question of contributory negligence on the part of the plaintiff, and in effect charged the jury that the machine must be under such control that the defendant could immediately stop it if the plaintiff, by the most careless act possible, heedlessly came in contact with the machine. Under the charge, if the driver saw the boy standing motionless in the road, and not within the line of the course he was following looking directly at him as he approached, he would be liable for the injuries caused by striking plaintiff, even if he suddenly and in the most careless manner ran in front of the machine as it came near him. The instruction amounted to a direction of a verdict for the plaintiff, because the evidence was conclusive that the defendant did not have such control of the machine as to stop it and prevent a collision, if the boy was acting in the most careless manner possible."<sup>84</sup>

81. *Cedar Creek Store Co. v. Steadham*, 187 Ala. 622, 65 So. 984.

82. *Lynch v. Shearer*, 83 Conn. 73, 75 Atl. 88.

83. *Verdon v. Crescent Automobile Co.*, 80 N. J. L. 199, 76 Atl. 346.

84. *Per Bergen, J.*

**Sec. 480. Children — children non sui juris.**

Children of very tender years, such as in law are considered *non sui juris*, are not chargeable with contributory negligence from their own conduct;<sup>85</sup> but in their cases, the negligence of parents or of those having guardianship is imputed to them.<sup>86</sup> But the mere fact that a six year old child was playing in the street is not *per se* negligence on the part of its parents, but a question for the jury is presented.<sup>87</sup> Nor are the parents of a school child guilty of any negligence in permitting it to go to school unattended.<sup>88</sup> Negligence may, however, be charged against a parent permitting a child of tender years to cross a street unaccompanied.<sup>89</sup> But, it is not necessarily contributory negligence on the part of parents of a child over eight years old who permit it to cross a street unattended.<sup>90</sup> The question of negligence in such cases necessarily depends upon the amount of traffic, the obstructions to the view, and

**85. Alabama.**—Hood & Wheeler Furniture Co. v. Royal (Ala. App.), 76 So. 965.

**Connecticut.**—Duff v. Husted, 111 Atl. 186.

**Illinois.**—Smith v. Tappan, 208 Ill. App. 433.

**Indiana.**—J. F. Darmondy Co. v. Reed, 111 N. E. 317.

**Michigan.**—Beno v. Kloka, 178 N. W. 646.

**New York.**—Jacobs v. Koehler S. G. Co., 208 N. Y. 416, 102 N. E. 519.

**Oregon.**—Ahonen v. Hryszko, 90 Oreg. 451, 175 Pac. 616.

**South Carolina.**—King v. Holiday, 108 S. E. 186.

**Nine years old.**—It is a question for the jury to determine whether a child between nine and ten years of age is *sui juris*. Gunsburger v. Kristeller, 189 App. Div. 82, 179 N. Y. Suppl. 506.

**86. Miller v. Flash Chemical Co.**, 230 Mass. 419, 119 N. E. 702; Sullivan v. Chadwick. 127 N. E. 632.

**87. Thies v. Thomas** 77 N. Y. Suppl. 276. "That the deceased was *sui juris* is clear, but that an infant wherever

he becomes *sui juris* is required to exercise the same degree of caution as an adult is not the law of this State.

. . . We think the rules governing the contributory negligence of infants are very well settled by the decisions of this court, though these rules do not obtain in many other jurisdictions. An infant may be of such tender years as to be incapable of personal negligence. At such age the infant is termed *non sui juris*, but if not responsible for its own negligence, the negligence of its parents or guardians in suffering it to incur danger may be imputed to it. This is what is called the doctrine of imputed negligence." Jacobs v. Koehler S. G. Co., 208 N. Y. 416, 102 N. E. 519.

**88. Tripp v. Taft**, 219 Mass. 81, 106 N. E. 578.

**89. Kuehne v. Brown**. 257 Pa. 37. 101 Atl. 77. Compare Miller v. Flash Chemical Co., 230 Mass. 419, 119 N. E. 702.

**90. Bruner v. Little**, 97 Wash. 319, 166 Pac. 1166.

other surrounding circumstances, as well as the age and intelligence of the child.<sup>91</sup> The question is generally for the jury.<sup>92</sup> When a child is too young to have any intelligence or discretion about taking care of itself in a public street, and when it has carelessly been allowed to go there unattended, still while upon the street it may have done nothing which would be deemed dangerous or lacking in due care, provided its movements had been directed by an adult person of reasonable and ordinary prudence in charge of it, and yet it may have been hurt. Under such circumstances, it may recover damages for the injury.<sup>93</sup>

### Sec. 481. Persons under disability.

The fact that a pedestrian is under some disability is considered on the question whether he has acted with the degree of care required by the law. A blind person is entitled to use the streets and is not guilty of negligence in so doing, the law requiring him, however, to use ordinary care under the circumstances.<sup>94</sup> And a similar situation exists in the case of a person who is deaf.<sup>95</sup> Likewise a beggar on his crutches has the right to use the streets, being required to exercise reasonable care under the circumstances for his safety.<sup>96</sup> So the fact that a pedestrian was intoxicated at the time of the injury may be considered as bearing both upon the question of whether he was exercising the required care at that time and upon the degree of care exercised by the driver of the automobile.<sup>97</sup> One with impaired sight and hearing who,

91. Six years old.—It is not necessarily negligent for the parents of a child to permit it to cross a street on an errand, where the locality was one in which there was little traffic except by pedestrians, and the child was accustomed to cross the street on its way to school. *Yeager v. Gately & Fitzgerald, Inc.*, 262 Pa. 466, 106 Pa. 76.

92. *Hughey v. Lennox* (Ark.), 219 S. W. 323; *Arkin v. Page*, 212 Ill. App. 282.

93. *Wiswell v. Doyle*, 160 Mass. 42, 35 N. E. 107, 39 Am. St. Rep. 451;

*Sullivan v. Chadwick* (Mass.), 127 N. E. 632.

94. *McLaughlin v. Griffin*, 155 Iowa. 302, 135 N. W. 1107. See also *Hefferon v. Reeves* (Minn.), 167 N. W. 423.

95. *Furtado v. Bird*, 26 Colo. App. 153, 146 Pac. 58.

96. *Millsaps v. Brogdon*, 97 Ark. 469, 134 S. W. 632.

97. *Griffen v. Wood*, 93 Conn. 99, 103 Atl. 354; *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44; *Herzig v. Sandberg* (Mont.), 172 Pac. 132.

while walking along the sidewalk, is struck by a machine backing from a private roadway may recover although the driver sounded his horn.<sup>98</sup>

### Sec. 482. Workmen in street — in general.

Laborers whose employment requires that they work in the streets are not considered in the same light as pedestrians.<sup>99</sup> The latter are not continuously in the street and their attention is devoted to the safe passage along the highway, while the attention of street laborers must be, to a considerable extent, at least, devoted to their tasks. There can be no duty imposed on a workman to be constantly on the lookout for motor vehicles;<sup>1</sup> on the contrary it is the duty of drivers of vehicles to observe the street laborers and to avoid contact with them.<sup>2</sup> It is not negligence as a matter of law for a workman to keep his eyes on his work and to fail to look and listen for approaching vehicles, if he remains in one spot.<sup>3</sup> And a laborer may properly assume that the automobilist will not be guilty of negligence in running him down without warning.<sup>4</sup> Thus, where a street laborer is struck by a machine, he cannot generally be found guilty of contributory negligence as a matter of law, but at least a question for the jury is presented.<sup>5</sup> The rule as to the reciprocal rights and duties of persons driving vehicles and of laborers on the highway has been stated as follows: "Persons riding or driving are bound to exercise reasonable care to see and avoid injuring persons who are at work in the streets, as well as pedestrians.

98. *Crawley v. Jermain*, 218 Ill. App. 51.

99. *Ceco'a v. 44 Cigar Co.*, 253 Pa. St. 623. 98 Atl. 775.

1. *Dube v. Keogh Storage Co.* (Mass.), 128 N. E. 782; *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519.

2. Section 422.

3. *Nehring v. Charles M. Monroe Stationery Co.* (Mo. App.), 191 S. W. 1054.

4. *Dube v. Keogh Storage Co.* (Mass.), 128 N. E. 782; *Nehring v.*

*Charles M. Monroe Stationery Co.* (Mo. App.), 191 S. W. 1054.

5. *King v. Grien*, 7 Cal. App. 473. 94 Pac. 777; *Carneghi v. Gerlach*, 208 Ill. App. 340; *Nehring v. Charles M. Monroe Stationery Co.* (Mo. App.). 191 S. W. 1054; *Cecola v. 44 Cigar Co.*, 253 Pa. St. 623. 98 Atl. 775; *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519; *Morrison v. Conley Taxicab Co.*, 94 Wash. 436, 162 Pac. 365. See also *Saper v. Baker*, 91 N. J. L. 713, 104 Atl. 26.

And the laborer is not bound to neglect his occupation, in order to avoid injury from the want of ordinary care on the part of drivers of vehicles. But he cannot recover if actually guilty of contributory negligence."<sup>6</sup> And one working on the floor of a way in a railroad station stands in practically the same legal situation as one working on a public highway.<sup>7</sup>

**Sec. 483. Workmen in street — violation of law by workman.**

The fact that the plaintiff in an action for negligence has himself violated the law, is held to be immaterial and irrelevant, unless a causal connection is shown between his illegal act or omission and the subsequent injury for which he seeks to recover. So, where the plaintiff's intestate was run over and killed by an automobile while superintending the renewal of a telephone underground service wire at a manhole in a city street and an ordinance of the city required the use of a lighted red lantern at the excavation, but none was in fact used, it was decided that the violation of the ordinance would not defeat the action unless such violation contributed to cause the injury and that it was for the jury to determine, under proper instructions, whether the absence of the lantern contributed to the accident or not, and also whether the decedent, in remaining at the manhole, after he saw the approaching automobile, acted as a reasonably prudent person would have acted under similar circumstances.<sup>8</sup>

**Sec. 484. Workmen in street — traffic officer.**

A traffic officer in the performance of his duties is, the same as other persons in the highways, bound to exercise reasonable care for his safety.<sup>9</sup> But he is not required to use the same degree of diligence as is required of an ordinary pedestrian passing along or across the street.<sup>10</sup> He is required

6. *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519.

7. *Papic v. Freund* (Mo. App.), 181 S. W. 1161.

8. *Case v. Clark*, 83 Conn. 183, 76 Atl. 526.

9. *Fitzsimons v. Isman*, 166 N. Y.

App. Div. 262, 151 N. Y. Suppl. 552; *White v. East Side Mill & Lumber Co.*, 84 Oreg. 224, 161 Pac. 969, 164 Pac. 736.

10. *Xenodochius v. Fifth Ave. Coach Co.*, 129 App. Div. 26, 113 N. Y. Suppl. 135; *Fitzsimons v. Isman*, 166 N. Y.

to exercise only the degree of caution that might be expected of an officer engaged in such duties.<sup>11</sup> Hence, as a general proposition, his negligence presents a question for the jury; and, if they acquit him of neglect of care, the court will not interfere.<sup>12</sup> While walking or standing near the center of the highway, he is entitled to assume that, owing to his presence, vehicles will obey the law of the road and keep to the right.<sup>13</sup> And he may assume that the automobilist will not wrongfully cut the corner, and he is not required as a matter of law to be on the lookout to avoid the consequences of such conduct.<sup>14</sup>

### Sec. 485. Last chance doctrine.

Under the "last clear chance" doctrine, a person who has been guilty of negligence is sometimes permitted to recover for his injuries, where, after the discovery of such negligence, the other party could nevertheless by the exercise of reasonable care have avoided the accident. There is no room for the doctrine in a case where both parties are equally guilty of concurring acts of negligence, and the negligence of both contributed to the accident at the time of its occurrence.<sup>15</sup> The

App. Div. 262, 151 N. Y. Suppl. 552. See also *Heath v. Seattle Taxicab Co.*, 73 Wash. 177, 131 Pac. 843. "The intestate, as said, was a police officer and at the time was performing his duty as such. He was, undoubtedly, required, in view of the performance of the work assigned to him, to use reasonable care to prevent being run over. He was not, however, obliged to use the same degree of care that would be required of an ordinary pedestrian." *Fitzsimons v. Isman*, 166 N. Y. App. Div. 262, 151 N. Y. Suppl. 552.

**Police pension.**—The fact that a policeman injured by a taxicab was partially reimbursed for his injuries from a pension fund, in part kept up by dues received from him, does not inure to the defendant's benefit so as to lessen the amount of liability. *Heath v. Seattle Taxicab Co.*, 73 Wash. 177, 131 Pac. 843.

11. *Xenodocheius v. Fifth Ave. Coach Co.*, 129 N. Y. App. Div. 26, 113 N. Y. Suppl. 135.

12. *Xenodocheius v. Fifth Ave. Coach Co.*, 129 N. Y. App. Div. 26, 113 N. Y. Suppl. 135.

13. *Xenodocheius v. Fifth Ave. Coach Co.*, 129 N. Y. App. Div. 26, 113 N. Y. Suppl. 135.

14. *White v. East Side Mill & Lumber Co.*, 84 Oreg. 224, 161 Pac. 969, 164 Pac. 736.

15. *Mayer v. Anderson* (Cal. App.), 173 Pac. 174; *Stephenson v. Parton*, 89 Wash. 653, 155 Pac. 147. "There is more or less confusion, if not conflict, in the treatment of this subject by the courts in different jurisdictions; but this court is committed to the doctrine that the last clear chance rule cannot be invoked where the negligence of the plaintiff is concurrent with that of the defendant. The law



doctrine is applied only in cases where antecedent negligence on the part of the pedestrian is shown.<sup>16</sup> The general rule, and a somewhat similar doctrine prevailing in a few States and known as the "humanitarian" rule, is frequently invoked in cases of collisions between street cars and automobiles.<sup>17</sup> As between pedestrians and the drivers of motor vehicles, a pedestrian who has been guilty of negligence in getting into a dangerous situation, in some jurisdictions, may be permitted to recover for his injuries where the driver, after he discovered or should have discovered the situation, could in the exercise of reasonable care, have avoided the collision.<sup>18</sup> That is to say, if a person injured in crossing a street failed to

on that subject, as recognized in this State, is well stated in *French v. Grand Trunk Ry. Co.*, 76 Vt. 441, 58 Atl. 722, that when a traveler has reached a point where he cannot extricate himself and vigilance on his part will not avert the injury, his negligence in reaching that position becomes the condition and not the proximate cause of the injury and will not preclude a recovery, but that it is equally true that if a traveler, when he reaches the point of collision, is in a situation to extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. The rule that, if the plaintiff's negligence proximately contributes to his own injury, he cannot recover is so well settled in this State that it needs no citation of authorities upon that point, and therefore the last clear chance rule can never apply where the plaintiff's negligence is concurrent with and of the same degree as that of the defendant. A charge as requested by the plaintiff would justify the jury in finding for him, though his negligence may have proximately contributed to his own injury. That the plaintiff cannot recover when his negligence is concurrent with

and of the same degree as that of the defendant is also shown in *Trow v. Vt. Central R. R. Co.*, 24 Vt. 487, 58 Am. Dec. 191, in which the authorities upon that subject are collected and commented upon." *Aiken v. Metcalf*, 92 Vt. 57, 102 Atl. 330.

16. *Keiper v. Pacific Gas & Elec. Co.* (Cal. App.), 172 Pac. 180; *Indianapolis Tr. & Terminal Co. v. Lie* (Ind. App.), 118 N. E. 959.

17. Section 613.

18. *Duter v. Sharen*, 81 Mo. App. 612; *School v. Grayson*, 147 Mo. App. 652, 127 S. W. 415; *Wynne v. Wagoner Undertaking Co.* (Mo.), 204 S. W. 15; *Ballman v. H. A. Luecking Teaming Co.* (Mo.), 219 S. W. 603; *Reynolds v. Kenyon* (Mo.), 222 S. W. 476; *Rubick v. Sandler* (Mo. App.), 219 S. W. 401; *Raymen v. Galvin* (Mo.), 229 S. W. 747; *Weiss v. Sodemann H. & P. Co.* (Mo. App.), 227 S. W. 837; *Schinogle v. Baughman* (Mo. App.), 228 S. W. 897; *Bibb v. Grady* (Mo. App.), 231 S. W. 1020; *Clark v. Jones* (Oreg.), 179 Pac. 272; *White v. Hegler*, 29 D. L. R. (Canada) 480, 34 W. L. R. 1061. See also *Ginter v. O'Donoghue* (Mo. App.), 179 S. W. 732; *Castle v. Wilson* (Mo. App.), 183 S. W. 1106; *Ottoby v. Mississippi Valley Trust Co.*, 197 Mo. App. 473, 196 S. W. 428.

exercise ordinary care and prudence for his own safety, it is nevertheless proper to leave to the jury the question whether, if the driver of the vehicle by which he was injured had been watchful, he could have discovered the peril to which the plaintiff was exposed in time to have avoided the injury.<sup>19</sup> Thus, it was said in one case,<sup>20</sup> "I think it is the law that a pedestrian crossing, not at a crossing and not looking and therefore being very careless, would be entitled to damages from an automobile driver who with no obstructed view could have seen the pedestrian at a sufficient distance to avoid him, but who for instance for no justifiable purpose kept his eyes either on his feet in the car or on a window at the side of the street and so did not see the pedestrian and ran over him—who, in other words, did not keep a lookout to see that he did not run into anyone. Also an automobile driver who does not keep a good lookout and does not see a pedestrian apparently going to cross his path without looking, is not entitled to go on and leave the responsibility upon the pedestrian. He must use reasonable care, when he sees the danger, to avoid him."

But there is no opportunity for the application of the last clear chance rule in a case where the person injured passed in front of the machine so suddenly that the collision could not be avoided.<sup>21</sup> Where a defendant has charged contributory negligence on the part of the deceased, alleging that he passed hurriedly from the sidewalk into the street near the

19. *Walldren Express & Van Co. v. Krug*, 291 Ill. 472, 126 N. E. 97; *Duter v. Sharen*, 81 Mo. App. 612; *Wittenberg v. Hyatt's Supply Co.* (Mo. App.), 219 S. W. 686. See also *Gordon v. Stadelman*, 202 Ill. App. 235.

**Instructions.**—It has been held proper to instruct the jury as follows: "The defendant has just as much right on the highway as the automobile, and the driver of the automobile must pay attention to pedestrians who are on the highway, and if it assumes to take the risks of a pedestrian, who is crossing the highway, getting out of its course, and the pedestrian does not increase his speed after the blowing of the horn

or any other signal, but keeps on his speed, it is the duty of the automobile to slacken its speed and to take no risks as to the pedestrian increasing his speed." *Diamond v. Cowles*, 174 Fed. 571, 98 C. C. A. 417.

20. *White v. Hegler*, 29 D. L. R. (Canada) 480, 34 W. L. R. 1061.

21. *Bishard v. Englebeck*, 180 Iowa. 1132, 164 N. W. 203; *Wynne v. Waggoner Undertaking Co.* (Mo.), 204 S. W. 15; *Goldman v. Lanigan Bros. Co.*, 185 App. Div. 742, 173 N. Y. Suppl. 777; *Stephen Putney Shoe Co. v. Ormsby's Adm'r* (Va.), 105 S. E. 563; *Burlic v. Stephens* (Wash.), 193 Pac. 684.

automobile, and so near that it was impossible to stop in time to avoid injury to him, and has introduced evidence to prove these allegations, it is held proper to permit the plaintiff to prove the possibility of stopping the machine after the dangerous position of deceased should have been seen, not as a basis of recovery, but to overcome the defense.<sup>22</sup>

In many jurisdictions, however, the last clear chance doctrine is applicable, if at all, only when the defendant had actual knowledge of the dangerous situation of the plaintiff, and is not applicable when such situation is unknown, though it might have been discovered had the defendant kept a reasonably careful outlook.<sup>23</sup> In such jurisdictions where a more limited view is taken of the doctrine, the rule may be stated that the plaintiff may recover for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposing him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him.<sup>24</sup> Thus, where the driver of an automobile sees a person standing in the highway and blows the horn at a distance of two or three hundred yards, but makes no further effort to avoid him, a recovery may be had.<sup>25</sup>

If a plaintiff relies upon the fact that he was not guilty of contributory negligence, but that the injury was caused by

22. *Scholl v. Grayson*, 147 Mo. App. 652, 127 S. W. 415.

23. "It is true that the instructions are faulty in that they fail to mark the distinction between the application of that rule where the driver of the automobile actually saw the respondent in time to avoid the injury and where the driver, by the exercise of reasonable care, might have seen and appreciated the respondent's danger in time to avoid the injury. In the first situation, the respondent's negligence, continuing to the time of the injury, would be immaterial. In the second, the rule of last clear chance would not apply, unless the respondent's negligence had spent itself or culminated in

a situation from which the exercise of reasonable care on his own part thereafter would not extricate him. The appellant, however, is in no position to complain of this defect." *Moy Quon v. M. Furuya Co.*, 81 Wash. 526, 143 Pac. 99.

24. *Hess v. Kemmerer*, 65 Pa. Super. Ct. 247; *Underhill v. Stevenson*, 100 Wash. 129, 170 Pac. 354. See also *Russell v. Vergason* (Conn.), 111 Atl. 625; *Williams v. Lombard*, 87 Oreg. 245, 170 Pac. 316; *Clark v. Jones* (Oreg.), 179 Pac. 272; *Locke v. Greene*, 100 Wash. 397, 171 Pac. 245.

25. *Stephenson v. Parton*, 89 Wash. 653, 155 Pac. 147.

the negligence of the defendant, it is held that he is not entitled to an instruction on the last chance or humanitarian doctrine. By invoking such doctrine, plaintiff confesses that he was guilty of negligence and therefore is not entitled to instructions authorizing a verdict in his favor on the finding by the jury, that he was not chargeable with his contributory negligence, provided the defendant could have prevented the accident.<sup>26</sup>

### Sec. 486. Acts in emergencies.

Where, by reason of the negligence or unlawful act of the operator of a motor vehicle, a pedestrian is suddenly placed in a position of peril, he is not expected to act with coolness and judgment, and his conduct is not scrutinized with the strictness which might prevail under other circumstances.<sup>27</sup> The fact that he might easily have avoided a collision with the automobile had he exercised better judgment in the emergency, will not necessarily charge him with contributory negligence.<sup>28</sup> His contributory negligence will generally present

26. *Hough v. Kobusch Automobile Co.*, 146 Mo. App. 58, 123 S. W. 83. See also *Moran v. Smith*, 114 Me. 55, 95 Atl. 272; *Laughlin v. Seattle Taxicab & Tr. Co.*, 84 Wash. 342, 146 Pac. 847; *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941.

27. *Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94; *Kessler v. Washburn*, 157 Ill. App. 532; *Rose v. Clark*, 21 Man. (Canada) 635. "It is too well settled to be argued that when a person is confronted with sudden peril, occasioned by the negligence of another, he is not required to exercise that degree of care which a person is obliged to exercise under other circumstances, but is only required to act with the degree of care which an ordinarily prudent person would have exercised under like conditions. But as to whether appellee in this case acted with such care was a question which should have been submitted to the jury under proper instructions."

*City of Indianapolis v. Pell*, 62 Ind. App. 191, 111 N. E. 22.

28. *California*.—*Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94; *Potter v. Back County Transp. Co.*, 33 Cal. App. 24, 164 Pac. 342; *Randolph v. Hunt (Cal. App.)*, 183 Pac. 358.

*Colorado*.—*Louthan v. Peet*, 66 Colo. 204, 179 Pac. 135.

*Illinois*.—*Kessler v. Washburn*, 157 Ill. App. 532; *Kuchler v. Stafford*, 185 Ill. App. 199. "It is clear from the evidence that appellee was called upon to act instantly, when, as he says, the flash of the light from the automobile was in his eyes. Having suddenly found himself in a place of peril, he could not be expected to act with the deliberate judgment of a man under no apprehension of danger. Persons in positions of great peril are not required to exercise all the presence of mind and care of a prudent and careful man; the law makes allowance for them and leaves the circumstances of their con-

a question for the jury.<sup>29</sup> He is not necessarily guilty of negligence because he acts contrary to the expectations of the operator of the machine.<sup>30</sup> Thus, where a pedestrian is suddenly confronted with an automobile rushing upon him, the fact that he steps first forward and then backward, so that as a result of his uncertain actions, the driver turns first one way and then another, until a collision is inevitable, the contributory negligence of the pedestrian is generally a question for the jury.<sup>31</sup> This situation is, however, to be carefully distinguished from a case where the driver of the automobile was proceeding along the highway in a prudent manner, and a pedestrian without reasonable cause becomes confused as to which way he shall pass and "zig-zags" back and forth into a position of danger.<sup>32</sup> In this class of cases, the placing

duet to the jury." *Kessler v. Washburn*, 157 Ill. App. 532.

*Indiana*.—*Cole Motor Co. v. Ludorff*, 61 Ind. App. 119, 111 N. E. 447.

*Iowa*.—*Little v. Maxwell*, 183 Iowa, 164, 166 N. W. 760.

*Massachusetts*.—*Neafsey v. Szemeta*, 126 N. E. 368.

*Missouri*.—*Frankel v. Hudson*, 271 Mo. 495, 196 S. W. 1121; *Hodges v. Chambers*, 171 Mo. App. 563, 154 S. W. 429; *Heartsell v. Billows*, 184 Mo. App. 420, 171 S. W. 7.

*New Jersey*.—*Wescoat v. Decker*, 85 N. J. L. 716, 90 Atl. 290.

*Pennsylvania*.—*Kerk v. Peters*, 261 Pa. 279, 104 Atl. 549.

*Texas*.—*Ward v. Cathey* (Civ. App.), 210 S. W. 289.

*Wisconsin*.—*Parker v. Kindenmann*, 161 Wis. 101, 151 N. W. 787.

29. *Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94; *Indianapolis v. Pell*, 62 Ind. App. 191, 111 N. E. 22; *Frankel v. Hudson*, 271 Mo. 495, 196 S. W. 1121; *Wescoat v. Decker*, 85 N. J. L. 716, 90 Atl. 290; *Coughlin v. Weeks*, 75 Wash. 568, 135 Pac. 649; *Lindstrom v. Seattle Taxicab Co.* (Wash.), 199 Pac. 289; *Parker v. Kindenmann*, 161 Wis. 101, 151 N. W. 787.

30. *Kuchler v. Stafford*, 185 Ill. App. 199.

31. *McKiernan v. Lehmaier*, 85 Conn. 111, 81 Atl. 969; *Heartsell v. Billows*, 184 Mo. App. 420, 171 S. W. 7; *Wescoat v. Decker*, 85 N. J. L. 716, 90 Atl. 290; *Coughlin v. Weeks*, 75 Wash. 568, 135 Pac. 649.

32. *Virgilio v. Walker*, 254 Pa. St. 241, 98 Atl. 815. "So far as the testimony indicates, this is a case where, in view of the surrounding conditions, the automobile was going at a reasonable speed, under proper control, and where the man in charge apparently gave such warnings as the circumstances required. The latter may have misjudged the probable movements of the pedestrian while he was 'zigzagging' in front of the automobile, and this may, in the end, have been the cause of the collision; but there is nothing in the story told by any of the witnesses which would justify an inference that the driver wantonly ran into Mr. Virgilio, or that he negligently omitted to do those things which an ordinarily careful person similarly situated would have done. In short, the unfortunate man who was struck appears to have jumped around in front of the car, and, while

of the blame for the accident is peculiarly within the province of the jury.<sup>33</sup> And where one is leading a domestic animal along the highway and it becomes frightened by the approach of an automobile, his negligence in holding onto the rope while being dragged in front of the machine may be presented to the jury.<sup>34</sup>

Where the plaintiff and two other ladies were crossing a street diagonally, when they saw a taxicab coming half a block away and stopped to let it pass; and, while the plaintiff's two companions remained stationary, the plaintiff becoming nervous lost her presence of mind and broke away from her companions and attempted to pass ahead of the machine when it was close upon her, it was held that a verdict of the jury in favor of the defendant would be affirmed.<sup>35</sup> And, where a man fifty-nine years of age started to cross a street, and, after reaching a space between two surface railway tracks, he heard the sound of the horn on the defendant's automobile, and, apparently excited thereby, took one or two steps back in front of the automobile and was hit, the machine being run at a speed of between eleven and twelve miles an hour, with lamps lighted, and no other vehicles obstructing the street, it was held that a verdict that the decedent was free from contributory negligence and that the accident was caused solely by the negligence of the driver, was against the weight of the evidence.<sup>36</sup>

A third person who attempts to catch a runaway motor vehicle for the purpose of changing its course, where persons' lives are endangered, and who is injured in so doing, is not thereby guilty of negligence as a matter of law so as to preclude a recovery for injuries thus sustained.<sup>37</sup>

both the chauffeur and he were endeavoring to avoid the threatened danger, 'zigzagged' or 'jockeyed' himself into the collision." *Virgilio v. Walker*, 254 Pa. St. 241, 98 Atl. 815.

33. *McKiernan v. Lehmaier*, 85 Conn. 111, 81 Atl. 969.

34. *Boos v. Field*, 192 N. Y. App.

Div. 696, 183 N. Y. Suppl. 482.

35. *Brand v. Taxa Cab Co.*, 129 La. 781, 56 So. 885.

36. *Wall v. Merkert*, 166 N. Y. App. Div. 608, 152 N. Y. Suppl. 293.

37. *American Express Co. v. Terry*, 126 Md. 254, 94 Atl. 1026.

**Sec. 487. Function of jury.**

As a general proposition, in an action by a pedestrian for injuries sustained in a collision with a motor vehicle, the negligence of the defendant,<sup>38</sup> and the contributory negligence of the plaintiff present questions within the province of the jury.<sup>39</sup> Particularly, is the contributory negligence of the

38. Section 452.

39. *United States*.—*New York* Transp. Co. v. Garside, 157 Fed. 521, 85 C. C. A. 285.

*Arkansas*.—*Breashears v. Arnett*, 222 S. W. 28; *Terry Dairy Co. v. Parker*, 223 S. W. 6.

*Alabama*.—*Adler v. Martin*, 179 Ala. 97, 59 So. 597; *Bachelder v. Morgan*, 179 Ala. 339, 60 So. 815.

*California*.—*Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94; *Potter v. Back County Transp. Co.*, 23 Cal. App. 24, 164 Pac. 342; *Weihe v. Rathjen Mercantile Co.*, 34 Cal. App. 302, 167 Pac. 287; *Off v. Crump*, 40 Cal. App. 173, 180 Pac. 360; *Randolph v. Hunt* (Cal. App.), 183 Pac. 358; *Webster v. Motor Parcel Delivery Co.* (Cal. App.), 183 Pac. 220; *Baldarachi v. Leach* (Cal. App.), 186 Pac. 1060; *Gross v. Burnside* (Cal.), 199 Pac. 780. "Contributory negligence is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that in the one case the plaintiff was guilty of contributory negligence. . . . When the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery. . . . Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the

jury." *Moss v. Boynton* (Cal. App.), 186 Pac. 631.

*Colorado*.—*Louthan v. Peet*, 66 Colo. 204, 179 Pac. 135.

*Illinois*.—*Crandall v. Krause*, 165 Ill. App. 15; *Rasmussen v. Drake*, 185 Ill. App. 526; *Bohm v. Dalton*, 206 Ill. App. 374; *Heelan v. Guggenheim*, 210 Ill. App. 1; *Brautigan v. Union Over-all Laundry & Supply Co.*, 211 Ill. App. 354.

*Indiana*.—*Rump v. Woods*, 50 Ind. App. 347, 98 N. E. 369.

*Iowa*.—*Brown v. Des Moines Steam Bottling Works*, 174 Iowa, 715, 156 N. W. 829; *Rolfs v. Mullins*, 179 Iowa, 1223, 162 N. W. 783; *Gilbert v. Vanderwall*, 181 Iowa, 685, 165 N. W. 165.

*Kansas*.—*Johnson v. Kansas City Home Telep. Co.*, 87 Kans. 441, 124 Pac. 528.

*Maryland*.—*American Express Co. v. State of Use of Denowitch*, 132 Md. 72, 103 Atl. 96.

*Massachusetts*.—*Dudley v. Kingsbury*, 199 Mass. 258, 85 N. E. 76; *Rogers v. Phillips*, 206 Mass. 308, 92 N. E. 327, 28 L. R. A. (N. S.) 944; *Creedon v. Galvin*, 226 Mass. 140, 115 N. E. 307; *French v. Mooar*, 226 Mass. 173, 115 N. E. 235; *Chaplin v. Brokline Taxi Co.*, 230 Mass. 155, 119 N. E. 650; *Miller v. Flash Chemical Co.*, 230 Mass. 419, 119 N. E. 702; *Emery v. Miller*, 231 Mass. 243, 120 N. E. 654; *Sarmiento v. Vance*, 231 Mass. 310, 120 N. E. 848; *Inangelo v. Petterson*, 128 N. E. 713.

*Michigan*.—*Schock v. Cooling*, 175 Mich. 313, 141 N. E. 675; *Bouma v. Dubois*, 169 Mich. 422, 135 N. W. 322; *Tuttle v. Briscoe Mfg. Co.*, 190 Mich.

plaintiff a jury question when he is a child of immature age.<sup>40</sup> A verdict of the jury in favor of the person injured will not ordinarily be set aside, if there was evidence upon which they

22. 155 N. W. 724; Czarniski v. Security Storage & Transfer Co., 204 Mich. 276, 170 N. W. 52; Patterson v. Wagner, 204 Mich. 593, 171 N. W. 356; Darish v. Scott, 212 Mich. 139, 180 N. W. 435; Perkins v. Holser, 182 N. W. 49; Degens v. Langredge, 183 N. W. 28.

*Minnesota.*—Smith v. Bruce, 131 Minn. 51, 154 N. W. 659; Johnson v. Johnson, 137 Minn. 198, 163 N. W. 160; Archer v. Skahen, 137 Minn. 432, 163 N. W. 784; Powers v. Wilson, 138 Minn. 407, 165 N. W. 231; Hefferon v. Reeves, 140 Minn. 505, 167 N. W. 423; Johnson v. Brastad, 143 Minn. 332, 173 N. W. 668; Plasch v. Fass, 144 Minn. 44, 174 N. W. 438; 10 A. L. R. 1446; Offerman v. Yellow Cab Co., 144 Minn. 478, 175 N. W. 537; Allen v. Johnson, 144 Minn. 333, 175 N. W. 545; Unmacht v. Whitney, 178 N. W. 886; Gibson v. Grey Motor Co., 179 N. W. 729.

*Missouri.*—Frankel v. Hudson, 271 Mo. 495, 196 S. W. 1121; Raymen v. Galvin (Mo.), 229 S. W. 747; McKenna v. Lynch (Mo.), 233 S. W. 175; Hodges v. Chambers, 171 Mo. App. 563, 154 S. W. 429; Ginter v. O'Donoghue, — Mo. App. —, 179 S. W. 732; Sullivan v. Chauvenet, — Mo. App. —, 186 S. W. 1090; LaDuke v. Dexter, — Mo. App. —, 202 S. W. 254; Brooks v. Harris, — Mo. App. —, 207 S. W. 293; Schinogle v. Baughman (Mo. App.), 228 S. W. 897.

*Nebraska.*—Rule v. Claar Transfer & Storage Co., 102 Neb. 4, 165 N. W. 883.

*New Jersey.*—Turner v. Hall, 74 N. J. Law, 214, 64 Atl. 1060; Pool v. Brown, 89 N. J. Law, 314, 98 Atl. 262; Galenter v. Peti, 114 Atl. 408.

*New York.*—Wolcott v. Renault Selling Branch, 223 N. Y. 288, 119 N. E.

556; Cowell v. Saperston, 149 App. Div. 373, 134 N. Y. Suppl. 284; Fitzgerald v. Russell, 155 App. Div. 854, 140 N. Y. Suppl. 519; O'Neil v. Kopke, 170 N. Y. App. Div. 601, 156 N. Y. Suppl. 664; Lorenzo v. Manhattan Steam Bakery, 178 App. Div. 706, 165 N. Y. Suppl. 847; Haas v. Newbery, 190 App. Div. 275, 179 N. Y. Suppl. 816; Perlmutter v. Byrne, 193 App. Div. 769, 184 N. Y. Suppl. 580; Rothfeld v. Clerkin, 98 Misc. 192, 162 N. Y. Suppl. 1056.

*North Dakota.*—Vannett v. Cole, 170 N. W. 663.

*Pennsylvania.*—Kurtz v. Tourism, 241 Pa. St. 425, 88 Atl. 656; Walleigh v. Bean, 248 Pa. St. 339, 93 Atl. 1069; Miller v. Tiedemann, 249 Pa. 234, 94 Atl. 835; Oelrich v. Kent, 259 Pa. 407, 103 Atl. 109; Banks v. M. L. Shoemaker & Co., 260 Pa. 375, 103 Atl. 734; Kerk v. Peters, 261 Pa. 279, 104 Atl. 549; O'Brien v. Bieling, 110 Atl. 89; Michalsky v. Putney, 51 Pa. Super. Ct. 163; King v. Brillhart (Pa.), 114 Atl. 515.

*Rhode Island.*—Thomas v. Burdick, 100 Atl. 398.

*South Dakota.*—Heidner v. Germ-schied, 41 S. Dak. 430, 171 N. W. 208.

*Texas.*—Burnett v. Anderson, — Civ. App. —, 207 S. W. 540; Merchants' Transfer Co. v. Wilkinson, — Civ. App. —, 219 S. W. 891.

*Utah.*—Sorenson v. Bell, 51 Utah, 262, 170 Pac. 72.

*Virginia.*—Core v. Wilhelm, 124 Va. 150, 98 S. E. 27.

*Washington.*—Lewis v. Seattle Taxicab Co., 72 Wash. 320, 130 Pac. 341; Chase v. Seattle Taxicab Co., 78 Wash. 537, 139 Pac. 499; Mickelson v. Fisher, 81 Wash. 423, 142 Pac. 1160; McCo'e v. Roddie, 103 Wash. 386, 174 Pac. 648; McClure v. Wilson, 186 Pac. 302;



might reasonably have rendered their decision.<sup>41</sup> Negligence as a matter of law may be found, however, when a pedestrian seems to have heedlessly walked in front of an approaching automobile.<sup>42</sup> As was said in one case,<sup>43</sup> "It has been very pointedly stated by the Court of Appeals, and I think it is generally understood by the bar, that in these street crossing cases the question of the pedestrian's contributory negligence is generally one of fact. Of course there are certain extreme cases where a pedestrian steps directly in front of a vehicle and in effect runs into it, in which the court is justified in determining the question of the pedestrian's negligence as a matter of law. These cases, however, are rare."

*Olsen v. Peerless Laundry*, —, 191 Pac. 756; *Elmberg v. Pielow*, 194 Pac. 549.

*West Virginia*.—*Deputy v. Kimmell*, 73 W. Va. 595, 80 S. E. 919.

*Wisconsin*.—*Ouellette v. Superior Motor & M. Works*, 157 Wis. 531, 147 N. W. 1014; *Klokow v. Harbaugh*, 166 Wis. 262, 164 Wis. 999; *Kellner v. Christianson*, 169 Wis. 390, 172 N. W. 796; *Luethe v. Schmidt-Gaertner Co.*, 170 Wis. 590, 176 N. W. 63.

40. *Alabama*.—*Reaves v. Maybank*, 193 Ala. 614, 69 So. 137.

*Connecticut*.—*Lynch v. Shearer*, 83 Conn. 73, 75 Atl. 88; *Dessureault v. Masselly*, 92 Conn. 690, 104 Atl. 347.

*Kentucky*.—*Ackers v. Fulkerson*, 153

Ky. 228, 154 S. W. 1101.

*Massachusetts*.—*Rasmussen v. Whipple*, 211 Mass. 546, 98 N. E. 592.

*Missouri*.—*Sullivan v. Chauvenet* (Mo.), 222 S. W. 759; *LaDuke v. Dexter* (Mo. App.), 202 S. W. 254.

*New York*.—*Pennige v. Reynolds*, 98 Misc. 239, 162 N. Y. Suppl. 966.

*Pennsylvania*.—*Greenbaum v. Costa*, 113 Atl. 79.

41. *McKiernan v. Lehmaier*, 85 Conn. 111, 81 Atl. 969; *Marsters v. Ioeusee* (Oreg.), 192 Pac. 907.

42. *Moss v. H. R. Boynton* (Cal. App.), 186 Pac. 631; *Shott v. Korn*, 1 Ohio App. 458, 34 Ohio Cir. Rep. 260.

43. *Rothfeld v. Clerkin*, 98 Misc. (N. Y.) 192, 162 N. Y. Suppl. 1056.

## CHAPTER XIX.

## MISCELLANEOUS TRAVELERS—CYCLISTS, RIDERS, ANIMALS IN HIGHWAY.

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  - 515. Negligence of guest of cyclist.
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**Sec. 488. Relative rights of cyclists and automobilists.**

A bicycle or motorcycle is recognized as a legitimate method of travel on the highways, the right to the use of such method, however, being subject to a reasonable regard for the rights of other travelers.<sup>1</sup> One may use a bicycle for travel on the

<sup>1</sup> Richards v. Palace Laundry Co. 107, 136 Wis. 46, 116 N. W. 844. (Utah), 186 Pac. 439; Weber v. Swal-

highways for pleasure or recreation.<sup>2</sup> When using the same street or crossing as an automobile, each party is bound, in view of the place and circumstances, to exercise reasonable care to avoid injury to the other.<sup>3</sup> The operator of the automobile does not insure against a collision with a cyclist, and is liable for damages to the latter only in case negligence is shown.<sup>4</sup> Neglect of due care in the operation of an automobile may be found, not only in a violation of the law of the road,<sup>5</sup> or the excessive speed of its operation,<sup>6</sup> but also through inattention, incompetency, or a mistake in judgment of the driver.<sup>7</sup> Statutory or municipal regulations may change the relative rights of travelers in a highway. For example, a municipal ordinance which gives the engines and apparatus of the fire department a right of way over other conveyances, is valid.<sup>8</sup> And this is so, though statutes prescribe that owners of motor vehicles shall have the same rights in the public streets as other users of the highways for such a statute is not construed so as to interfere with the police power

2. *Cooper v. Scannell* (Mass.), 130 N. E. 494.

3. *Radwick v. Goldstein*, 90 Conn. 701, 98 Atl. 583; *Schrayer v. Bishop & Lyons*, 92 Conn. 677, 104 Atl. 349; *Lemmon v. Broadwater* (Del.), 108 Atl. 273; *Frieker v. Philadelphia Rapid Transit Co.*, 63 Pa. Super. Ct. 381; *Heath v. Cook* (R. I.), 68 Atl. 427; *Weber v. Swallow*, 136 Wis. 46, 116 N. W. 844; *Rex v. Wilson*, 32 Canada C. C. 102, 50 D. L. R. 117.

4. *Radwick v. Goldstein*, 90 Conn. 701, 98 Atl. 583; *Lemmon v. Boardwater*, 30 Del. (7 Boyce) 472, 108 Atl. 273; *Larsh v. Strasser*, 183 Iowa, 1360, 168 N. W. 142; *Nordley v. Sorlie*, 35 N. Dak. 395, 160 N. W. 70; *Parker v. Cartier* (R. I.), 105 Atl. 393.

Instructions to jury.—In an action by a bicyclist to recover damages for personal injuries sustained in a collision with defendant's motor truck, where the evidence is conflicting as to

the negligence of the defendant and the contributory negligence of the plaintiff, and the court correctly instructs the jury as to the rights of the parties if they find one or the other or both guilty of negligence, the court cannot be charged with error in failing to say that there could be no recovery if neither party was in fault, if it appears that no request was made to so charge, and the court did say that if the plaintiff got "into the position where the accident was practically unavoidable by anybody," he could not recover. *Wolf v. Schmidt & Sons Brewing Co.*, 236 Pa. St. 240, 84 Atl. 778.

5. Chapter XIV.

6. Section 303, *et seq.*

7. *Frieker v. Philadelphia Rapid Transit Co.*, 63 Pa. Super. Ct. 381.

8. *Sutter v. Milwaukee Board of Fire Underwriters*, 164 Wis. 532, 166 N. W. 57.

of municipalities to make regulations for the use of the streets.<sup>9</sup>

#### **Sec. 489. Horseback travelers — duty of machine operators.**

The driver of a motor vehicle must exercise reasonable care to avoid causing an injury to a person riding on a horse or pony or other animal of burden.<sup>10</sup> The owner of an automobile has the same rights on the highways as those riding on horseback, but must operate the machine with due regard for the rights of others; and the speed of the machine, its size, appearance, manner of movement, the danger of operating it upon the highway, and the other surrounding circumstances, will be taken into consideration in determining the care required of such owner.<sup>11</sup> If he needlessly or recklessly runs his machine into the horse of a rider and thereby injures the horse or the rider, he is liable for the injury.<sup>12</sup> When overtaking a person on horseback who apparently does not hear the approach of the car, the operator cannot proceed regardless of the fact that the rider does not turn out, but the speed of the machine should be slackened.<sup>13</sup> If reasonably necessary, the automobile should be brought to a stop.<sup>14</sup> The parties have equal rights to the use of the highway, and the horseman is not required to surrender more than half of the beaten track in order that the automobilist may pass.<sup>15</sup> If, when an

9. *Sutter v. Milwaukee Board of Fire Underwriters*, 164 Wis. 532, 166 N. W. 57.

10. *Traeger v. Wasson*, 163 Ill. App. 572; *White v. Rukes*, 56 Okla. 476, 155 Pac. 1184.

11. *White v. Rukes*, 56 Okla. 476, 155 Pac. 1184.

12. *White v. Rukes*, 56 Okla. 476, 155 Pac. 1184.

13. *Furtado v. Bird*, 26 Cal. App. 153, 146 Pac. 58.

14. *Furtado v. Bird*, 26 Cal. App. 153, 146 Pac. 58.

15. *Traeger v. Wasson*, 163 Ill. App. 572, wherein it was said: "Under the common law and under the statute all parties using the public highway for

legitimate and lawful purposes have equal rights therein. Had plaintiff and defendant been going in opposite directions and it became necessary for them to pass in the public highway, the law created no greater obligation upon the part of the plaintiff to leave the traveled roadway for the purpose of permitting defendant to pass than it did upon the part of the defendant to leave the traveled roadway for the purpose of permitting plaintiff to pass. While it may be known as a matter of general knowledge that out of courtesy a man traveling upon horseback usually leaves the beaten track for the use of a vehicle for the reason that it may be easier for the horse without a vehicle

automobile is passing a mule ridden along the highway, it suddenly backs directly against the machine, which is well equipped with brakes and under perfect control at the time, but the operator of which is unable to avoid injury, the owner of the mule is not entitled to recover damages.<sup>16</sup> Warning must generally be given of the approach of the machine, but negligence cannot be charged in this respect where the rider has actual knowledge of the approach of the machine; for, in such a case, the neglect to sound the signal cannot be deemed the proximate cause of the injury.<sup>17</sup>

Of course, the owner of the automobile which collides with a horse may recover for damages to the machine, if he shows negligence of the rider and freedom from contributing negligence on the part of the driver of the car. Where, in an action to recover for damages to an automobile, it appeared that the plaintiff while driving his car along the left-hand side of a country road, saw a horseman coming rapidly toward him who was also on the wrong side of the road and turned

attached to travel upon that portion of the highway which is not included in the beaten track, the statute does not require that a person traveling upon horseback so do. Under the rule that persons' rights upon the public highway are equal, plaintiff had the right to continue to use at least one-half of the beaten track and the record discloses that he did no more than this, that he surrendered the right side of the beaten track for the use of the defendant, and that was all that he was required to do. The fact that the parties were going in the same direction instead of in opposite directions imposed no greater obligation upon the plaintiff to leave the beaten track, and the plaintiff was not guilty of contributory negligence by traveling on the left side of the beaten track as the record discloses that he did. If the defendant desired to pass the plaintiff upon the public highway, going in the same direction, he cannot insist that

any greater burden should be cast upon the plaintiff to permit him to pass than the defendant shall be required to assume for himself. It is insisted, however, by defendant that he did attempt to turn his automobile from the beaten track but that on account of the rough condition of the public highway at that point he was unable to do so, and the car swerved back into the public highway. Conceding that such condition is shown by the record, it then became the duty of the defendant to so manage and control his automobile that he would not run into and against the horse of the plaintiff. We are satisfied that the jury were fully warranted in finding the defendant guilty of the negligence charged in the plaintiff's declaration."

16. *Baldwin v. Smitherman*, 171 N. C. 772, 88 S. E. 854.

17. *Priebe v. Crandall* (Mo. App.), 187 S. W. 605. And see section 329.

his car so as to go to the right, and in so doing swung across the path of the horseman, who ran into him, it was held that the negligence of the horseman was established, but that a judgment entered on a verdict in defendant's favor would not be reversed, for there was sufficient evidence of contributory negligence on the part of the plaintiff to sustain the verdict.<sup>18</sup>

#### **Sec. 490. Horseback travelers — contributory negligence of rider.**

As is the case with all classes of travelers on the public highways, a horseback rider is bound to exercise reasonable care for his safety. If he sustains a collision with an automobile, as a general proposition, he cannot recover damages for his injuries unless he was free from negligence contributing to the accident. A horseback rider, when approaching an intersecting street, must exercise reasonable caution to avoid injury from a motor vehicle proceeding along such street, but the rule that one about to cross a railroad track must stop,

18. *Tompkins v. Barnes*, 145 App. Div. 637, 130 N. Y. Suppl. 320, wherein it was said: "On the question of contributory negligence, however, the plaintiff is silent, and as absence of contributory negligence is as much a part of the cause of action as the negligence of the defendant, we are unable to acquiesce in the proposition that the judgment should be reversed. The evidence clearly shows that the plaintiff was on the westerly side of the highway, upon his left hand, when the defendant came into view, the latter upon the easterly side of the highway, on his left hand as he approached. There was no presumption that the horse would change his course, and the plaintiff was not in danger to remain on his left hand side of the street as he was going. Instead of keeping to his course, he testified that he crossed over to his right-hand side of the street, directly in the path of the oncoming

horse, and the situation thus presented the question for the jury whether this was exercising that reasonable degree of care which the law demands as a condition of recovery. The jury has found that the plaintiff is not entitled to recover, and it may well be that, in considering the evidence, they reached the conclusion that the plaintiff, although generally speaking he is entitled to be upon the right-hand side of the highway, was not called upon, in the exercise of reasonable care, to get to the right-hand side of the road in the face of this horse, which according to the testimony, was being ridden recklessly along the highway. The plaintiff, after seeing the horse, left a place of safety and ran into the course of the horse, and it was for the jury to determine whether this was prudent or not under all of the circumstances."

look, and listen, does not apply to a traveler thus coming out of an intersecting street into a highway upon which automobiles are customarily run.<sup>19</sup> When proceeding along the public highway, a horseback rider is not necessarily guilty of contributory negligence because he does not surrender the entire beaten track to the use of a motor vehicle approaching from the rear.<sup>20</sup> Nor is a rider necessarily guilty of contributory negligence because he is driving or leading an unbroken horse along the highway by means of a rope or lariat.<sup>21</sup> Whether the rider has exercised the care of an ordinarily prudent man under the circumstances, is a question which is generally to be left to the jury.<sup>22</sup>

#### **Sec. 491. Use of highway for domestic animals.**

In some jurisdictions a dog running unattended along or across a public highway is regarded more in the light of a trespasser than as a lawful traveler along the highway.<sup>23</sup> When regarded in this light, the duty of the driver of a motor vehicle is to refrain from intentional or wanton injury to the animal, and he is not liable merely for negligence. But, assuming a duty to exercise reasonable care to avoid injury to a dog in the street, there can be no liability imposed by the courts merely upon proof of the death of a dog by an automobile, leaving the manner of its death a matter of speculation.<sup>24</sup> The driver of a motor vehicle traveling at a moderate

19. *Studer v. Plumlee*, 130 Tenn. 517, 172 S. W. 305.

20. *Traeger v. Wasson*, 163 Ill. App. 572.

21. *Townsend v. Butterfield*, 168 Cal. 564, 143 Pac. 760, wherein it was said: "Highways are made and maintained for the free passage of persons, and of their horses and cattle when properly controlled. There was no evidence that the method of controlling the unbroken horse by means of a rope or lariat fastened to his neck, while taking him along the highway, was an improper or careless method. The use of a rope for that purpose would seem to be a proper precaution and preferable to

driving him along with no means of control or check. Under these circumstances it cannot be claimed that the question was not properly left to the jury."

22. *Studer v. Plumlee*, 130 Tenn. 517, 172 S. W. 305.

23. **Unlicensed dog.**—Under the law of *Massachusetts*, an unlicensed dog is not a trespasser or outlaw upon the public highway, and an automobilist is liable for the negligent killing of the animal. *Lucker v. Strauss*, 226 Mass. 579, 116 N. E. 236.

24. *Wallace v. Waterhouse*, 86 Conn. 546, 86 Atl. 10; *Flowerce v. Thornberry* (Mo. App.), 183 S. W. 359;

rate of speed may properly assume that a dog running by the side or in front of the vehicle will exercise the ordinary instincts of such animals and keep out of danger.<sup>25</sup> Reliance on such assumption can continue, however, only until it appears that the animal may not avoid collision with the machine; when it appears that the dog is threatened with injury, it is the duty of the chauffeur to exercise reasonable care to avoid the danger.

Even in the case of a horse which may lawfully be upon the highway, it is necessary for its owner to prove negligence in case the horse is injured or killed by an automobile. But, it has been held, where a person tied his horse to a hitching post at the curb of the street and a few minutes later discovered that the animal had been injured by the defendant's automobile, that the doctrine of *res ipsa loquitur* placed the burden on the defendant of explaining that the accident did not occur from want of care on his part.<sup>26</sup>

One may use the highways for the purpose of leading or driving horses or stock. Such use of the highway is lawful and an automobilist is required to exercise reasonable care to avoid a collision with such animals.<sup>27</sup> As in other cases,

O'Hara v. Gould, 84 N. J. L. 583, 87 Atl. 117. "It would be easy to surmise a variety of things entering, as acts of causation, into the injury of the dog, which might have occurred in addition to these determinable factors and consistent with them. Such additional factors in the situation might point to a lack of care on the part of the driver of the automobile. They easily might, on the other hand, demonstrate that he was free from blame, and that the dog was responsible for his own death. No light was thrown upon these matters of possible controlling importance, and the jury was left to conjecture as to what occurred and what the real proximate cause of the killing of the animal was. The improper speed of the automobile may have concurred in point of time with the dog's injury without being the

cause of it." Wallace v. Waterhouse, 86 Conn. 546, 86 Atl. 10. "It appears that during the day-time the accident took place. A dark-colored auto driven by the defendant passed in the street. The witness saw the dog in the road, and that it was run over by the auto, which did not slow up, but was going at a moderate rate of speed. The witness afterwards saw the dog lying in the road. So far as the case shows, both auto and dog were lawfully in the street. There is no evidence of careless driving. The mere fact that it ran over a dog is not sufficient to charge negligence, much less can it support a claim for a willful injury." O'Hara v. Gould, 84 N. J. L. 583, 87 Atl. 117.

25. Flowerree v. Thornberry (Mo. App.), 183 S. W. 359.

26. Whitwell v. Wolf. 127 Minn. 529, 149 N. W. 299.

27. Maddox v. Jones (Ala.), 89 So.



he does not insure against injury.<sup>28</sup> So, too, the one having charge of the animal must exercise reasonable care to avoid a collision with the motor vehicle.<sup>29</sup> The questions of negligence and contributory negligence are generally for the jury.<sup>30</sup> One who is driving cattle upon a traveled highway must use reasonable care to keep the cattle upon the right side of the highway; and if they get upon the wrong side of the road, or

38; *Moren v. Duevillez*, 212 Ill. App. 208; *Arrington v. Horner*, 88 Kans. 817, 129 Pac. 1159; *Pullman v. Moore* (Mo. App.), 218 S. W. 938; *Goodrich v. Matthews* (N. Car.), 98 S. E. 529; *Hanson v. Hulet* (N. Dak.), 175 N. W. 205; *Carvel v. Kusel* (Tex. Civ. App.), 205 S. W. 941. See also *Duprat v. Chesmore* (Vt.), 110 Atl. 305.

**"Highest care."**—The Missouri statute requiring automobilists to use "highest degree of care" applies to a horse ranging on a public highway. *Pullam v. Moore* (Mo. App.), 218 S. W. 938.

**Variance.**—In an action for damages for the killing of plaintiff's cow, occasioned by being struck by defendant's automobile while being led along the highway by plaintiff's wagon, wherein the complaint alleged that defendant, not regarding his duty, negligently ran and operated the automobile at a high and dangerous rate of speed and ran it against the cow, evidence for plaintiff, tending to show, not only that the car was operated at a high rate of speed, but that defendant did not turn out as he passed plaintiff's wagon, but passed it in the traveled track and in close proximity to the wagon and cow, was admissible. *Saylor v. Motor Inn*, 136 Minn. 466, 162 N. W. 71.

28. *Arrington v. Horner*, 88 Kans. 817, 129 Pac. 1159; *Tucker v. Carter* (Mo. App.), 211 S. W. 138.

**Unavoidable injury to hog.**—If a hog suddenly darts into the road under a passing automobile, the motorist is not liable. *Hester v. Hall* (Ala. App.), 81 So. 361.

29. *Andrews v. Dougherty* (Conn.), 112 Atl. 700; *Moren v. Duevillez*, 212 Ill. App. 208; *Arrington v. Horner*, 88 Kans. 817, 129 Pac. 1159.

**Proximate cause.**—Even though the owner of a horse is guilty of contributory negligence in allowing it to be upon the streets, he is not precluded from a recovery, unless his negligence proximately contributes to the injury. *Haynes v. Kay*, 111 S. Car. 107, 96 S. E. 623.

30. *Maddox v. Jones* (Ala.), 89 So. 38; *Goodrich v. Matthews*, 177 N. Car. 198, 98 S. E. 529; *Hanson v. Hulet* (N. Dak.), 175 N. W. 205.

**Leading horse behind buggy.**—In an action against an owner of an automobile for the killing of a horse, it appeared that at the time of the accident plaintiff was driving a buggy in a city street leading the horse that was killed behind a buggy. He found himself in the rear of two coal wagons which were keeping to the right, so that he was compelled to turn to the left. After passing one wagon and being still opposite to the second, he saw an automobile approaching at a rapid rate, with one wheel in the car track. Finding that he had not room between the automobile and the coal wagon, he turned further to the left until he came within two feet of the curb. The automobile passed the buggy, then inclined to the right and struck the horse. *Held*, that the case was for the jury, and that a verdict and judgment for plaintiff should be sustained. *Everett v. Sturges*, 46 Pa. Super. Ct. 612.

the driver suffers them to travel upon this side, he is bound to use more care and keep a better lookout for approaching vehicles than would be required of him if the cattle were upon the right side, either by notice, or other means, in order to avoid collision between the cattle and the approaching vehicle. Only such care under the circumstances would be reasonable care.<sup>31</sup> But, under statutes prohibiting the running loose of stock and animals on the public highways, the owner of a mule may be precluded as a matter of law, from recovering damages for an injury to the animal.<sup>32</sup>

If, by reason of the negligence of the owner of the horse, it causes injury to an automobile or to an occupant thereof, the owner of the animal may be liable for the damages.<sup>33</sup> Thus, if the owner of a horse leaves the same unattended and untied in a city street, thereby violating an ordinance of the city, and it runs away and runs into the plaintiff's automobile, the violation of the ordinance may be considered negligence *per se*, and the owner of the machine may recover for injuries proximately resulting from the violation.<sup>34</sup> And the owner of an automobile may be allowed to recover for injuries thereto occasioned by a collision with a dog.<sup>35</sup>

### Sec. 492. Violation of law of road — in general.

As a general proposition, a cyclist is subject to the law of the road.<sup>36</sup> In case a collision occurs between an automobile

31. *Andrews v. Dougherty* (Conn.), 112 Atl. 700.

32. *Dillon v. Stewart* (Tex. Civ. App.), 180 S. W. 648.

33. *Marshall v. Suburban Dairy Co.* (N. J.), 114 Atl. 750; *Stevens v. Saskatoon Taxicab Co.*, 45 D. L. R. (Canada) 763.

**Insurance on automobile.**—The fact that the owner of an automobile carries insurance thereon as against accident and has collected such insurance moneys, is not admissible for the purpose of reducing the damages recoverable for the defendant's negligence in permitting the horse to run away. *Hill*

*v. Condon*, 14 Ala. App. 332, 70 So. 208.

34. *Hill v. Condon*, 14 Ala. App. 332, 70 So. 208.

35. *Tasker v. Arey*, 114 Me. 551. 96 Atl. 737. But see *Mellicker v. Sedlacek* (Iowa), 179 N. W. 197, where the action failed because viciousness of the dog was not shown.

**Sow in road.**—See *Higgins v. Searle*, 100 L. T. (Eng.) 280.

**Sheep.**—Owner of sheep in highway not liable for injury to automobilist. *Heath's Garage v. Hodges* (1916), 2 K. B. (Eng.) 370.

36. *Clarke v. Woop*, 159 N. Y. App.

and a bicycle or motorcycle, and the automobile is found to have violated the law of the road in being on the wrong side of the highway, a presumption arises that the chauffeur was guilty of negligence.<sup>37</sup> That is, a *prima facie* case of negligence is presented upon proof that the automobile was on the wrong side of the highway at the time of the collision.<sup>38</sup> So, too, contributory negligence may be charged against the cyclist when he is the one who is traveling on the wrong side of the street or highway.<sup>39</sup> The use of the wrong side of the highway may be excused by the exigencies of the occasion, so as to carry the question of negligence to the jury, as, for example, when it is necessary to make a diversion from the usual course in order to avoid an obstruction or an injury to another.<sup>40</sup> So, too, one may be justified in using the wrong side of the highway when such course is necessary to avoid injury to the plaintiff or to some other traveler.<sup>41</sup> Moreover, it is necessary that the injuries be such as proximately result from the violation of the law of the road,<sup>42</sup> but, in accidents of this character when one turns to the wrong side of the highway and there strikes a cyclist, whether the injuries are the proximate cause is easily a question for the jury.<sup>43</sup>

### Sec. 493. Violation of law of road — meeting and passing cyclist.

In this country, the law of the road requires that the driver of an automobile shall turn to the right upon meeting another traveler.<sup>44</sup> If, at the time of a collision with a bicycle or

Div. 437, 144 N. Y. Suppl. 595. And see section 245.

37. *Slaughter v. Goldberg*, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90; *Cooke v. Jerome*, 172 N. Car. 626, 90 S. E. 767; *Johnson v. Heitman*, 88 Wash. 595, 153 Pac. 331; *Hartley v. Lasater*, 96 Wash. 407, 165 Pac. 106. See also *Gulich v. Paine*, 231 N. Y. 311; *Walleigh v. Bean*, 248 Pa. St. 339, 93 Atl. 1069. And see section 267.

38. *Clarke v. Woop*, 159 N. Y. App. Div. 437, 144 N. Y. Suppl. 595; *Casey v. Boyer* (Pa.), 113 Atl. 364.

39. Section 510.

40. *Potter v. Glassell*, 146 La. 687, 83 So. 898; *Clarke v. Woop*, 159 N. Y. App. Div. 437, 144 N. Y. Suppl. 595.

41. *Clarke v. Woop*, 159 N. Y. App. Div. 437, 144 N. Y. Suppl. 595; *Cooke v. Jerome*, 172 N. Car. 626, 90 S. E. 767.

42. *Weaver v. Carter*, 28 Cal. App. 241, 152 Pac. 323.

43. *Baillargeon v. Neyers* (Cal.), 182 Pac. 37.

44. Section 249.

motorcycle the automobile is on the wrong side of the street, a *prima facie* case of negligence is presented.<sup>45</sup> Particularly is this so, when the approaching cyclist is in plain view of the operator of the motor vehicle.<sup>46</sup> In some States a violation of a statute regulating the law of the road is considered negligence *per se*.<sup>47</sup> And, when both travelers are proceeding on their respective sides of the street or highway, but the driver of the automobile suddenly crosses the road a short distance in front of the cyclist, ordinarily a fair question of negligence is presented for the consideration of the jury.<sup>48</sup> Where the complaint alleges that the defendant's automobile suddenly crossed the street without warning and struck the plaintiff, a specific allegation of negligence is not necessary, for the act of the defendant in such a case necessarily gives rise to an inference of negligence.<sup>49</sup> But, where a bicyclist continues to ride on the wrong side of the road along which a motor car is approaching in full view from the opposite direction, and maintains that position until the motorist in order to avoid a collision turns to the left, and the bicyclist is killed owing to the fact that he turns to the right at the same time, the motorist is not liable.<sup>50</sup> And it has been held that the driver of an automobile, as a matter of law, is not negligent in traveling along the traveled roadbed of the highway, for one cannot be said to be on the "wrong" side of the highway when he is following the usual course of travelers.<sup>51</sup>

45. *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90; *Schnabel v. Kafer*, 39 S. Dak. 70, 162 N. W. 935; *Figueroa v. Madero* (Tex. Civ. App.), 201 S. W. 271; *Harris v. Parks* (Utah), 196 Pac. 1002; *Peterson v. Pallis*, 103 Wash. 180, 173 Pac. 1021. And see section 267.

46. *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90; *Konig v. Lyon* (Cal. App.), 192 Pac. 875; *Morken v. St. Pierre* (Minn.), 179 N. W. 681.

47. *Lemmon v. Broadwater*, 30 Del. (7 Boyce) 472, 108 Atl. 273. And see sections 267, 297.

48. *Parmenter v. McDougall*, 172 Cal. 306, 156 Pac. 460; *Brandenberg v. Klehr*, 197 Ill. App. 459.

49. *Herrick v. Oakland Motor Co.*, 29 Cal. App. 414, 155 Pac. 1006.

50. *Clarke v. Woop*, 159 N. Y. App. Div. 437, 144 N. Y. Suppl. 595.

51. *Nordley v. Sorlie*, 35 N. Dak. 395, 160 N. W. 70.

#### Sec. 494. Violation of law of road — overtaking and passing cyclist.

When the driver of an automobile overtakes and desires to pass a bicycle or motorcycle proceeding in the same direction, the law of the road in this country requires that he shall pass to the left side of the cyclist.<sup>52</sup> The requirement that the rear vehicle shall pass to the left is now generally affirmed by statutory enactment.<sup>53</sup> If, without a sufficient legal excuse, he attempts to pass on the wrong side, he may be charged with such damages as proximately result from his wrongful use of the highway.<sup>54</sup> The cyclist should turn to the right so as to afford the faster vehicle a reasonable opportunity to turn to the left. If, however, the cyclist, instead of turning as required by the law of the road, swerves toward the left, the motorist may be justified in attempting to pass on the right side.<sup>55</sup> In case of a conflict as to whether the rider of a bicycle turned in the wrong direction, a question within the province of the jury is presented.<sup>56</sup> Reasonable care may forbid the automobilist from attempting the passage near an intersecting street where the cyclist might turn toward the left; in case he turns toward the left at the same time that the driver of the auto attempts the passage, the negligence of the respective parties is generally a question for the jury.<sup>57</sup>

#### Sec. 495. Violation of law of road — cyclist overtaking automobilist.

In case a cyclist wishes to pass a motor vehicle, the legal situation is the same as when a motorist seeks to pass a cyclist. The faster cyclist should turn toward the left in making the passage, the autoist concurrently turning toward the right.<sup>58</sup>

52. Section 252.

53. Statute requiring forward vehicle to turn to right.—A statutory enactment requiring that the forward vehicle shall turn to the right, impliedly requires and permits the overtaking one to pass on the left side. *Paschel v. Hunter*, 88 N. J. Law, 445, 97 Atl. 40.

54. *Weaver v. Carter*, 28 Cal. App.

241, 152 Pac. 323; *Cooke v. Jerome*, 172 N. Car. 626, 90 S. E. 767.

55. *Cook v. Jerome*, 172 N. Car. 626, 90 S. E. 767.

56. *Cook v. Jerome*, 172 N. Car. 626, 90 S. E. 767.

57. *Hartley v. Lasater*, 96 Wash. 407, 165 Pac. 106.

58. *Borg v. Larson*, 60 Ind. App. 514, 111 N. E. 201.

In turning back toward the center of the highway, the cyclist should exercise due care to the end that the movement is made far enough from the automobile that a collision will not ensue. In case the cyclist slips or from some other cause is in a dangerous situation after the passage, the driver of the automobile should exercise reasonable care to avoid injury to the cyclist.<sup>59</sup>

**Sec. 496. Violation of law of road — meeting cyclist after overtaking other vehicle.**

The general rule of the road requires that a motorist, when overtaking a slower conveyance, shall turn to the left.<sup>60</sup> The law of the road, however, does not give the driver of the machine a license to pass the slower vehicle under all circumstances. He can do so only when reasonable prudence permits the passing.<sup>61</sup> If he attempts to pass the vehicle at the same time that a cyclist is attempting to pass from the opposite direction, he may be liable for injuries sustained by the latter.<sup>62</sup> The driver of the automobile is required to exercise such care as the circumstances demand.<sup>63</sup> Reasonable care may require that the speed of the machine be much lessened and that it be brought under control so that travelers from the

59. *Winslow v. New England Co-op. Soc.*, 225 Mass. 576, 114 N. E. 748.

60. Section 252.

61. "A person attempting to pass a vehicle ahead of him and going in the same direction must exercise proper care in so doing. If a vehicle is approaching from the opposite direction at the moment when he desires to pass the vehicle in front, and the highway is not wide enough to safely accommodate all three teams abreast, then it would be the duty of the person in charge of the rear vehicle, in the exercise of proper care under the circumstances, to wait until the vehicle coming in the opposite direction had passed by before he attempted to turn out. It is not necessary to involve the question as to the duty of the vehicle in the

rear, in passing, towards another vehicle that may be approaching in an opposite direction. The approach of the vehicle in the opposite direction is simply one of the circumstances which must be considered by the rear man when he attempts to pass. It is simply one of the things which demands the exercise of care upon his part under all circumstances, and in some circumstances he would be required to refrain from attempting to pass until the approaching vehicle had gone by." *Ribas v. Revere Rubber Co.*, 37 R. I. 189, 91 Atl. 58.

62. *Wiley v. Young*, 178 Cal. 681, 174 Pac. 316; *Ribas v. Revere Rubber Co.*, 37 R. I. 189, 91 Atl. 58.

63. *Ribas v. Revere Rubber Co.*, 37 R. I. 189, 91 Atl. 58.

opposite direction may be more easily avoided.<sup>64</sup> In such a situation, the cyclist would be traveling along what to him is the right side of the highway, and he is not charged with knowledge that an automobile will swerve past a vehicle to his side of the road.

**Sec. 497. Violation of law of road — street intersection.**

In the absence of statutory or municipal regulation changing the rights of the parties, a cyclist and the driver of a motor vehicle have equal rights at the intersection of street crossings. Each is bound to exercise reasonable precaution to avoid a collision; but, if one is at the intersection decidedly in advance of the other, he is generally allowed the right of way, and he has a right to assume that the other will respect his prior right.<sup>65</sup> The ordinary rights of the parties may be changed by municipal ordinance. Thus, in behalf of the crowded traffic on some of the busy thoroughfares, ordinances sometimes prescribe that vehicles along such a thoroughfare shall have a right of way over those on cross streets.<sup>66</sup> So, too, traffic laws in some States give a right of way to a traveler approaching an intersecting street from the right.<sup>67</sup> At a street crossing each traveler is expected to keep on the right side of the highway along which he is traveling; and, where the duty is imposed by statute or municipal ordinance, its violation in a few jurisdictions is negligence *per se*.<sup>68</sup>

**Sec. 498. Violation of law of road — turning corners.**

When the driver of an automobile seeks to turn a corner, he is bound to exercise reasonable care to avoid injury to trav-

64. *Riggles v. Priest*, 163 Wis. 199, 157 N. W. 755.

65. *Whitelaw v. McGillard*, 179 Cal. 349, 176 Pac. 679.

66. *Ewig v. Lumber Operating & Mfg. Co.*, 183 N. Y. App. Div. 198, 170 N. Y. Suppl. 192; *Bullis v. Ball*, 98 Wash. 342, 167 Pac. 942. See also *Weber v. Beeson*, 197 Mich. 607, 164 N. W. 255. And see section 262.

67. *Nolan v. Davis* (N. J.), 112 Atl. 188; *Saari v. Wells Fargo Exp. Co.*, 109 Wash. 415, 186 Pac. 898; *Glatz v. Kroeger Bros. Co.*, 168 Wis. 635, 170 N. W. 934. See also *Ward v. Gildea* (Cal. App.), 186 Pac. 612.

68. *Johnson v. Heitman*, 88 Wash. 595, 153 Pac. 331. See also *Zuccone v. Main Fish Co.* (Wash.), 177 Pac. 314.

elers along each of the intersecting streets as well as to pedestrians on the crosswalks.<sup>69</sup> A turn toward the right is not accompanied with the dangers that are incident to a turn to the left, for the reason that the autoist is not intersecting the course of traffic to the same extent. When turning to the left, it is generally a matter of statutory or municipal regulation that the autoist shall keep to the right of the center of the intersecting streets;<sup>70</sup> and, if he fails to obey the regulation and injury is thereby occasioned to a cyclist, negligence of the auto driver may be found.<sup>71</sup> In making such a turn at a much frequented corner in a city, the machine should be under control and its speed reduced to the extent reasonably necessary.<sup>72</sup> Negligence may be found if the auto driver turns without warning and collides with a cyclist proceeding parallel to the machine.<sup>73</sup>

#### Sec. 499. Violation of law of road — turning or backing in street.

The turning of an automobile in a public highway is a proper use thereof;<sup>74</sup> but the driver is required to use all reasonable precautions to avoid injuries to cyclists and other travelers. Where an automobile and a motorcycle are proceeding in the same direction, and the motorcycle runs into the auto because the latter attempts to turn around in the

69. See sections 258-259.

70. Section 259.

71. *Alabama*.—Karpes v. City Ice Delivery Co., 198 Ala. 449, 73 So. 642.

*California*.—Cook v. Miller, 175 Cal. 497, 166 Pac. 316; Opitz v. Schenck, 174 Pac. 40; Perez v. Hartman, 39 Cal. App. 601, 179 Pac. 706; Martinelli v. Bond (Cal. App.), 183 Pac. 463; Austin v. Newton (Cal. App.), 189 Pac. 471.

*Indiana*.—Reitz v. Hodgkins, 185 Ind. 163, 112 N. E. 386.

*Kansas*.—Cross v. Rosencranz, 195 Pac. 857.

*Michigan*.—Reed v. Martin, 160 Mich. 253, 125 N. W. 61; Holden v. Hadley, 180 Mich. 568, 147 N. W. 482.

*Minnesota*.—Elvidge v. Stronge & Warner Co., 181 N. W. 346; Molin v. Wark, 113 Minn. 190, 129 N. W. 383.

*Missouri*.—Heryford v. Spitecansky (Mo. App.), 200 S. W. 123.

*New York*.—Berekhemer v. Empire Carrying Corp., 172 N. Y. App. Div. 866, 158 N. Y. Suppl. 856.

*Washington*.—Molitor v. Blackwell Motor Co., 191 Pac. 1103.

*Wisconsin*.—Foster v. Bauer, 180 N. W. 817.

72. Berekhemer v. Empire Carrying Corp., 172 N. Y. App. Div. 866, 158 N. Y. Suppl. 856. And see section 501.

73. Geiger v. Garrett (Pa.), 113 Atl. 195.

74. See section 263.



street without warning the cyclist, thereby obstructing the course of the motorcycle, the driver of the auto may properly be found guilty of negligence.<sup>75</sup> In such a case, evidence of the occupants of the automobile that before starting to turn the car they looked around and saw no other vehicle in the vicinity is of no weight, when it is undisputed that the cyclist was in plain view, for it is negligence not to see what is clearly visible.<sup>76</sup> Negligence may also be charged against the operator where he backs his machine in the street without warning and thereby causes an injury to a cyclist. And especially is this so, when it is provided by statute that no vehicle shall back or make a turn in any street if by so doing it interferes with other vehicles, but shall go around a block or to a street sufficiently wide to turn in without backing.<sup>77</sup>

#### Sec. 500. Lookout.

Reasonable care requires that the driver of a motor vehicle shall exercise a reasonable lookout so that he may see other travelers and avoid an injury to them.<sup>78</sup> The driver of the vehicle cannot necessarily escape liability on a plea that he

75. *Koenig v. Semran*, 197 Ill. App. 624.

**Instruction to jury.**—In an action where it appeared that a cyclist was struck by an automobile while the machine was turning around so as to go back in the opposite direction, the following charge to the jury was held to be proper: "You are to take all the evidence, all the circumstances, and determine whether he was doing anything he ought not to have done, that an ordinarily reasonable and prudent man would not have done under all the circumstances. He had a right to make that turn. He had a right to use any part of the street that he was coming into, subject only to the rights of other people who might be there. If two vehicles meet in a street, it is the duty of each one of them, as seasonably as they can, to get each on his own right-

hand side of the traveled way of that street. But that law does not compel a man always to be on the right side. He can use any part of the street so long as he is not interfering with the rights of other people, and the fact this happened on the right-hand side of the street is only another piece of evidence to be considered by you. You are to consider whether Peterson was endeavoring, in making a turn, to get on the right-hand side near the hydrant, where under certain circumstances he properly belonged." *Johnson v. Shaw*, 204 Mass. 165, 90 N. E. 518.

76. *Koenig v. Semran*, 197 Ill. App. 624.

77. *Pyers v. Tiers*, 87 N. J. L. 520, 99 Atl. 130.

78. Sections 332-336. *Martin v. Lilly*, 188 Ind. 139, 121 N. E. 443.

did not see another traveler, for it is his duty to keep a reasonably careful lookout, and he is charged with knowledge of what he should have seen with such a lookout.<sup>79</sup> In case of a collision with a bicycle or motorcycle, if he is not exercising reasonable care in looking for other travelers, he may be liable for injuries sustained by the cyclist.<sup>80</sup> Thus, negligence of the automobilist is properly found on evidence tending to show that he came up behind the cyclist and ran into him, for, in such a case, the automobilist is in a better position to avoid danger, and where the one in front is exercising reasonable care, a collision *prima facie* indicates negligence on the part of the driver of the motor vehicle.<sup>81</sup> If the accident happened after dark, the driver of the machine would be deemed guilty of negligence in not having his car under such control that he could stop within the scope of his lights.<sup>82</sup>

### Sec. 501. Speed and control of auto.

The driver of a motor vehicle is at all times required to have the machine under reasonable control.<sup>83</sup> When traveling at night, the driver of an automobile should have his machine under such control that he will not run down cyclists traveling in the same direction.<sup>84</sup> Reasonable control implies that the machine shall not be run at more than a reasonable rate of speed.<sup>85</sup> What is a reasonable rate of speed depends on

79. *Kennedy v. Webster*, 137 Minn. 335, 163 N. W. 519.

80. *Rogers v. Phillips*, 217 Mass. 52, 104 N. E. 466; *Porter v. Nesmith* (Miss.), 87 So. 5.

81. *Heath v. Cook* (R. I.), 68 Atl. 427. See also *Barker v. Savas*, 52 Utah 262, 172 Pac. 672.

82. *Harnau v. Haight*, 189 Mich. 600, 155 N. W. 563. See sections 326, 344.

83. *Irwin v. Judge*, 81 Conn. 492, 71 Atl. 572; *Radwick v. Goldstein*, 90 Conn. 701, 98 Atl. 583; *Harnau v. Haight*, 189 Mich. 600, 155 N. W. 563; *Molin v. Wark*, 113 Minn. 190, 129 N. W. 383. And see section 326.

84. *Harnau v. Haight*, 189 Mich. 600, 155 N. W. 563.

85. *California*.—*Weaver v. Carter*, 28 Cal. App. 241, 152 Pac. 323.

*Connecticut*.—*Irwin v. Judge*, 81 Conn. 492, 71 Atl. 572; *Radwick v. Goldstein*, 90 Conn. 701, 98 Atl. 583.

*Michigan*.—*Holden v. Hadley*, 180 Mich. 568, 147 N. W. 482.

*Minnesota*.—*Molin v. Wark*, 113 Minn. 190, 129 N. W. 383.

*New York*.—*Beickhemer v. Empire Carrying Corp.*, 172 N. Y. App. Div. 866, 158 N. Y. Suppl. 856.

*Pennsylvania*.—*Walle'gh v. Bean*, 248 Pa. St. 339, 93 Atl. 1069.

*Washington*.—*Hartley v. Lasater*, 96 Wash. 407, 165 Pac. 106.

*Canada*.—*Wales v. Harper* (Manitoba), 17 West. L. R. 623.

the surrounding circumstances, such as the character of the machine and its equipment, the density and nature of the traffic, the obstructions along the road. The question is generally one for the jury.<sup>86</sup> Statutes or municipal ordinances may preclude an inquiry as to whether a particular speed is reasonable by arbitrarily fixing the maximum speed which motor vehicles may run under given circumstances. Such regulations are to be obeyed, and their violation generally affords ample ground for charging the violator with responsibility for all damages proximately resulting therefrom.<sup>87</sup> But the jury may properly find that a speed, although not in excess of a specific limitation, is unreasonable under the circumstances.<sup>88</sup> The circumstances may be such that the driver of a motor vehicle should stop his car to avoid a collision with a cyclist. But one need not necessarily stop his car when he sees a person on a bicycle approaching in plain view for some distance, though such bicyclist is on the wrong side of the road, for he may assume, in the absence of anything appearing to the contrary, that the bicycle will be turned to the proper side of the road and the collision thus avoided.<sup>89</sup> The negligence of the driver of a motor vehicle, however, may be found by the jury, though he is not driving at an excessive speed, as through incompetency, inattention, or a mistake in judgment.

86. *Merkel v. Jersey City H. & P. St. Ry.*, 75 N. J. Law, 654, 68 Atl. 74; *Brewster v. Barker*, 129 N. Y. App. Div. 724, 113 N. Y. Suppl. 1026; *Ackerman v. Stacey*, 157 N. Y. App. Div. 835, 143 N. Y. Suppl. 227; *Fricker v. Philadelphia Rapid Transit Co.*, 63 Pa. Super. Ct. 381; *Cheney v. Buck* (Utah), 189 Pac. 81.

87. *California*.—*Weaver v. Carter*, 28 Cal. App. 241, 152 Pac. 323.

*Iowa*.—*Wlaterick v. Hamilton*, 179 Iowa, 607, 161 N. W. 684. See also *Larsh v. Strasser*, 183 Iowa, 1360, 168 N. W. 142.

*Minnesota*.—*Molin v. Wark*, 113

*Minn.* 190, 129 N. W. 383; *Riser v. Smith*, 136 Minn. 417, 162 N. W. 520.

*South Dakota*.—*Cameron v. Miller*, 180 N. W. 71.

*Texas*.—*Flores v. Garcia* (Civ. App.), 226 S. W. 743.

*Washington*.—*Anderson v. Kinnear*, 80 Wash. 638, 141 Pac. 1151; *Barth v. Harris*, 95 Wash. 166, 163 Pac. 401.

*Wisconsin*.—*Riggles v. Priest*, 163 Wis. 199, 157 N. W. 755.

88. *Opitz v. Schenck* (Cal.), 174 Pac. 40. And see section 324.

89. *Clarke v. Woot*, 159 N. Y. App. Div. 437, 144 N. Y. Suppl. 595.

**Sec. 502. Warning of approach.**

The burden of reasonable care which is imposed upon the driver of a motor vehicle when using the public highways,<sup>90</sup> requires, as a general proposition, that warning of its approach be given to other travelers who apparently are oblivious thereto.<sup>91</sup> The burden of the operator of a machine in this respect is now generally affirmed by statutory enactment. If the required warning is not given, the driver of the car may be liable to a cyclist who is unaware of its approach and who is injured by a collision therewith.<sup>92</sup> But the fact that the horn has been removed from the auto and the driver opens the cut-out to give warning, does not necessarily show negligence, though the use of cut-outs was forbidden by ordinance at the place of the accident.<sup>93</sup> The duty of giving a warning of approach to an intersecting street may also be imposed on the rider of a motorcycle, so that if neither the autoist nor the cyclist gives the warning and a collision thereby results, the driver of the automobile may not be liable.<sup>94</sup>

**Sec. 503. Contributory negligence of cyclist — in general.**

In case of a collision between an automobile and a bicycle or motorcycle, as a general rule, the cyclist cannot recover from the driver of the auto unless it appears that he was in the exercise of reasonable care at the time of the collision.<sup>95</sup>

90. Section 277.

91. Section 329.

92. See *Christie v. McCall* (Cal. App.), 177 Pac. 507; *Rogers v. Phillips*, 217 Mass. 52, 104 N. E. 466; *Wales v. Harper* (Manitoba), 17 West. L. R. 623. See also *Barton v. Van Gesen*, 91 Wash. 94, 157 Pac. 215.

93. *Linneball v. Levy Dairy Co.*, 173 App. Div. 861, 160 N. Y. Suppl. 114.

94. *Larsh v. Strasser*, 183 Iowa. 1360, 168 N. W. 142.

95. *Alabama*.—*Huey v. Dykes*, 203 Ala. 231, 82 So. 481.

*Arizona*.—*Young v. Campbell*, 20 Ariz. 71, 177 Pac. 19, appeal dismissed

on rehearing, 181 Pac. 171.

*California*.—*Konig v. Lyon* (Cal. App.), 192 Pac. 875.

*Michigan*.—*Gibbs v. Dayton*, 166 Mich. 263, 131 N. W. 544.

*Missouri*.—*Heryford v. Spiteansky* (Mo. App.), 200 S. W. 123; *Boyer v. Oldham* (Mo. App.), 209 S. W. 617; *Meredith v. Claycomb* (Mo. App.), 216 S. W. 794.

*New York*.—*Miner v. Rembt*, 178 N. Y. App. Div. 173, 164 N. Y. Suppl. 173, 164 N. Y. Suppl. 945.

*Washington*.—*Clark v. Wilson*, 108 Wash. 127, 183 Pac. 103; *Tyrell v. Leego*, 100 Wash. 129, 178 Pac. 467.

In some jurisdictions, however, the effect of contributory negligence is limited in cases where it is shown that the defendant has been guilty of "gross" negligence. But the courts in at least one jurisdiction have refused to apply this doctrine to a case of injuries caused by the violation of a speed limit statute by an automobile.<sup>96</sup> Mere negligence is not generally a bar to wilful misconduct on the part of the automobilist; but wilful conduct of the cyclist will defeat the action although the conduct of the automobilist was likewise wilful.<sup>97</sup> Even children, when riding a bicycle along the public streets, are required to exercise the degree of care reasonably to be expected from children of the same age and intelligence.<sup>98</sup> The contributory negligence of a cyclist is ordinarily a question for the jury.<sup>99</sup> The fact that, in a collision between an automobile and a motorcycle, the motorcycle ran into the side of

*Wisconsin*.—Foster v. Bauer, 180 N. W. 817.

96. Riggles v. Priest, 163 Wis. 199, 157 N. W. 755.

97. Spillers v. Griffin, 109 S. Car. 78, 95 S. E. 133. See also McVoy v. Chassin (Ala. App.), 88 So. 29.

98. Schrayner v. Bishop & Lynes, 92 Conn. 677, 104 Atl. 349; Black v. Parke, Davis & Co. (Mich.), 178 N. W. 700; Newmann v. Hudson County Co., 155 N. Y. App. Div. 271, 139 N. Y. Suppl. 1028; Kriens v. McMillan (S. D.), 173 N. W. 731; Barton v. Van Gesen, 91 Wash. 94, 157 Pac. 215. "An infant may be guilty of negligence, and, if it proximately contributes to its injury, it bars a recovery of the infant in the same manner and to the same extent that contributory negligence of an adult bars an action by the latter; but the difficulty arises in determining when, and under what circumstances, is an infant guilty of contributory negligence. That which will be contributory negligence on the part of an adult may be proper care on the part of an infant. That which will be negligence

on the part of one infant may be proper care on the part of another, depending upon the age, discretion, intelligence, experience, etc., of the infant. A child of tender years has capacity to exercise only such care and self-restraint as belong to childhood. Reasonable men are presumed to know this, and must govern themselves accordingly. The caution and care required of others toward the infant are measured by the age, the maturity, the capacity, and the intelligence of the child. Birmingham & A. R. Co. v. Matison, 166 Ala. 608, 609, 52 South. 49. A child too young to exercise any care or discretion is clearly as incapable of negligence as it is of crime or sin, and is therefore not answerable to the doctrine of contributory negligence. There are ages so young (usually under 7) that there is a conclusive presumption of law, and hence evidence is not admissible to refute the presumption." Jones v. Strickland, 201 Ala. 138, 77 So. 562.

99. Section 516.

the automobile does not establish the contributory negligence of the cyclist.<sup>1</sup>

**Sec. 504. Contributory negligence of cyclist — statutory requirement as to degree of care.**

A statutory enactment requiring one operating a motor vehicle on the public highways to use the "highest" degree of care to prevent injury to other travelers does not apply to one driving a motorcycle who brings an action for injuries received in a collision with an automobile. While such a statute might apply in an action against the cyclist for injuries received by another, when he himself is bringing the action, the criterion of his contributory negligence is whether he exercised ordinary care.<sup>2</sup>

**Sec. 505. Contributory negligence of cyclist — proximate cause.**

Contributory negligence or wrongful conduct on the part of a cyclist is a defense to his action for injuries from an automobile only when such negligence is one of the proximate

1. *Zuecone v. Main Fish Co.* (Wash.), 177 Pac. 314; *Glatz v. Kroeger Bros. Co.*, 168 Wis. 635, 170 N. W. 934.

2. *Hopkins v. Sweeney Automobile School Co.* (Mo. App.), 196 S. W. 772, wherein it was said: "The statute, being in derogation of the common law, is to be strictly construed. It was passed because motor vehicles are a dangerous instrumentality, and their operation is known to be a source of danger to others, and the care required by the statute was to minimize that danger. There may be circumstances in which the driver of a motor vehicle might be injured in the course of the operation of his own machine, where he could be properly held to be without remedy on that ground that the statutory degree of care rested upon him at that particular time, and that his failure to exercise that degree of care was partly responsible for his injury. We do not say that such a case could

not arise. All that we hold here is that in the circumstances of this case the degree of care resting upon plaintiff at the time he was struck was ordinary care, while the care resting upon defendant not to run into him as he was passing over the intersection was the care required by the statute. If plaintiff is to be held in this case to the exercise of the statutory degree of care, then, if the driver of an automobile drove into a hole in the street and was injured, he could not recover therefor unless he was exercising the highest degree of care of a very careful person, while if he were driving a buggy, or any other conveyance except a motor vehicle, he would be held to only ordinary care. And at the same time the fact that in the one case he was operating a motor vehicle, and in the other he was not would have nothing to do in a causative way, with his injury."

causes of the injury, but not when the conduct was not a proximate cause of the injury.<sup>3</sup> Thus, as a general proposition, the failure of the owner of a motorcycle with reference to the proper registration and licensing of the machine, will not defeat his action for injuries.<sup>4</sup> Whether the negligence or wrongful conduct of the cyclist is a contributing cause of the injury, may be a jury question.<sup>5</sup>

**Sec. 506. Contributory negligence of cyclist — looking for approaching vehicles.**

One riding a motorcycle and obeying the law of the road, cannot, as a matter of law be said to be guilty of contributory negligence, because, at the time of his collision with an automobile, he is looking down at his machine.<sup>6</sup> And a cyclist entering upon an intersecting street is not required, as a matter of law, to look back to see whether he will be overtaken by an automobile on such intersecting street.<sup>7</sup> Nor is one necessarily required to look for vehicles which may be approaching on the wrong side of the highway.<sup>8</sup> But, when a rider on a bicycle or motorcycle approaches an intersecting street along which automobiles and other vehicles, as well as pedestrians, may be expected to travel, the cyclist, in an exercise of due regard for his own safety, should at least look for vehicles.<sup>9</sup> Even a child is expected to use some care in look-

3. *Cross v. Roseneranz* (Kans.), 195 Pac. 857; *Elvidge v. Stronge & Warner Co.* (Minn.), 181 N. W. 346.

4. *Marquis v. Messier*, 39 R. I. 563, 99 Atl. 527. See also *Polmatier v. Newbury*, 231 Mass. 307, 120 N. E. 850. And see section 126.

5. *Weber v. Beeson*, 197 Mich. 607, 164 N. W. 255.

6. *Allan v. Pearson*, 89 Conn. 401, 94 Atl. 277.

7. *Hopkins v. Sweeney Automobile School Co.* (Mo. App.), 196 S. W. 772.

8. *Dier v. Voorhees*, 200 Mich. 510, 167 N. W. 26; *Ferraro v. Cooper*, 176 N. Y. Suppl. 67.

9. *Livingston v. Barney*, 62 Calo. 528, 163 Pac. 863; *McCarragher v. Proal*, 114 N. Y. App. Div. 470, 100

N. Y. 208; *Weber v. Swallow*, 136 Wis. 46, 116 N. W. 844. See also *Parker v. Cartier* (R. I.), 105 Atl. 393.

Where a delivery boy riding a bicycle was struck by an automobile which he attempted to cross in front of on a paved street sixty-seven feet wide it was held that he was guilty of negligence where it appeared that he was experienced in the use of the bicycle and in riding about the streets; that he had only the automobile and another bicycle to avoid and that if he had looked he must have seen the oncoming automobile a few rods away. And it was declared that if he did not look he did not exercise common prudence. *Gibbs v. Dayton*, 166 Mich. 263, 131 N. W. 544.

ing for other vehicles, though the care required depends upon the age and intelligence of the child.<sup>10</sup> Where one riding a bicycle westward on the north side of a street collided at the intersection of a cross street with an automobile which had just crossed from the south side of the street, behind an east-bound car, for the purpose of going north on the cross street, it was held that the plaintiff was guilty of negligence, either in failing to keep a proper lookout or in riding so near the street car and at such speed as to render the collision inevitable.<sup>11</sup>

### **Sec. 507. Contributory negligence of cyclist — care in looking.**

When looking for automobiles, the cyclist must use reasonable care, for he will be charged with knowledge of such vehicles as in the exercise of reasonable care he should have seen.<sup>12</sup> If his view is obstructed until he reaches the street, his speed should be reduced to a reasonable rate under the circumstances, and, as soon as he emerges beyond the obstructions,

10. *Newmann v. Hudson County Co.*, 155 N. Y. App. Div. 271, 139 N. Y. Suppl. 1028; *Barton v. Van Gesen*, 91 Wash. 94, 157 Pac. 215.

11. *Weber v. Swallow*, 136 Wis. 46, 116 N. W. 844, wherein it was said: "We are led to the conclusion that if plaintiff was riding near the curb he was guilty of a want of ordinary care in not observing defendant and avoiding running into the automobile and that such negligence contributed to produce the collision. If, on the other hand, plaintiff rode so near the street car that he was unable to see defendant in time to avoid colliding with his automobile after it emerged from behind the passing car, then he was guilty of culpable negligence, because he was bound to anticipate that the street crossing might be used by travelers either on foot or in vehicles, whose safety he necessarily imperiled by thus using the road. Such a situation demanded of him a high degree of care

and watchfulness for the safety of others by reason of the great liability of colliding with and injuring them. Such conduct by plaintiff was imminently dangerous to others, and therefore was under the circumstances a want of that care that ordinarily careful persons exercise under the same or similar circumstances. From the physical facts surrounding the collision it appears that whichever way plaintiff used the street just before and at the time of the collision proves him negligent either in failing to keep a proper lookout and thus avoiding a collision with the defendant, or in using the street near a passing street car in a manner and at a rate of speed as made it inevitable that he would collide with travelers emerging from behind street cars and attempting to pass over crossing streets."

12. *McCarragher v. Proal*, 114 N. Y. App. Div. 470, 100 N. Y. Suppl. 208.



he should exercise his faculty of vision.<sup>13</sup> Where it appeared that the plaintiff rode upon a bicycle down a steep farm driveway upon a State highway which he intended to cross, and was there struck by the defendant's automobile, which was driven at a negligent rate of speed, and near the entrance to the highway the view from the driveway was obscured, but at a point on the driveway about 100 feet from the road there was a view of the highway for 308 feet, and the plaintiff testified that he looked when at this point and did not see the automobile, and had two milk pails suspended on the handle of his bicycle, and knew that the road was much used by automobiles, and several of the plaintiff's witnesses testified that the automobile sounded two warning signals, but the plaintiff denied having heard them, it was held that a finding that plaintiff was free from contributory negligence was against the weight of evidence.<sup>14</sup>

**Sec. 508. Contributory negligence of cyclist — crossing in front of observed auto.**

When a cyclist uses due care in looking for approaching vehicles, and actually sees one, he is not necessarily guilty of contributory negligence because he does not stop and give the right of way to the motorist. If both the cyclist and the motorist are approaching a street intersection along different streets, the cyclist may, perhaps, be justified in thinking that he can cross before the automobile will reach the crossing.<sup>15</sup> Even though the automobilist is given the right of way at the crossing, if the machine is some distance from the crossing when the cyclist enters the intersection, the latter may justify his conduct in attempting the crossing.<sup>16</sup> Whether he is justified in proceeding, is generally a question for the jury.<sup>17</sup> Unless the appearances indicate to the contrary, he may assume that the automobilist will not violate speed limits and

13. *McCarragher v. Proal*, 114 N. Y. App. Div. 470, 100 N. Y. Suppl. 208.

14. *Simpson v. Whitman*, 147 N. Y. App. Div. 642, 132 N. Y. Suppl. 801.

15. *Weber v. Beeson*, 197 Mich. 607, 164 N. W. 255; *Walleigh v. Bean*, 248

Pa. St. 339, 93 Atl. 1069.

16. *Weber v. Beeson*, 197 Mich. 607, 164 N. W. 255.

17. *Walleigh v. Bean*, 248 Pa. St. 339, 93 Atl. 1069.

will obey the law of the road.<sup>18</sup> When he is proceeding along the road, he may also assume that the driver of an automobile coming from the rear will not run him down.<sup>19</sup> And, where a person is riding a bicycle on the right side of the road in the day time and an automobile is behind him going in the same direction, it is held not to be negligent as a matter of law for the bicyclist to attempt to cross the road, where the automobile is so far behind that it might reasonably be expected that the person operating it would see him.<sup>20</sup> But one riding a bicycle from a private driveway to the street may be negligent as a matter of law where he fails to give any warning of his approach and runs directly into the path of an approaching motor vehicle.<sup>21</sup>

#### **Sec. 509. Contributory negligence of cyclist — speed of cyclist.**

In the case of a collision between a motor vehicle and a motorcycle or bicycle, the cyclist will be deemed guilty of contributory negligence if his speed at the time of the collision was unreasonable and such speed was one of the proximate causes of the accident.<sup>22</sup> And, if the speed of the cyclist was such as to exceed the statutory or municipal limitation, the general rule is that negligence as a matter of law may be adjudged.<sup>23</sup> But in some jurisdictions the violation of a speed ordinance is not negligence, but is merely evidence of negli-

18. Section 512.

19. *Harnau v. Haight*, 189 Mich. 600, 155 N. W. 563.

20. *Rogers v. Phillips*, 206 Mass. 308, 92 N. E. 327, 28 L. R. A. (N. S.) 944.

21. *Hunter v. Mountfort*, 117 Me. 555, 102 Atl. 975.

22. *Young v. Campbell*, 20 Ariz. 71, 177 Pac. 19, appeal dismissed on rehearing, 181 Pac. 171; *Cook v. Miller*, 175 Cal. 497, 166 Pac. 316; *Dice v. Johnson* (Iowa), 175 N. W. 38; *Weber v. Swallow*, 136 Wis. 46, 116 N. W. 844.

**Amendment of answer.**—Where, in an action by a bicyclist against the

driver of an automobile for damages sustained in a collision, there is evidence that the plaintiff was traveling at a rate in excess of six miles an hour at the time of the collision, the defendant at the close of the evidence will be permitted to amend his answer so as to set up a city ordinance which prohibited the riding of bicycles at the point faster than six miles an hour. *Barton v. Van Gesén*, 91 Wash. 94, 157 Pac. 215.

23. *Dowdell v. Beasley* (Ala. App.), 82 So. 40; *Foster v. Bauer* (Wis.), 180 N. W. 817. See also section 321.

gence; and, in such a case, it will remain a question for the jury whether the violation of the speed regulation will constitute negligence.<sup>24</sup> A rate of speed below that prescribed by statute or ordinance may, however, be unreasonable under some circumstances, and may afford basis for a charge of negligence.<sup>25</sup> Speed regulations are sometimes enacted in such form as to except from their operation the vehicles of police officers in pursuit of offenders; but nevertheless such an officer may be guilty of contributory negligence if he runs a motorcycle faster than a reasonable rate of speed.<sup>26</sup> A traffic ordinance giving a motorcycle policeman the right of way at street crossings does not absolve him from exercising due care.<sup>27</sup> When the cyclist is approaching a street intersection over which vehicles on the cross street have prior rights at the crossing, it is the duty of the cyclist to slacken his speed so that he may accord to vehicles on the intersecting street the rights of priority to which they are entitled.<sup>28</sup> Where a statute forbids a speed in going over a street crossing at a rate in excess of four miles an hour when any person was upon the crossing, it was held that a cyclist was not necessarily guilty of contributory negligence in passing the crossing at a speed of from twelve to fifteen miles an hour when there was no person on the crossing.<sup>29</sup>

#### Sec. 510. Contributory negligence of cyclist — violation of law of road.

A cyclist is generally subject to the recognized law of the road.<sup>30</sup> A violation of such law is considered at least *prima facie* evidence of negligence;<sup>31</sup> and hence, in case of a collision of a motorcycle or bicycle with an automobile, the conduct of

24. *Powell v. Alitz* (Iowa), 182 N. W. 236; *Weber v. Beeson*, 197 Mich. 607, 164 N. W. 255. And see section 320.

25. *Cook v. Miller*, 175 Cal. 497, 166 Pac. 316. And see section 324.

26. *Miner v. Rembt*, 178 App. Div. 173, 164 N. Y. Suppl. 173, 164 N. Y. Suppl. 945.

27. *Clark v. Wilson*, 108 Wash. 127,

183 Pac. 103.

28. *Bullis v. Ball*, 98 Wash. 342, 167 Pac. 942.

29. *Barth v. Harris*, 95 Wash. 166, 163 Pac. 401.

30. *Dice v. Johnson* (Iowa), 175 N. W. 38; *Clarke v. Woop*, 159 N. Y. App. Div. 437, 144 N. Y. Suppl. 595. And see sections 245, 492.

31. Section 267.

the cyclist in operating his machine in violation of the recognized rule of the road may bar a recovery for his injuries.<sup>32</sup> To have this effect, however, the violation of the law of the road by the cyclist, must be one of the proximate causes of the collision.<sup>33</sup>

### **Sec. 511. Contributory negligence of cyclist — warning of approach.**

Statutory provisions generally require that motor vehicles shall be equipped with a horn or other device for giving a warning of the approach of the machine, and that such equipment shall be used for warning other travelers.<sup>34</sup> Regulations of this character may apply to motorcycles. When a motorcycle and an automobile are approaching at right angles toward a street intersection, and a regulation of this nature applies to the motorcycle as well as to the automobile, and neither sounds the required signal, the cyclist may be blamable for the accident to the same extent as the automobilist, and hence will be denied recovery against the latter.<sup>35</sup>

### **Sec. 512. Contributory negligence of cyclist — reliance on observance of law by automobilist.**

Until a traveler on a street or highway has some knowledge indicating the situation to be otherwise, he is entitled to assume that other travelers will obey the law of the road and will violate no regulations pertaining to its use.<sup>36</sup> A cyclist is not necessarily guilty of negligence because he sustains a

**32.** *Lemmon v. Broadwater*, 30 Del. (7 Boyce) 472, 108 Atl. 273; *Borg v. Larson*, 60 Ind. App. 514, 111 N. E. 201; *Dice v. Johnson* (Iowa), 175 N. W. 38; *Nolan v. Davis* (N. J.), 112 Atl. 188; *Clarke v. Woop*, 159 N. Y. App. Div. 437, 144 N. Y. Suppl. 595; *Ewrig v. Lumber Operating & Mfg. Co.*, 183 N. Y. App. Div. 198, 170 N. Y. Suppl. 192; *Presser v. Dougherty*, 239 Pa. St. 312, 86 Atl. 854. See also *Brandenberg v. Klehr*, 197 Ill. App. 459; *Edwards v. Yarbrough* (Mo.

App.), 201 S. W. 972; *Wright v. Mitchell*, 252 Pa. 325, 97 Atl. 478; *Richards v. Palace Laundry Co.* (Utah), 186 Pa. 439; *Walmsley v. Pickrell* (Wash.), 186 Pac. 847.

**33.** *Harnau v. Haight*, 189 Mich. 600, 155 N. W. 563; *Baker v. Fogg & Hires Co.* (N. J.), 112 Atl. 406.

**34.** Section 330.

**35.** *Corning v. Maynard*, 179 Iowa, 1065, 162 N. W. 564; *Larsh v. Strasser*, 183 Iowa, 1360, 168 N. W. 142.

**36.** Section 352.

collision on account of his reliance of such assumption,<sup>37</sup> or because he does not anticipate a violation.<sup>38</sup> Thus, if one riding on a motorcycle sees an automobile approaching on the wrong side of the highway, he need not stop, but may proceed a reasonable distance in reliance that the operator of the automobile will turn to the proper side of the highway.<sup>39</sup> But, while he has a right to assume that statutes and ordinances will be observed, this does not relieve him from the duty of exercising care and caution for his own safety, and when he observes that the law is being violated, he is not justified in proceeding and asserting his rights.<sup>40</sup>

### Sec. 513. Contributory negligence of cyclist — last clear chance doctrine.

In some jurisdictions the "last clear chance" doctrine prevails to the effect that one who by his negligence has placed himself in a dangerous situation may nevertheless not be barred from a recovery for his injuries, if the other party saw, or by the exercise of reasonable care, could have seen the situation in time to have avoided the injury and negligently failed to do so.<sup>41</sup> In many jurisdictions, however, the

37. *Lemmon v. Broadwater*, 30 Del. (7 Boyce) 472, 108 Atl. 273; *Reitz v. Hodgkins*, 185 Ind. 163, 112 N. E. 386; *Heryford v. Spitecanfsky* (Mo. App.), 200 S. W. 123; *Baker v. Fogg & Hires Co.* (N. J.), 112 Atl. 406; *Pinder v. Wickstrom*, 80 Oreg. 118, 156 Pac. 583; *Cameron v. Miller* (S. Dak.), 180 N. W. 71; *Richards v. Palace Laundry Co.* (Utah), 186 Pac. 439.

38. *Black v. Parke, Davis & Co.* (Mich.), 178 N. W. 700; *Dunkel v. Smith*, 168 Wis. 257, 169 N. W. 567.

39. *Konig v. Lyon* (Cal. App.), 192 Pac. 875; *Pinder v. Wickstrom*, 80 Oreg. 118, 156 Pac. 583.

40. *McCarragher v. Proal*, 114 N. Y. App. Div. 470, 100 N. Y. Suppl. 208.

41. See *Ward v. Meadows* (Ala.), 88 So. 427; *Rooney v. Levison* (Conn.), 111 Atl. 794; *Kelley v. Keller* (Mich.),

179 N. W. 237; *Heryford v. Spitecanfsky* (Mo. App.), 200 S. W. 123; *Albright v. Joplin Oil Co.* (Mo. App.), 229 S. W. 829; *Richards v. Palace Laundry Co.* (Utah), 186 Pac. 439.

"Humanitarian" rule in Missouri.— "As we conceive the humanitarian rule, it is to be applied in favor of one who has gotten into a place of danger, not purposely or wantonly, but through ignorance, unwittingly, or negligently, and being there is either ignorant, unconscious, or oblivious to the danger he is in, or for some physical reason, or want of time, is apparently not going to get out of the danger. When this attitude of a person becomes apparent to one using an instrumentality that will injure him unless some action is taken by the one controlling same to avert it, and the attitude of the one in

"last chance" rule applies only where the defendant actually saw the dangerous situation and not where reasonable care on his part would have enabled him to have seen it.<sup>42</sup> In any event, if the cyclist suddenly places himself in the dangerous position, as when he suddenly swerves in front of the motor vehicle, there is generally no room for application of the last clear chance doctrine.<sup>43</sup> That is to say, when the contributory negligence of the cyclist is concurrent with the negligence of the driver of the vehicle, the cyclist cannot recover.<sup>44</sup>

### Sec. 514. Contributory negligence of cyclist — acts in emergencies.

When one riding on a bicycle or motorcycle is suddenly placed in danger of an imminent collision with an automobile driven negligently, he is not expected to use the coolness with

danger is apparent for a sufficient length of time for the ordinarily reasonable person, using ordinary vigilance, to have discovered it, and the user of such instrumentality has at his hands the means, by the exercise of ordinary use of same, to avoid an injury, it becomes his duty to so manage his instrumentality as not to cause injury, and a failure so to do constitutes negligence and liability under the humanitarian rule. The very basis of the rule is that the plaintiff is in a position of danger from which there is an inability on his part to escape, and that inability may result from a physical cause, as of a foot being caught, which renders him unable to escape, or from a mental state, as of being unconscious or oblivious to his danger, and for that reason, while his physical state is unimpaired, he is deprived of the mentality to realize his danger and escape it. It therefore becomes most essential, then, in order that there may be a recovery under the humanitarian rule, that a finding be made that to an ordinary person the injured party was apparently oblivious to the danger, in

cases where the evidence presented the question that the injured party was oblivious and unconscious of his danger, or on the other hand there must be a finding that the injured party apparently could not extricate himself, although conscious of his danger." *Albright v. Joplin Oil Co.* (Mo. App.), 229 S. W. 829.

**South Carolina.**—The "last clear chance" doctrine cannot be invoked in *South Carolina. Spillers v. Griffin*, 109 S. Car. 78, 95 S. E. 133.

**42.** *Maris v. Lawrence Ry. & Light Co.*, 98 Kans. 205, 158 Pac. 6; *Twitshell v. Thompson*, 78 Oreg. 285, 153 Pac. 45; *Alamo Iron Works v. Prado* (Tex. Civ. App.), 220 S. W. 282; *Bullis v. Ball*, 98 Wash. 342, 167 Pac. 942. See also *Radwick v. Goldstein*, 90 Conn. 701, 98 Atl. 583; *Goodman v. Bauer*, 60 Ind. App. 671, 111 N. E. 315.

**43.** *Nelson v. Hedin*, 184 Iowa, 657, 169 N. W. 37; *Kalinowski v. Veermann* (Mo. App.), 211 S. W. 723; *Hartley v. Lasater*, 96 Wash. 407, 165 Pac. 106.

**44.** *Rooney v. Levinson* (Conn.), 111 Atl. 794; *Bullis v. Ball*, 98 Wash. 342, 167 Pac. 942.

which he would act under normal circumstances.<sup>45</sup> His lack of judgment and failure to use the best means to avoid the accident, do not necessarily render him guilty of contributory negligence as a matter of law.<sup>46</sup> A question for the jury is presented.<sup>47</sup> The fact that in the emergency he violates the law of the road by running on the wrong side thereof, does not conclusively establish his negligence.<sup>48</sup> The best means of avoiding the accident might be the stopping of his bicycle as soon as possible, but he is not charged with negligence *per se* because he attempts to avoid the collision in some other manner.<sup>49</sup> And, if the cyclist, in order to avoid the impending collision, runs his machine into the curb and is thereby injured, the injuries received may be deemed the proximate result of the negligence of the automobilist.<sup>50</sup> In many juris-

45. "Men who act in emergencies are not to be held to that strict accountability that the law demands of those who act deliberately. Nor are they to be penalized because they did not do what, in the light of subsequent events, or in theory, would have avoided the accident. The instinct of self-preservation and the instinct to refrain from harming others are always present in emergent situations affecting personal security. These impulses prompt that which is done, and what is done is usually that which should have been done, or all that could have been done. Hence the law will excuse an act which, if done deliberately or after a lapse of time sufficient for reflection, would make the actor answerable as for a willful tort." *Hartley v. Lasater*, 96 Wash. 407, 165 Pac. 106.

46. *Lebsack v. Moore*, 65 Colo. 315, 177 Pac. 137; *Walterick v. Hamilton*, 197 Iowa, 607, 161 N. W. 684; *Pyers v. Tiers*, 89 N. J. L. 520, 99 Atl. 130; *Wright v. Mitchell*, 252 Pa. 325, 97 Atl. 478; *Sheffield v. Union Oil Co.*, 82 Wash. 386, 144 Pac. 529; *Hartley v. Lasater*, 96 Wash. 407, 165 Pac. 106. See also *Beickhemer v. Empire Carry-*

*ing Corp.*, 172 N. Y. App. Div. 866, 158 N. Y. Suppl. 856.

47. *Cheney v. Buck* (Utah), 189 Pac. 81; *Harris v. Parks* (Utah), 196 Pac. 1002; *Sheffield v. Union Oil Co.*, 82 Wash. 386, 144 Pac. 529.

48. *Potter v. Glassell*, 146 La. 687, 83 So. 898; *Sheffield v. Union Oil Co.*, 82 Wash. 386, 144 Pac. 529.

49. *Pyers v. Tiers*, 89 N. J. L. 520, 99 Atl. 130.

50. *Wright v. Mitchell*, 252 Pa. 325, 97 Atl. 478, wherein it was said: "If at the time of the accident, the plaintiff was exercising proper care in passing along the highway, and the defendant negligently managed his machine so as suddenly to imperil the safety of the plaintiff, the latter would not be guilty of negligence if, while exercising the caution of a prudent man, his bicycle struck the curb when he was attempting to escape the peril. In that case the proximate cause of the accident would not be the act of the plaintiff in riding his bicycle against the curb, but the negligence of the defendant which endangered the plaintiff's safety. If the plaintiff would have been struck and injured by the defend-

dictions, this general doctrine is limited to cases where the injured person is placed in peril through the negligence of the defendant and without negligence on his part.<sup>51</sup>

### Sec. 515. Negligence of guest of cyclist.

Though a contrary rule prevails in a few jurisdictions, the rule generally adopted in this country is that the negligence of the driver of an automobile is not imputed to a mere guest riding therein.<sup>52</sup> One riding as a guest on the rear or side of a motorcycle is to be considered similarly.<sup>53</sup> But, though the negligence of the driver is not imputed to the passenger, the latter nevertheless must exercise reasonable care for his own safety.<sup>54</sup> As in other cases of negligence and contributory negligence, whether reasonable care has been employed is generally a question for the jury.<sup>55</sup> Negligence will not neces-

ant's machine had he not deflected from the straight course along the highway as a means of escaping from impending danger, he would not necessarily be guilty of negligence if, in attempting to escape the danger, he did not exercise the care or judgment required of him if it had been his voluntary action. All that was required of him to protect himself from the anticipated danger was to use the care of an ordinarily prudent man, under all the circumstances, and, if he did so, he could not be charged with negligence. When a person has been put in sudden peril by the negligent act of another, and, in an instinctive effort to escape from that peril, falls upon another peril, it is immaterial whether under different circumstances he might and ought to have seen and avoided the latter danger."

51. *Newmann v. Hudson County Co.*, 155 N. Y. App. Div. 271, 139 N. Y. Suppl. 1028, wherein it was said: "If the child, in the exercise of due care, had found herself in a position of danger caused by the negligence of the defendant, and became frightened sud-

denly, then, of course, she was not chargeable with the exercise of what in a moment of calmness would be ordinary care, and she should not be chargeable with blame in turning the bicycle to the south and running in front of the oncoming motor truck in order to avoid it, but such rule applies only to a case where the person injured was put in a position of danger through the negligence of the defendant, and without any negligence on his or her part, and the court should have so stated." See also *Corning v. Maynard*, 179 Iowa, 1065, 162 N. W. 564.

52. Section 679.

53. *Karpeles v. City Ice Delivery Co.*, 198 Ala. 449, 73 So. 642; *Parmenter v. McDougall*, 172 Cal. 306, 156 Pac. 460; *Wiley v. Young*, 178 Cal. 681, 174 Pac. 316; *Sanders v. Taber*, 79 Oreg. 522, 155 Pac. 1194.

54. *Parmenter v. McDougall*, 172 Cal. 306, 156 Pac. 460; *Bell v. Jacobs*, 261 Pa. 204, 104 Atl. 587.

55. *Parmenter v. McDougall*, 172 Cal. 306, 156 Pac. 460; *Simpson v. Schiff* (Kans.), 197 Pac. 857.



sarily be charged against the guest merely because he has reason to believe that the cyclist was usually careless; but such fact is merely one of the circumstances to be considered by the jury in determining whether the guest has exercised proper care.<sup>56</sup> But, though the negligence of the cyclist will not be imputed to the guest, there may remain the question whether the negligence of the automobilist was a proximate cause of the accident, or whether the negligence of the cyclist was the sole cause of the accident; in the latter event, the automobilist is not liable for the injury to the guest.<sup>57</sup>

### Sec. 516. Function of jury.

As in other cases of negligence, when a cyclist is bringing an action for injuries received from a collision with a motor vehicle, the negligence of the defendant and the contributory negligence of the plaintiff are generally questions for the jury.<sup>58</sup> As has been said,<sup>59</sup> "It is well established that if the

56. *Wiley v. Young* (Cal.), 174 Pac. 316.

57. *Karpeles v. City Ice Delivery Co.* 198 Ala. 449, 73 So. 642; *Hagenah v. Bidwell* (Cal. App.), 189 Pac. 799; *Lemmon v. Broadwater*, 30 Del. (7 Boyce) 472, 108 Atl. 273.

58. *Arizona*.—*Benton v. Regeser*, 20 Ariz. 273, 179 Pac. 966.

*California*.—*Townsend v. Keith*, 34 Cal. App. 564, 168 Pac. 402; *Whitelaw v. McGillard*, 179 Cal. App. 349, 176 Pac. 679; *Christy v. McCall* (Cal. App.), 177 Pac. 507; *Guderitz v. Boardway Bros.*, 39 Cal. App. 48, 177 Pac. 859; *Baillargeon v. Neyers*, 180 Cal. 504, 182 Pac. 37; *Brimberry v. Duffield Lumber Co.*, 191 Pac. 894; *Konig v. Lyon* (Cal. App.), 192 Pac. 875.

*Illinois*.—*Hodges v. Coey*, 205 Ill. App. 417; *Thomas v. Howatt*, 210 Ill. App. 380.

*Indiana*.—*Fame Laundry Co. v. Henry* (Ind. App.), 131 N. E. 411; *Nordyke & Marmon Co. v. Smith* (Ind. App.), 131 N. E. 414.

*Iowa*.—*Nelson v. Hedin*, 184 Iowa,

657, 169 N. W. 37; *Dice v. Johnson*, 175 N. W. 38; *Powell v. Alitz*, 182 N. W. 236.

*Kansas*.—*Keil v. Evans*, 99 Kans. 273, 161 Pac. 639; *Simpson v. Schiff* (Kans.), 197 Pac. 857.

*Massachusetts*.—*Hallett v. Crowell*, 232 Mass. 244, 122 N. E. 264.

*Michigan*.—*Vezina v. Shermer*, 165 N. W. 697; *Dier v. Voorhees*, 200 Mich. 510, 167 N. W. 26; *Rotter v. Detroit United Ry.*, 171 N. W. 514; *Ward v. DeYoung*, 177 N. W. 213; *Black v. Parke, Davis & Co.*, 178 N. W. 700; *Kelley v. Keller*, 179 N. W. 237.

*Minnesota*.—*Riser v. Smith*, 136 Minn. 417, 162 N. W. 520; *Kelly v. McKeon*, 139 Minn. 285, 166 N. W. 329; *Williams v. Larson*, 140 Minn. 468.

*Mississippi*.—*Porter v. Nesmith*, 87 So. 5.

*Missouri*.—*Roy v. North Kansas City Development Co.* (Mo. App.), 209 S. W. 990; *Meredith v. Claycomb* (Mo. App.), 216 S. W. 794.

evidence in a personal injury action for negligence is conflicting, or, if not, if the inferences to be drawn therefrom are doubtful and uncertain, then the questions of negligence are for a jury." Where there is a conflict in the evidence as to whether a collision between the plaintiff's bicycle and the defendant's automobile was caused by the defendant suddenly turning to the left-hand side of the street and thereby striking the plaintiff, who was coming from the opposite direction, or by the sudden veering of the plaintiff's bicycle, a question arises for the jury.<sup>60</sup> Whether the acts of negligence alleged were the proximate cause of the damages resulting from a collision of the plaintiff's motorcycle with the defendant's automobile, is a jury question.<sup>61</sup> In an action for negligent injuries claimed to have resulted from the collision of a motorcycle and an automobile, the owner of which is shown by undisputed evidence to have failed in complying with the statute requiring the driver of a motor vehicle to keep to the right of street intersections in turning corners, while the bicyclist was claimed to have been negligent, under disputed testimony, in failing to avoid the accident, the question of negligence and of contributory negligence were held to be for the jury.<sup>62</sup>

*New Hampshire.*—Whitney v. Carr, 106 Atl. 37.

*New Jersey.*—Siegeler v. Nevweiler, 91 N. J. L. 273, 102 Atl. 349; Desmond v. Basch & Greenfield, 108 Atl. 362.

*New York.*—Linneball v. Levy Dairy Co., 173 N. Y. App. Div. 861, 160 N. Y. Suppl. 114.

*North Carolina.*—Cooke v. Jerome, 172 N. Car. 626, 90 S. E. 767.

*Pennsylvania.*—Walleigh v. Bean, 248 Pa. St. 339, 93 Atl. 1069; Pickering v. Snyder, 113 Atl. 375.

*South Dakota.*—Cameron v. Miller, 180 N. W. 71.

*Texas.*—Alamo Iron Works v. Prado (Civ. App.), 220 S. W. 282; Templeton v. Northern Texas Traction Co. (Civ.

App.), 217 S. W. 440.

*Utah.*—Cheney v. Buck, 189 Pac. 81.

*Washington.*—Clark v. Wilson, 108 Wash. 127, 183 Pac. 103; Walmsley v. Pickrell, 186 Pac. 847.

*Wisconsin.*—Slack v. Joyce, 163 Wis. 567, 158 N. W. 310; Dunkel v. Smith, 168 Wis. 257, 169 N. W. 567.

59. Friedrich v. Boulton, 164 Wis. 526, 159 N. W. 803.

60. Harris v. Pew, 185 Mo. App. 275, 170 S. W. 344.

61. F. J. Cooledge & Sons v. Johnson-Gewinner Co., 17 Ga. App. 733, 88 S. E. 409; Weber v. Beeson, 197 Mich. 607, 164 N. W. 255.

62. Reed v. Martin, 160 Mich. 253, 125 N. W. 61.

## CHAPTER XX.

### FRIGHTENING HORSES.

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#### Sec. 517. In general.

Owners of animal-drawn and motor vehicles have equal rights in the streets and highways, subject to the exercise of reasonable care by each with respect to the rights of the other.<sup>1</sup>

1. *Arkansas*.—*Russ v. Strickland*, 130 Ark. 406, 197 S. W. 709.

Therefore the fact, standing alone, that a horse becomes frightened by the operation of an automobile in a street does not render the motorist liable for an injury thus incurred.<sup>2</sup> And, though the owner of an animal may be aware of its tendency to become frightened at the approach of an automobile, he is not guilty of negligence in driving it along a street or highway.<sup>3</sup> In all cases the principle controls that reasonable care is required of all users of the public thoroughfares. It is the duty of the driver of an automobile in every case where he sees an animal is liable to, or is becoming, frightened by the operation of the car to exercise such care as a reasonably prudent man would under the same circumstances;<sup>4</sup> and, if it appears that from his failure to exercise such care injury has resulted, he will be liable therefor.<sup>5</sup>

*Delaware*.—Walls v. Windsor, 5 Boyce's (28 Del.) 265, 92 Atl. 989.

*Indiana*.—Brinkman v. Pacholke, 41 Ind. App. 662, 84 N. E. 762; East v. Amburn, 47 Ind. App. 530, 94 N. E. 895. "Counsel insists that one operating an automobile has the same rights to the use of the streets as one operating any other kind of vehicle. So he has; and he is also charged with the same degree of care and caution, and the same regard for the rights of others in the use of the streets. We desire to make no distinction in favor of or against the operator of an automobile, but it is his duty, the same as the driver of any other vehicle, to use care proportionate to the dangers to which the vehicle in which he travels exposes other travelers of the highway." East v. Amburn, 47 Ind. App. 530, 94 N. E. 895

*Missouri*.—Hall v. Compton, 130 Mo. App. 675, 108 S. W. 1122.

*Montana*.—"The drivers of horse-drawn vehicles have the same right to use the public streets as street cars or automobiles—neither more nor less; none of them may go blithely along indifferent to the danger of others, but each must be operated so as to prevent

doing avoidable injury to others, stopping if and when necessary to that end." Anderson v. Missoula St. Ry. Co., 54 Mont. 83, 167 Pac. 841.

*Nebraska*.—Tyler v. Hoover, 92 Neb. 221, 138 N. W. 128.

*New York*.—Knight v. Lanier, 69 N. Y. App. Div. 454, 74 N. Y. Suppl. 999.

*Tennessee*.—Coca Cola Bottling Works v. Brown, 139 Tenn. 640, 202 S. W. 926. And see section 49.

2. Hall v. Compton, 130 Mo. App. 675; 108 S. W. 1122; Tyler v. Hoover, 92 Neb. 221, 138 N. W. 128. See also Walls v. Windsor, 5 Boyce's (28 Del.) 265, 92 Atl. 989. And see section 519.

3. Butler v. Cabe, 116 Ark. 26, 171 S. W. 1190.

4. *Arkansas*.—Russ v. Strickland, 130 Ark. 406, 197 S. W. 709.

*Illinois*.—Traeger v. Wasson, 163 Ill. App. 572.

*Iowa*.—Pekarek v. Myers, 159 Iowa. 206, 140 N. W. 409.

*Minnesota*.—Nelson v. Holland, 127 Minn. 188, 149 N. W. 194.

*Nebraska*.—Tyler v. Hoover, 92 Neb. 221, 138 N. W. 128.

*Texas*.—Blackwell v. McGrew (Civ. App.), 141 S. W. 1058.

5. *Illinois*.—Fitzsimmons v. Snyder,

**Sec. 518. Degree of care to avoid frightening horses.**

It is a fundamental rule that the operator of a motor vehicle is bound to exercise reasonable care to prevent injury to other travelers in the highway.<sup>6</sup> This general rule includes, not only the duty to avoid actual collisions with other conveyances, but also the obligation of using reasonable care to operate the machine in such a way that horses and other animals will not be frightened thereby. One driving a horse may rely on the exercise of reasonable care by the operator of an automobile approaching from the rear, and in using a street frequented by automobiles he assumes only the risk of their operation in a reasonably careful manner.<sup>7</sup> It is a rule of the common law that, although one may travel with a conveyance which is likely to frighten horses, yet, while doing so, he must exercise reasonable care to avoid injury to others lawfully using the highway.<sup>8</sup> The fact that motor vehicles are novel and unusual in appearance and for that reason are likely to frighten horses, is no reason for prohibiting the use of such machines.<sup>9</sup> It is, however, the duty of one operating a motor car to take all reasonable precautions against frightening horses or other domestic animals on the highway.<sup>10</sup> But, if the driver of an automobile proceeds with due

181 Ill. App. 70; *Freeze v. Harris*, 162 Ill. App. 118.

*Iowa*.—*Staley v. Forest*, 157 Iowa, 188, 138 N. W. 441.

*Maine*.—*Blackden v. Blaisdell*, 113 Me. 567, 93 Atl. 540.

*Minnesota*.—*Nelson v. Holland*, 127 Minn. 188, 149 N. W. 194.

*Nebraska*.—*Schueppe v. Uhl*, 97 Neb. 328, 149 N. W. 789.

*South Dakota*.—*Van Horn v. Simpson*, 35 S. D. 640, 153 N. W. 883.

*Texas*.—*Carsey v. Hawkins*, 163 S. W. 586, 165 S. W. 64.

6. Section 277.

7. *Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236.

8. *Harris v. Hicks* (Ark.), 221 S. W. 472; *Murphy v. Wait*, 102 N. Y. App.

Div. 121, 92 N. Y. Supp. 253. See also *Upton v. Windham*, 75 Conn. 288, 53 Atl. 660.

9. *Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. (N. S.) 238, 6 Ann. Cas. 656. And see sections 47, 48.

10. *Arkansas*.—*Russ v. Strickland*, 130 Ark. 406, 197 S. W. 709.

*Illinois*.—*Tracger v. Wasson*, 163 Ill. App. 572.

*Indiana*.—*Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. (N. S.) 238, 6 Ann. Cas. 656; *Brinkman v. Pacholke*, 41 Ind. App. 662, 84 N. E. 762; *East v. Amburn*, 47 Ind. App. 530, 94 N. E. 895.

*Iowa*.—*Strand v. Grinnell Automobile Garage Co.*, 136 Iowa, 68, 113 N.

care and with a proper regard to the rights of other travelers having equal rights in the street, he is not liable for injuries occasioned by the frightening of a horse.<sup>11</sup> The degree of care to be exercised by the driver of the automobile depends upon the circumstances of each particular case, such as the disposition of the horse, the natural surroundings, and the size and appearance of the auto.<sup>12</sup> In many States statutes have been passed prescribing the degree of care to be exer-

W. 488; *Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236; *Pekarek v. Myers*, 159 Iowa, 206, 140 N. W. 409.

*Kentucky*.—*Shinkle v. McCullough*, 116 Ky. 960, 77 S. W. 196.

*Minnesota*.—*Nelson v. Holland*, 127 Minn. 188, 149 N. W. 194.

*Mississippi*.—*Burcham v. Robinson*, 113 Miss. 527, 74 So. 417.

*Missouri*.—*Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122; *Graham v. Sly*, 177 Mo. App. 348, 164 S. W. 136.

*Nebraska*.—*Tyler v. Hoover*, 92 Neb. 221, 138 N. W. 128.

*New York*.—*Knight v. Lanier*, 69 N. Y. App. Div. 454, 74 N. Y. Suppl. 999.

*South Dakota*.—*Van Horn v. Simpson*, 35 S. Dak. 640, 153 N. W. 883.

*Tennessee*.—*Coco Cola Bottling Works v. Brown*, 139 Tenn. 640, 202 S. W. 926.

*Texas*.—*Blackwell v. McGrew* (Civ. App.), 141 S. W. 1058.

**High degree of care.**—Statutory provisions in some states may require that the driver of an automobile exercise the "highest" degree of care when traveling along a public highway. *Hufft v. Dougherty*, 184 Mo. App. 374, 171 S. W. 17. Such a provision is constitutional. *Hays v. Hogan*, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918C 715, Ann. Cas. 1918E 1127. And see section 281.

**"Every reasonable precaution."**—Statutes 1903, c. 463, § 7 of *Massachusetts* required that the driver of one "approaching" any vehicle drawn by a

horse or horses, should operate, manage and control such automobile in such manner as to exercise every reasonable precaution to prevent the frightening of such horse or horses and to insure the safety and protection of any person riding or driving the same. Under this statute it was held that an automobile overtaking a horse-drawn vehicle from behind, was "approaching" within the meaning of the statute. *Gifford v. Jennings*, 190 Mass. 54, 76 N. E. 233.

11. *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122.

12. *Giles v. Voiles*, 144 Ga. 853, 88 S. E. 207; *Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. (N. S.) 238, 6 Ann. Cas. 656; *Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236.

**Loading of machine.**—In *Pease v. Cochran* (S. D.), 173 N. W. 158, 5 A. L. R. 936, where negligence was charged in the unusual appearance of the load on the machine, the court said: "In order to constitute actionable negligence on this branch of the case, there must have been something about the appearance of the car or the manner in which it was loaded that would suggest to an ordinarily prudent man that it would terrify or frighten an ordinary horse, *i. e.*, a horse that had become accustomed to automobiles on the road. There are horses that would take fright at any automobile, regardless of whether it was loaded at all;

cised by automobilists and in some cases the course of conduct to be pursued by them.<sup>13</sup> Such a statute may be held to apply, not only in the case of animals in harness, but also where animals are being conducted or driven along a highway by a drover.<sup>14</sup>

**Sec. 519. Auto driver not an insurer.**

While the driver of an automobile is required to use reasonable care to avoid frightening horses, he does not insure that horses will not become frightened at the approach of his car or that he will answer for the injuries occasioned by their fright.<sup>15</sup> As was said in one case,<sup>16</sup> "The frightening of a horse driven or ridden along a public highway caused by encountering a vehicle or pedestrian does not, of itself, raise any inference of negligence on the part of the pedestrian or the driver of the vehicle. The law contemplates that all sorts of people and all kinds of conveyances may use the highway with equal right and, as long as the driver of a lawful vehicle observes the laws of the road and proceeds with the degree of care to be expected of an ordinarily careful and prudent person in such situation, he cannot be held liable for an injury caused by the fright of the animal at his appearance or at that of his conveyance." One injured by the fright of

but people are not required to refrain from using automobiles on the highway to avoid frightening such horses, and a person taking such horse on the highway would do so at his own peril. On the other hand, there are horses that would not take fright at an automobile, no matter how it might be loaded or what its appearance might be. But this fact would not justify a person in going upon a highway with an automobile so loaded, or having such an appearance, that it would be calculated to frighten or terrify an ordinary horse."

13. See the following cases: *Walls v. Windsor* (Del. Super.), 92 Atl. 989; *Ellsworth v. Jarvis*, 92 Kan. 895, 141

Pac. 1135; *Arrington v. Horney*, 88 Kan. 817, 129 Pac. 1159; *Craton v. Huntzinger*, 163 Mo. App. 718, 147 S. W. 512; *Curry v. Fleer*, 157 N. C. 16, 72 S. E. 626.

**Sufficiency of indictment or information under a statute.** See *Holland v. State*, 11 Ga. App. 769, 76 S. E. 104; *Coryell v. State*, 92 Neb. 482, 138 N. W. 572.

14. *Fitzsimmons v. Snyder*, 81 Ill. App. 70.

15. *Giles v. Voiles*, 144 Ga. 853, 88 S. E. 207; *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122.

16. *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122.

horses necessarily assumes the burden of showing the negligence of the driver of the automobile.<sup>17</sup> Thus, it is error for the presiding justice to charge broadly that: "The degree of diligence which must be exercised in a particular exigency is such as is necessary to prevent injuring others."<sup>18</sup> "Automobiles are constantly driven along streets past horses without frightening them, and if the appearance and movement of a particular automobile and the noise incident to its operation are in no way unusual, it is not *per se* a wrongful act to operate it in proximity to a horse, so long as the horse exhibits no fright."<sup>19</sup> Thus, where the automobile was of ordinary appearance and no unusual noise was produced and it was operated at a low rate of speed and there was no evidence to show that the operator of the machine had any reason to suppose that a team of horses was likely to become

17. *Delaware*.—Walls v. Windsor, 92 Atl. 989.

*Georgia*.—Giles v. Voiles, 144 Ga. 853, 88 S. E. 207.

*Iowa*.—Gearhart v. Stouder, 161 Iowa, 644, 143 N. W. 499; Cresswell v. Wainwright, 154 Iowa, 167, 134 N. W. 594; Gipe v. Lynch, 155 Iowa, 627, 136 N. W. 714.

*Kentucky*.—Shelton v. Hunter, 162 Ky. 531, 172 S. W. 950.

*Maine*.—Carter v. Potter, 110 Me. 545, 86 Atl. 671.

*Missouri*.—Hall v. Compton, 130 Mo. App. 675, 108 S. W. 1122; Sapp v. Hunter, 134 Mo. App. 685, 115 S. W. 463; Fields v. Sevier, 184 Mo. App. 685, 171 S. W. 610.

*New York*.—Barnett v. Anheuser-Busch Agency, 134 N. Y. Suppl. 734.

*Pennsylvania*.—Silberman v. Huyette, 22 Montg. Co. L. Rep. 39.

*Texas*.—Riley v. Fisher (Civ. App.), 146 S. W. 581.

*Utah*.—Fowkes v. J. I. Case Threshing Mach. Co., 46 Utah, 53, 151 Pac. 53.

*Washington*.—Yttregarl v. Young, 77 Wash. 523, 137 Pac. 1043.

**Statute of limitations.**—Action for injuries alleged to be due to frightening of horses by an automobile, held to be barred by the statute of limitations of Connecticut. Sharkey v. Skilton, 83 Conn. 503, 77 Atl. 950.

18. Giles v. Voiles, 144 Ga. 853, 88 S. E. 207, wherein it was said: "In stating the degree of diligence that the defendant was required to observe, the court informed the jury that he was bound to a degree of diligence which would prevent injury to the defendant. This, in effect, imposed upon the defendant the duty of observing the diligence required of an insurer, and eliminated all such questions as accident, contributory negligence, and the duty of the plaintiff to exercise ordinary care to avoid the consequences of the defendant's negligence. It was the equivalent of instructing the jury that it was the duty of the defendant to avoid injury to the plaintiff's property at all events."

19. O'Donnell v. O'Neil, 130 Mo. App. 360, 109 S. W. 815; Pease v. Cochran (S. D.), 173 N. W. 158, 5 A. L. R. 936.



frightened and after the horses had become frightened nothing could have been done by him to avoid the accident, as it happened instantly and the horses in a few seconds were free from the vehicle and dashing along the street, it was held that he was in the exercise of reasonable care and not liable to one injured by the runaway team.<sup>20</sup> And where, in an action for damages occasioned by the frightening of plaintiff's team by the operation of defendant's automobile, it appeared that the team pulled back and escaped immediately on the stopping of the automobile, and it did not appear that, had the defendant arrested the sparker as soon as he saw or might have seen that the team was frightened, it would have been in time to have obviated their escape, or that he could have done anything to have stopped their fright after he might have discovered it, he was not guilty of negligence warranting a recovery.<sup>21</sup>

## Sec. 520. Notice that horses take fright.

The operator of an automobile propelled by a gasoline engine is charged with notice of the fact that horses may be frightened thereby, and is bound to exercise reasonable care to handle his machine in such a manner as to avoid frightening horses lawfully on the highway.<sup>22</sup>

20. *Simmons v. Lewis*, 146 Iowa, 316, 125 N. W. 194.

21. *House v. Cramor*, 134 Iowa, 374, 112 N. W. 3, 13 Ann. Cas. 461, 10 L. R. A. (N. S.) 655.

22. *House v. Cramer*, 134 Iowa, 374, 112 N. W. 3, 13 Ann. Cas. 461, 10 L. R. A. (N. S.) 655; *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122. It is incumbent upon a person driving an automobile along a highway to take notice that motor cars are, as yet, usually strange objects to horses, and are likely to startle the animals when driven up in front of them at a rapid rate. *McIntyre v. Orner*, 166 Ind. 57, 76 N. E.

750, 4 L. R. A. (N. S.) 1130, 8 Ann. Cas. 1087; *Gaskins v. Hancock*, 156 N. C. 56, 72 S. E. 80.

**Excuse for failure to observe frightened horses.**—It is no justification for the failure of the driver of an automobile to look ahead and observe the fright of horses drawing an approaching carriage that it is necessary for him to keep his eyes and attention fixed on the track of the road to enable him to guide the machine by the carriage safely and to avoid chuck holes and other obstacles. *McIntyre v. Orner*, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 8 Ann. Cas. 1087.

**Sec. 521. Proximate cause.**

Assuming the negligence of the operator of a motor vehicle, he is liable only for such injuries as proximately result from such negligence. Before one injured by the fright of a horse can recover from the driver of an automobile for such injuries, he must show that the negligence of the auto driver was a proximate cause of the fright of the horse and that his injuries result from such fright.<sup>23</sup> When a horse is frightened by the negligent operation of a motor vehicle, the results of the fright such as a physical injury thereby inflicted on the driver or a damage to property from the horse running away, are natural results which may be expected from the negligence of the operator of the machine. For example, if an automobile chauffeur negligently frightens a horse, and as a result of such fright the horse kicks its driver, the personal injuries thus sustained by the driver may be deemed the proximate result of the negligence.<sup>24</sup> But, it has been held, that, where the fright of the horse caused it to rupture a blood vessel in its heart resulting in death, in the absence of any physical

23. *Henderson v. Northam*, 176 Cal. 493, 168 Pac. 1044; *Lee v. City of Burlington*, 113 Iowa, 356, 85 S. W. 618; *Herdman v. Zwart*, 167 Iowa, 500, 149 N. W. 631; *Coughlin v. Mark*, 173 Ky. 728, 191 S. W. 503. See also *Martin v. Garlock*, 82 Kans. 266, 108 Pac. 92.

**Act of person in carriage.**—Where the plaintiff was driving a horse attached to a buggy along a public highway, and the horse became frightened by the operation of an approaching automobile of the defendant, and fell into a ditch and was injured, the act of a third person in the buggy with the plaintiff in grabbing the lines and attempting to control the frightened horse, which pulled the horse into the ditch, where he was injured, was not necessarily the legal cause of the injury. Whether the operation of the defendant's automobile in frightening the horse, or the grabbing of the lines by

the third party, was the legal cause of the injury to the horse, and whether or not the defendant was negligent, were issues for a jury. *Nixon v. Williams* (Ga. App.), 103 S. E. 880.

**Instruction to jury.**—In an action based on the frightening of a horse by an automobile, in the absence of a request for a more definite instruction, a charge to the jury that a recovery could be had if the injury was caused by the negligence of the defendant, without contributory negligence on the part of the plaintiff, is not rendered materially erroneous by the omission to state that the negligence complained of must have been the proximate cause and that the injury must have been one reasonably to have been anticipated as a result thereof. *Martin v. Garlock*, 82 Kans. 266, 108 Pac. 92.

24. *Gifford v. Jennings*, 190 Mass. 54, 76 N. E. 233.

injury to it, there was no liability for the horse.<sup>25</sup> Though a different rule may obtain in a few jurisdictions, it is generally held that the failure to have an automobile properly licensed and registered as required by statute is not the proximate cause of an injury occasioned by the machine. Thus, when such an automobile frightens a horse, ground of liability other than the mere violation of the statute must be shown.<sup>26</sup> So, too, the fact that the automobilist violates the statute with reference to stopping after the accident and giving his name to one injured is not to be considered on the question of negligence in causing the accident.<sup>27</sup> To a reasonable extent the municipality charged with the maintenance of a highway is bound to anticipate that horses will become frightened on the highway and must use reasonable care to avoid injuries from such fright. Thus, when a horse becomes frightened at an automobile and shys and an injury results because the municipality has failed properly to guard or fender the road, the injury may be said to be the proximate result of the negligence of the municipality and it will be liable for the injuries.<sup>28</sup>

25. *Lee v. City of Burlington*, 113 Iowa, 356, 85 N. W. 618, wherein it was said: "If there had been any physical injury to the horse due to defendant's negligence and resulting in death, there would undoubtedly be liability. But where death results from fright alone the defendant is not liable in damages, since such a result is so unusual and extraordinary that one ought not to be held liable therefor. As a general rule, no recovery may be had for injuries resulting from fright caused by the negligence of another, where no immediate personal injury is received. This is the settled rule as to human beings. . . . and we see no reason why the same rule should not be applied to animals (see also *Mahoney v. Dankwart*, 108 Iowa, 321). Although

possessed of the most vivid imagination, one could hardly anticipate such results as are said to have followed from the fright of the horse. It was such an unusual occurrence that the law will not consider it the proximate result of the alleged negligence."

26. *Black v. Moree*, 135 Tenn. 73, 185 S. W. 682; *Mumme v. Sutherland* (Tex. Civ. App.), 198 S. W. 395. And see section 126.

27. *Henderson v. Northam*, 176 Cal. 493, 168 Pac. 1044.

28. *Livingston & Co. v. Philley*, 155 Ky. 224, 159 S. W. 665; *Maynard v. Westfield*, 87 Vt. 532, 90 Atl. 504; *Davis v. Township of Usborne*, 28 D. L. R. (Canada) 397, 36 O. L. R. 148, 9 O. W. N. 484. And see section 701.

**Sec. 522. Horse not on highway.**

Statutory provisions relative to the use of highways by motor vehicles are designed, as a general proposition, solely for the protection of other travelers along the way. Thus, the fact that the operator of a motorcycle violated a speed statute and thereby frightened a team working in a field adjoining the highway, affords no cause of action for ensuing injuries.<sup>29</sup> But, where, upon the approach of an automobile, the driver of a horse leads it off the highway on private lands in order to avoid its fright, it seems that the same rules apply to the conduct of the driver of the machine, as would apply if the horse had remained on the public highway.<sup>30</sup>

**Sec. 523. Automobile left unattended by side of highway.**

Where a horse has become frightened at an automobile which has been left standing by the side of the highway, whether the operator thereof has exercised due care depends upon the surrounding circumstances, such as the appearance of the automobile, the time it has been left unattended, and the necessity for its remaining at such place. If a motor vehicle is left at the side of the road because of a breakdown, its operator is not guilty of negligence, unless he has unreasonably delayed its repair or removal.<sup>31</sup> But where a bright red automobile with brass trimmings was left standing by the side of the road for a long time, and the jury found that the use of the highway was not reasonable but rather was an unauthorized obstruction thereof, it was held that the finding would not be disturbed upon appeal.<sup>32</sup>

**Sec. 524. Noise — usual noise.**

An automobile, being a legitimate vehicle for travel upon the public highways, may be operated though noises result therefrom.<sup>33</sup> The right to operate an automobile upon the

29. *Walker v. Faelber*, 102 Kans. 646, 171 Pac. 605.

30. *Harroun v. Benton*, 197 Ill. App. 138.

31. *Davis & Sons v. Thornburg*, 149

N. Car. 233, 62 S. E. 1088.

32. *McIntyre v. Coote*, 19 Ont. L. R. (Canada) 9. See also *Harris v. Mobbs*, L. R. 3 Exch. Div. (Eng.) 268.

33. Section 49.

public highways necessarily carries the right to make the usual noises incident to such operation.<sup>34</sup> It may not, of itself, be negligence to permit the engine of an automobile to run while the machine is temporarily standing still on the highway, and when it is not shown that the driver knew or should have known that the machine was frightening a horse, in time to have avoided the accident, the court may properly refuse to submit the auto driver's negligence in this respect.<sup>35</sup> But the situation may be such that even the usual noises of operation should be abated in order to avoid frightening a horse, and their continuance may be a ground of negligence.<sup>36</sup> Thus, where a motorist, in compliance with a signal from the driver of a mule, ran his machine into a cut-out in the bank on the side of the road, and stopped the forward motion of the machine, but the motor, however, was permitted to run, and, according to the testimony given in an action by the party driving the mule, gave forth considerable noise and caused the whole machine to vibrate. The plaintiff continued his approach; the mule becoming more or less frightened as he neared the machine, and when he was almost opposite it, he became uncontrollable, and ran over to the extreme right of the road, where he struck a telephone pole, throwing the plaintiff from the wagon. The question of the negligence of the defendant was permitted to go to the jury and the jury found negligence and awarded damages to the plaintiff; and it was held that it is a fact of which courts will take judicial notice that automobiles on highways, especially when they are infrequent, have a tendency to frighten animals; and the duty, therefore, devolves upon the drivers of such machines to exercise due care to prevent accidents. The amount of necessary care varies with the various circumstances, and acts which in a given case might be negligence in another might be due care, and therefore it is almost absolutely necessary that what

34. *Gipe v. Lynch*, 155 Iowa. 627. 136 N. W. 714; *Coca Cola Bottling Works v. Brown*, 139 Tenn. 640, 202 S. W. 926; *Brown v. Thorne*, 61 Wash. 18, 111 Pac. 1047. See also *Day v. Kelly*, 50 Mont. 306, 146 Pac. 930.

35. *Pipe v. Lynch*, 155 Iowa. 627. 136 N. W. 714.

36. *Ellsworth v. Jarvis*, 92 Kans. 895, 141 Pac. 1135; *Carsey v. Hawkins* (Tex.), 163 S. W. 586, 165 S. W. 64.

action amounts to due care must be a question of fact.<sup>37</sup> And, while the noise of a machine may not, of itself, afford a basis for the recovery of damages for injuries, yet the running of the car at a high speed so that a traveler's horse is thereby frightened may be such negligence as will sustain a verdict.<sup>38</sup>

### Sec. 525. Noise — unusual noise.

It cannot, as a matter of law, be said that the operation of an automobile in a manner to make a loud noise, creating dust and smoke, constitutes negligence.<sup>39</sup> But the jury may charge negligence against the operator of a motor vehicle approaching a horse, if the machine makes an unusual or unnecessary noise, and he may be responsible for injuries accruing from the fright of the horse.<sup>40</sup> Thus, where a horse became restless upon the approach of an automobile and the operator of the machine, not only failed to stop, but tooted his horn as he came in proximity to the horse, it was held that he might properly be charged with negligence.<sup>41</sup> And, it has been held that there was sufficient evidence of negligence in the driving of an automobile, whereby a team was frightened and ran away, to require the case to be submitted to the jury, where it appeared that the automobile was run at a speed of twenty or twenty-five miles an hour, on a street where there were many teams and where the city ordinances prohibited a speed in excess of ten miles an hour, that the driver passed within fifteen feet of the team and blew his whistle when directly opposite and did not notice the horses before they started to

37. *Rochester v. Bull*, 78 S. C. 249, 58 S. E. 766. See also *Sapp v. Hunter*, 134 Mo. App. 685, 115 S. W. 463; *Fletcher v. Dixon*, 107 Md. 420, 68 Atl. 875.

38. *Shinkle v. McCullough*, 116 Ky. 560, 77 S. W. 196. See also *Mason v. West*, 61 N. Y. App. Div. 160, 70 N. Y. Suppl. 478. And see section 525.

39. *Henderson v. Northam*, 176 Cal. 493, 168 Pac. 1044.

40. *Coughlin v. Mark*, 173 Ky. 728, 191 S. W. 503; *Lubier v. Mohaud*, 38

Queb. S. C. (Canada) 190.

**Evidence.**—In an action for damages caused by the alleged frightening of a horse by an automobile, it has been held that a witness acquainted with the defendant's automobile may testify that it was exceedingly noisy and was the loudest machine he had ever heard. *Fletcher v. Dixon*, 113 Md. 101, 77 Atl. 326.

41. *Messer v. Bruening*, 32 N. Dak. 515, 156 N. W. 241.

run.<sup>42</sup> So, too, where the driver of a motorcycle overtook the driver of a restive horse and sounded his whistle, making an unusual noise, it was held that he was liable for injuries sustained by the driver of the horse as a result of the horse becoming frightened and overturning the buggy in the ditch.<sup>43</sup> But one may be justified in sounding his horn when passing a horse, when the signal is given in good faith for the purpose of a warning to another traveler some distance in advance.<sup>44</sup> Where the plaintiff's witnesses testified that the automobile, when along side of a team of horses, started "chugging," and frightened them into a runaway, resulting in the death of one of the horses, it was held that such evidence was sufficient evidence of negligence to take the case to the jury.<sup>45</sup> Similarly, negligence may be inferred from the circumstances that a team became frightened at the flapping of the curtains on an auto van.<sup>46</sup> But, where the operator of an automobile stopped it in the street near a blacksmith shop, and expected to start it shortly, it was held that he was not negligent in allowing explosions from his engine to continue, unless he saw horses were being frightened thereby, or in the exercise of ordinary care should have noticed the fright, and by the exercise of reasonable diligence could have stopped the noise in time to have avoided the runaway.<sup>47</sup> In other words, the operator of the machine need not necessarily stop the motor; whether he is negligent in continuing the running of the engine will depend upon the circumstances involved in each particular case.<sup>48</sup> It might not be negligence to leave the engine running while the operator leaves the machine for a short time, but gross negligence may be charged against one who leaves the machine so running for a considerable period.<sup>49</sup> Where the

42. *Grant v. Armstrong*, 55 Wash. 365, 104 Pac. 632.

43. *Hutson v. Flatt*, 194 Ill. App. 29.

44. *Conrad v. Shuford* (N. C.), 94 S. E. 424.

45. *Kirlin v. Chittenden*, 176 Ill. App. 550.

46. *La Brash v. Wall*, 134 Minn. 130, 158 N. W. 723.

47. *House v. Cramer*, 134 Iowa, 374, 112 N. W. 3, 10 L. R. A. (N. S.) 655, 13 Ann. Cas. 461.

48. *Affeld v. Murphy*, 137 Minn. 331, 163 N. W. 530; *Sapp v. Hunter*, 134 Mo. App. 685, 115 S. W. 463.

49. *Coco Cola Pottling Works v. Brown*, 139 Tenn. 640, 202 S. W. 926.

chauffeur commenced to crank his machine for the purpose of starting in close proximity to harnessed horses standing quietly in charge of a driver, without giving any previous warning, and continued to do so after the horses exhibit symptoms of fright, and thereby caused them to run away, it was held that he was held guilty of actionable negligence, for it was his duty when he began to "crank up" to keep a watchful eye on the horses standing so close by and that when he saw that they manifested symptoms of fright, to stop at once, until they could be removed.<sup>50</sup> Statutes which require the driver of the machine to stop when signaled by the driver of a horse, do not require that the engine of the machine be stopped; whether it should be stopped will depend on the circumstances of each particular case.<sup>51</sup> But a statute which under some circumstances requires the stopping of the engine on "meeting" a team driven by a woman does not apply when the driver of the machine turns into a by-road to avoid the "meeting" and there stops the machine, but not the motor.<sup>52</sup>

### Sec. 526. Noise — failure to sound horn.

It is, perhaps an anomaly in one case to charge the driver of a motor vehicle with negligence in sounding his horn when approaching a horse-driven vehicle, and in another case to impute negligence to him if he fails to give a warning of his approach and his sudden appearance frightens the horse.

50. *Tudor v. Bowen*, 152 N. C. 441, 67 S. E. 1015, 30 L. R. A. (N. S.) 804, 21 Ann. Cas. 646.

51. *Mahoney v. Maxfield*, 102 Minn. 377, 113 N. W. 904, 14 L. R. A. (N. S.) 251, 12 Ann. Cas. 289.

52. *Affeld v. Murphy*, 137 Minn. 331, 163 N. W. 530, wherein the court said: "A majority of the court are of the opinion that the statute mentioned does not apply, and that there is no basis for a charge of negligence apart from it. The driver did not meet the team. He turned into the side road to avoid a meeting. He was cautious. At a

favorable opportunity he turned aside and avoided a meeting. There was surely no fault unless the failure to stop the motor was a fault. The auto was then a considerable distance from the team, and it was not reasonably to be anticipated that any harm would come. We hold that the statute was without application in the situation disclosed, that a failure to stop the motor did not involve liability because of the statute, and that independently of the statute there was no basis for a finding of negligence."



Whether he should sound a signal, and when it should be done, depends upon what course of action is reasonable care under the circumstances. Where one in control of an automobile on a public street came up behind a wagon drawn by a horse not given to shying, kicking or running and not afraid of automobiles, and without sounding his horn came within ten feet of the nearer hind wheel of the wagon and tried to pass where there was not sufficient room, it was held that he could be found negligent in not sounding his horn as required by the statute.<sup>53</sup> Where an operator of an automobile saw, or by ordinary care could have seen, a horse and vehicle on a highway ahead of him, and he was required by statute to give warning of his approach, and to use every reasonable precaution to insure the safety of the occupants of the vehicle, and there was evidence that he did not give any warning, that he drove the machine at a high rate of speed, and that he did nothing toward respecting the safety of the persons in the vehicle, except to swerve the machine to the right to pass it, it was held that such evidence was *prima facie* proof of negligence, authorizing a recovery for injuries received by the persons in the vehicle in consequence thereof.<sup>54</sup>

**Sec. 527. Emission of smoke or vapor.**

Actionable negligence may be based on the fact that, when an automobile is in proximity to a horse, a cloud of steam or smoke suddenly ensues from the machine, the horse thereby becomes frightened and causing injuries either to persons or to property.<sup>55</sup> To approach close to a horse-drawn vehicle and then suddenly to project a cloud of smoke or vapor in the face of the horse, could not well be expected to produce any result other than the fright of the horse.<sup>56</sup> Thus, where, in

53. Gifford v. Jennings, 190 Mass. 54, 76 N. E. 233, wherein it was said: "The jury might find that a horn should be sounded on overtaking a horse not only to warn the driver of the horse to keep to his side of the road, but also to give timely warning of the approach of this machine which, in the kind of noise made by it, as well

as in other respects, is novel and therefore may be dangerous, and that the defendant should have known this."

54. National Casket Co. v. Powar, 137 Ky. 156, 125 S. W. 279.

55. Graham v. Sly, 177 Mo. App. 348, 164 S. W. 136.

56. Graham v. Sly, 177 Mo. App. 348, 164 S. W. 136.

an action against the driver of an automobile to recover for personal injuries, it appeared that the plaintiff, driving in a buggy with his wife and small child, approached, at a point in a narrow road, an automobile driven by defendant; that plaintiff threw the lines to his wife, descended to the ground, and without looking at, or speaking to the defendant, went to the head of his horse, which had become restless and that the defendant started to proceed, when immediately a volume of vapor as large as a hat was spurted from a tube in the rear axle, under and against the horse, accompanied by a hissing sound and strong odor of gasoline and that the horse became unmanageable, overturning the buggy and injuring the wife and it further appeared that the horse was eighteen years old and prior to the accident trustworthy, it was decided that the case was for the jury.<sup>57</sup>

### Sec. 528. Speed.

The requirement that an autoist shall use reasonable care in the operation of his machine is frequently violated by running at an excessive speed,<sup>58</sup> and especially is this so when the limit prescribed by statute or municipal ordinance is violated. If the fright of a horse and consequent injuries are the proximate result of the excessive speed of a motor vehicle, the driver thereof may be liable.<sup>59</sup> \* Independently of statute,

57. *Reed v. Snyder*, 38 Pa. Super. Ct. 421, wherein it was said: "The defendants must necessarily have seen the nervous horse, the man at its head, the mother and child in the buggy, and must certainly have known that when the machine over which they had full control would be started by their direction, the vapor would be ejected in the direction of the horse, that a noise would be produced, with an accompanying odor of gasoline. A jury would be warranted in concluding that they had full control of their machine, and should have known the hazard following their progress, which could have been relieved of all possible danger by

remaining stationary for but a moment."

58. Section 305.

59. *Georgia*.—*Strickland v. Whately*, 142 Ga. 802, 83 S. E. 856.

*Illinois*.—*Hutson v. Flatt*, 194 Ill. App. 29.

*Indiana*.—*Carter v. Caldwell*, 183 Ind. 434, 109 N. E. 355; *Briikman v. Pacholke*, 41 Ind. App. 662, '84 N. E. 762; *East v. Amburn*, 47 Ind. App. 530, 94 N. E. 895.

*Iowa*.—*Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236; *Lemke v. Ady*, 159 N. W. 1011.

*Kentucky*.—*East Tenn. Telep. Co. v. Cook*, 155 Ky. 649, 160 S. W. 166.

no person should operate a motor vehicle on the public highways at a rate of speed greater than is reasonable and proper in view of the time and place, and having regard to the traffic and condition and use of the highway.<sup>60</sup>

**Sec. 529. Operating auto in proximity to horse.**

Negligence may sometimes be charged against the driver of an automobile on account of the proximity with which he drives his machine to a horse.<sup>61</sup> Thus, if in passing a horse from the rear, the automobile is guided back into the center of the road sooner than due caution would require and thereby it comes close to the horse's head, the jury may be justified in imputing negligence to the chauffeur.<sup>62</sup> And, when meeting a horse, if the driver of an automobile delays his turn to the right, so that apparently the machine is coming head-on to the horse, negligence may be found.<sup>63</sup> Neglect of due care is especially clear in such a case, when the automobile is violating the law of the road in proceeding along the wrong side thereof,<sup>64</sup> or is appropriating to itself more than its share of the road.<sup>65</sup> The attempt of the automobilist to pass on the left

**Instruction to jury.**—The trial court may properly instruct the jury as to the consideration to be given to the fact of speed, if found to be less than the statutory rate, where the instruction further outlines the duty of the automobilist to use proper care, under the circumstances, in passing plaintiff's buggy. *Brickman v. Pacholke*, 41 Ind. App. 662, 84 N. E. 762. Where the plaintiff testified that at the place where the defendant's automobile passed his buggy, frightened his mule and caused it to jump from the road and to throw the occupants from the buggy, there was a fill three feet high, it was not error to charge the portion of the statute which declared that "upon approaching a . . . high embankment," the person operating an automobile shall have it under control and operate it at a speed not greater

than six miles per hour. *Strickland v. Whatley*, 142 Ga. 802, 83 S. E. 856.

60. *Harris v. Hicks* (Ark.), 221 S. W. 472; *Wade v. Brebts*, 161 Ky. 607, 171 S. W. 188. And see section 305.

61. *Zelezny v. Birk Bros. Brew. Co.*, 211 Ill. App. 282; *Zellner v. McTague*, 170 Iowa. 534, 153 N. W. 77; *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122.

62. *Delfs v. Dunshee*, 143 Iowa. 381, 122 N. W. 236.

63. *East v. Amburn*, 47 Ind. App. 530, 94 N. E. 895; *Staley v. Forrest*, 157 Iowa, 188; 138 N. W. 441; *Holbs v. Preston*, 115 Me. 553, 98 Atl. 757.

64. *Hannan v. St. Clair*, 44 Colo. 134, 96 Pac. 822; *Burcham v. Robinson*, 113 Miss. 527, 74 So. 417.

65. *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122.

side contrary to the law of the road, is not conclusively negligence, but places a burden on the driver of the machine to show why he diverted from the rule of the road.<sup>66</sup> If the narrowness of a road, the frightened appearance of a horse, and the size of the space for passage, are apparent to the driver of an automobile and he takes his chance of passing safely and miscalculates the space, he will not be in a position to complain of a verdict against him, where he can pass safely by waiting a few minutes until reaching a wider space in the road.<sup>67</sup>

Evidence tending to show that upon a traveled track twenty-two feet wide, with a ditch on each side, the plaintiff had driven his single horse as far as he could to the right and had stopped as the defendant approached with his automobile; that defendant could have kept wholly to the right of the center of the road, but instead of doing so he turned his machine to the left and passed so close to plaintiff's buggy that there was but from one to two feet between the wheel track of the buggy and that of the car; that water and slush were splashed toward the horse as the car passed; and that the horse, though not ordinarily afraid of automobiles, suddenly lurched and overturned the buggy, has held sufficient to sustain a verdict to the effect that the defendant was negligent and that this negligence proximately caused the injury.<sup>68</sup>

### Sec. 530. Stopping — independently of statute.

If the driver of an automobile knows, or, by the exercise of reasonable care should know, that further progress with his machine will render a horse unmanageable, it is his duty to stop the machine and take such steps as may seem necessary for the safety of the horse-drawn vehicle.<sup>69</sup> The presumption

66. *Herdman v. Zwart*, 167 Iowa. 500; 149 N. W. 631. And see sections 270-274.

67. *Gurney v. Piel*, 105 Me. 501, 74 Atl. 1131.

68. *Pfeiffer v. Radke*, 142 Wis. 512. 125 N. W. 934.

69. *Alabama*.—*Roach v. Wright*, 195

Ala. 333, 70 So. 271.

*Illinois*.—*Stout v. Taylor*, 168 Ill. App. 410.

*Indiana*.—*McIntyre v. Orner*, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 8 Ann. Cas. 1087; *Brinkman v. Pacholke*, 41 Ind. App. 662, 84 N. E. 762.

is that the machine is always under the control of the operator, and it is his duty to stop it, if he knows or in the exercise of reasonable prudence should know that it is exciting a horse so that there is danger in continuing the forward motion of the car.<sup>70</sup> The duty of stopping is now, as a general proposition, expressly required by statute.<sup>71</sup> But, independently of any statute on the subject, the driver of a motor vehicle should stop when he sees that he is frightening a horse by proceeding.<sup>72</sup> And this is true after, as well as before, statutory enactments have provided for stopping on signals or under other circumstances.<sup>73</sup>

As a general rule it may be stated that if the operator of an automobile knows, or by the exercise of ordinary care may know, that the movement or noise of his machine will render an animal unmanageable, he must use all the care and caution which a prudent and careful driver should exercise under the same circumstances. He has the right to assume, and to act upon the assumption, that every person whom he meets will also exercise ordinary care and caution according to the circumstances and will not negligently or recklessly expose himself to danger, but rather make an attempt to avoid it. But when an operator has had time to realize, or by the exercise of a proper lookout should have realized, that a person whom he meets is in a perilous position, or in a position of disadvantage, and therefore seemingly unable to avoid the coming automobile, he must exercise increased exertion to avoid a

*Iowa*.—*Raber v. Hinds*, 133 Iowa, 312, 110 N. W. 597; *Walkup v. Beebe*, 139 Iowa, 395, 116 N. W. 321.

*Kentucky*.—*Shinkle v. McCullough*, 116 Ky. 960, 77 S. W. 196.

*Mississippi*.—*Burcham v. Robinson*, 113 Miss. 527, 74 So. 417.

*Missouri*.—*Fields v. Sevier*, 184 Mo. App. 685, 171 S. W. 610.

*Washington*.—*Brown v. Thorne*, 61 Wash. 18, 111 Pac. 1047.

*Canada*.—*Campbell v. Pugsley*, 7 D. L. R. 177.

<sup>70.</sup> *Brown v. Thorne*, 61 Wash. 18, 111 Pac. 1047.

<sup>71.</sup> See following sections.

<sup>72.</sup> *Christy v. Elliott*, 216 Ill. 31, 1 L. R. A. (N. S.) 215, 74 N. E. 1035, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; *Strand v. Grinnell Automobile Garage Co.*, 136 Iowa. 68, 113 N. W. 488; *Walkup v. Beebe*, 139 Iowa. 395, 116 N. W. 321; *Nelson v. Holland*, 127 Minn. 188, 149 N. W. 194; *Pease v. Cochran* (S. Dak.), 173 N. W. 158, 5 A. L. R. 936.

<sup>73.</sup> *Strand v. Grinnell Automobile Garage Co.*, 136 Iowa. 68, 113 N. W. 488; *Nelson v. Holland*, 127 Minn. 188, 149 N. W. 194.

collision, or what is equivalent, the fright of a horse induced by an automobile.<sup>74</sup>

Where the plaintiff testified that, while driving an ordinarily gentle horse on a city street, the horse became frightened at the defendant's automobile when it was within one hundred and thirty-nine feet of her, and as the automobile approached the horse became more frightened, and, turning quickly, threw plaintiff to the street close to the sidewalk; that the automobile was then eighty feet away, coming toward her, and ran over her without any attempt being made to stop it, and the defendant testified that he was driving at the rate of five or six miles an hour, and first discovered the horse's fright when he was twenty feet away; that the horse turned quickly to the side of the street on which the defendant was driving when the defendant turned the machine in on the pavement to avoid a collision; that he was obliged to leave the pavement on account of a house built close thereto and when he returned to the street there was room between the sidewalk and plaintiff's buggy for him to pass, but as he was doing so, the plaintiff jumped out and fell immediately in front of the machine, so close that he could not stop, and to avoid running the wheels over her he turned the machine and the body of the car passed over her, it was held that under either version of the affair the jury were authorized to find defendant negligent in failing to stop when he discovered, or should have discovered by ordinary care, the fright of the plaintiff's horse.<sup>75</sup>

### Sec. 531. Stopping — discretion as to stopping.

The general rule as to stopping stated in the preceding section is not an inflexible one. In some cases the proper degree of care as to the operator might require the machine to be stopped upon the first evidence of danger; in others it might be necessary to slow down the speed; and yet again,

<sup>74</sup> Spangler v. Markley, 39 Pa. Yoder, 80 Kan. 25, 101 Pac. 468.

Supr. Ct. 351, 357, *per* Orlady, J.

<sup>75</sup> Webb v. Moore, 136 Ky. 708, 125

Must use reasonable precaution commensurate with danger. McDonald v.

S. W. 152.

it might be more prudent to proceed at a high rate of speed, or not lessen the speed at which the machine is running. Each case presents different conditions and situations. What would be ordinary care in one case might be negligence in another. But, whatever the condition or situation, the driver of the automobile must at all times and in all places, observe ordinary care to avoid injury to persons or travelers on the highway.<sup>76</sup> So in a case in *South Carolina* the court declared that it is not prepared to adopt as a correct statement of the common law that the driver of an automobile must stop if it can be discovered by ordinary foresight that an animal has become frightened, for there might be circumstances when the most prudent thing to do, upon discovery that a horse is frightened, would be to get by with the automobile as quickly as possible so as to remove the cause of fright. The true rule was said to be that the driver must exercise the care which ordinary prudence requires under the circumstances.<sup>77</sup> And, in another case, it was said that it is reasonable to presume that in some cases the fright of a horse will be increased by stopping an automobile just opposite to him, rather than by passing on by and if the driver of a machine passes on he is not responsible for the damages inflicted by the horse, where the emergency in which he was placed was occasioned by an imprudent act of the plaintiff.<sup>78</sup> So, too, the owner of an automobile who was running his machine in a careful manner, at a slow rate of speed, along a city street crowded with travelers and vehicles, and keeping a lookout to avoid accidents, was held not liable for an injury inflicted by a horse taking fright thereat, when he was not aware of any danger from said fright until his machine had reached a point opposite to or had passed the horse's head, and then deemed it less dangerous to pass on than to stop, and when the horse was in charge of three able-bodied men, and there

76. *Fleming v. Oates*, 122 Ark. 28, 182 S. W. 509; *Harris v. Hicks* (Ark.), 221 S. W. 472; *Webb v. Moore*, 136 Ky. 708, 125 S. W. 152. And see section 277.

77. *Gue v. Wilson*, 87 S. C. 144, 69 S. E. 99.

78. *Baughner v. Harman*, 110 Va. 316, 66 S. E. 86.

was nothing in its behavior to lead him to suppose that it would become unmanageable.<sup>79</sup>

But statutory enactments have abrogated in most jurisdictions any discretion in the matter of stopping. Under statutes requiring the driver of an automobile to stop his car when he sees that a horse is frightened or when he receives a signal from the driver, the chauffeur has no discretion as to the means he shall take to avoid frightening a horse. It is his duty to stop his machine.<sup>80</sup>

### **Sec. 532. Stopping — overtaking and passing frightened horse.**

When an automobile is approaching a horse-driven vehicle from the rear, the chauffeur is not necessarily guilty of negligence in attempting to pass. It is his duty to exercise reasonable care to avoid injury to the travelers in the wagon, and what is reasonable care will depend on the circumstances. A statute requiring an automobilist to stop when passing a frightened horse, is not generally applicable in the case of a motor vehicle overtaking and attempting to pass.<sup>81</sup> Where the evidence tended to show that the machine approached the plaintiff's wagon from the rear, and was within a few feet from the horse and turned in front of it a short distance ahead, it was held that the negligence of the driver of the auto was for the jury.<sup>82</sup> And if there is an opportunity to turn the horse into a side road a short distance ahead, the driver of the machine may be charged with negligence in attempting to pass the animal and in not waiting until its driver had an opportunity to turn out.<sup>83</sup>

### **Sec. 533. Stopping — stopping engine.**

Though it may be the duty of the operator of a motor vehicle to stop the machine on the approach of an excited horse, it is not always necessary for him to stop the running

79. *Baughner v. Harman*, 110 Va. 316.  
66 S. E. 86.

80. *Stout v. Taylor*, 168 Ill. App.  
410; *Searcy v. Golden*, 172 Ky. 42, 188  
S. W. 1098.

81. Section 534.

82. *Delfs v. Dunshee*, 143 Iowa. 381,  
122 N. W. 236.

83. *Brinkman v. Pacholke*, 41 Ind.  
App. 662, 84 N. E. 762.



of the engine. Due caution may require that the engine be stopped in some cases, but under other circumstances the continuance of the running of the engine may be consistent with an exercise of reasonable caution. This proposition may be better considered under the duty of the operator to avoid noises which will frighten timid horses, and is therefore discussed under another section.<sup>84</sup>

**Sec. 534. Stopping—statutory duty to stop on fright of horse.**

In many jurisdictions statutes have been enacted which impose a duty on the drivers of automobiles to stop when it is apparent that a horse is being frightened by the operation of the machine.<sup>85</sup> Under such statutes the driver of the automobile has no discretion as to stopping; it is his duty to stop though he might in good faith believe that the danger could be more easily averted by rapidly continuing his progress.<sup>86</sup> Indeed, the violation of the statute may be deemed negligence

84. Section 525.

85. *Arkansas*.—Russ v. Strickland, 130 Ark. 406, 197 S. W. 709.

*Delaware*.—Walls v. Windsor (Del. Super.), 92 Atl. 989.

*Illinois*.—Smith v. Heish, 161 Ill. App. 83.

*Kansas*.—Arrington v. Horner, 88 Kan. 817, 129 Pac. 1150.

*Kentucky*.—Searcy v. Golden, 172 Ky. 42, 188 S. W. 1098.

*New York*.—Union Transfer & Storage Co. v. Westcott Express Co., 79 Misc. 408, 140 N. Y. Suppl. 98.

*North Carolina*.—Curry v. Fleece, 157 N. C. 16, 72 S. E. 626.

*Utah*.—Beggs v. Clayton, 40 Utah, 389, 121 Pac. 7.

*Canada*.—Lubier v. Nichaud, 38 Que. S. C. 190; Stewart v. Steele, 6 D. L. R. 1.

86. *Fleming v. Oates*, 122 Ark. 28, 182 S. W. 509; *Russ v. Strickland* (Ark.), 197 S. W. 709; *Searcy v. Golden*, 172 Ky. 42, 188 S. W. 1098.

"The driver of a car cannot determine for himself whether it is as safe or safer to proceed than it is to stop. The law has decreed that he must stop his car, and he is under the duty to do so, although, in his opinion, some other course may be safer. His failure to stop the car under these circumstances is therefore negligence, and renders him liable for any injury of which it is the proximate cause, provided the party injured is not himself guilty of negligence contributing to his injury." *Russ v. Strickland* (Ark.), 197 S. W. 709.

**Question for jury.**—Where the statute requires the driver of an automobile to stop when a horse is frightened at the approach of the machine, and it is conceded that the driver did not stop, the court cannot submit to the jury the question whether it was necessary for him to stop. *Searcy v. Golden*, 172 Ky. 42, 188 S. W. 1098.

*per se*.<sup>87</sup> A statutory requirement that the operator of an automobile shall stop when it appears that his machine is frightening a horse, may be construed to mean that he shall stop whenever, in the exercise of due care, it should appear to him that his machine was having that effect.<sup>88</sup> In other words, a chauffeur cannot negligently fail to observe that a horse is frightened or about to become frightened. The statute may require the automobilist to stop when there is *indication* of fright,<sup>89</sup> and may apply to a horse which has actually become frightened as well as to one which is about to be frightened.<sup>90</sup> It is held, however, that a statute requiring the driver of a motor vehicle to stop until a horse about to be frightened by the machine has passed, does not apply when the machine approaches the horse from the rear, but in such case the duty of the chauffeur is governed by the general rule to exercise reasonable care to avoid injury to other travelers on the highway.<sup>91</sup> A construction of the statute which would require the automobile to stop until the horse-drawn vehicle had passed, would impede the use of the road almost to the extent of denying to the automobilist the right to travel the road.

87. *Beggs v. Clayton*, 40 Utah, 389, 121 Pac. 7.

88. *Russ v. Strickland* (Ark.), 197 S. W. 709; *Ward v. Meredith*, 220 Ill. 66, 77 N. E. 118; *Stout v. Taylor*, 168 Ill. App. 410.

"Just when a horse is about to become frightened and just when he is actually frightened is very difficult to determine, and we think the plain meaning of the statute is to require persons using such vehicles as automobiles, calculated to frighten horses, to stop the same whenever a horse shows indication of fright upon their approach." *Ward v. Meredith*, 220 Ill. 66, 77 N. E. 118.

89. *Ward v. Meredith*, 220 Ill. 66, 77 N. E. 118.

90. *Ward v. Meredith*, 122 Ill. App. 159, affirmed 220 Ill. 66, 77 N. E. 118.

91. *Fleming v. Oates*, 122 Ark. 28, 182 S. W. 509, wherein it was said:

"The purpose of that statute was to require drivers of automobiles to come to a full stop when they observe that an approaching horse, ridden or driven by another traveler, is about to become frightened. The statute imposes an absolute duty on the driver of the automobile to stop, and liability for damages arises from a violation of that statute. We think, however, that the statute was not intended to impose the absolute duty upon the driver of an automobile to stop his machine because a team in front, going in the same direction, appears to be frightened, but under those circumstances it is left to a trial jury to say whether under all the circumstances of the case the driver of the automobile has been guilty of negligence. . . . Doubtless the legislature took into consideration the hardship of requiring the driver of an automobile to stop his car merely be-

**Sec. 535. Stopping — stopping in front of horse after passing.**

When an automobile has overtaken and passed a horse-drawn vehicle, thereby exciting the animal, the stopping of the motor vehicle in front of the horse may add to the fright of the horse so that injuries will result. The operator of the machine may be charged with negligence under such circumstances.<sup>92</sup>

Where the evidence justified a finding, that after the defendant had passed the plaintiff, who had gained a partial control of his frightened horse, and upon hearing its approach, stopped his car a short distance ahead of the horse, thus adding to its fright, it was decided that the court was justified in calling the attention of the jury to this evidence and directing them to determine whether defendant was negligent in thus stopping the car, without specially defining in that connection the care required of defendant, the court having in other instructions correctly defined negligence.<sup>93</sup>

**Sec. 536. Statute requiring stopping on signal — in general.**

In many States, statutes have been enacted to the effect that the operator of a motor vehicle shall stop his machine upon the signal of the driver of an animal-drawn vehicle.<sup>94</sup> The constitutionality of such a law is hardly open to ques-

cause a team in front of him appears to be frightened. The automobile, of course, travels faster than vehicles drawn by horses, and if this statute applied, it would prevent the driver of an automobile from passing the slower vehicle. On the other hand, it is perfectly reasonable to require the driver of a machine, when meeting another traveler driving a team, to stop and let the team pass. The legislature doubtless had this distinction in mind in failing to put into the statute a positive requirement that an automobile overtaking another kind of vehicle should stop. for such a requirement would impede travel almost to the extent of denying the driver of an automobile the use of the road. The law-

makers evidently intended to omit any definite requirement applicable to a state of facts such as is shown in this case, so that the question of negligence or due care could rest upon settled principles on that subject. This case should have been submitted to the jury on the question whether appellant exercised ordinary care to avoid frightening the team, without giving to the jury the statute which imposed the absolute duty of stopping until the team got out of the way."

92. *Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236.

93. *Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236.

94. *Arkansas*.—*Battle v. Guthrey*, 137 Ark. 228, 208 S. W. 289.

tion.<sup>95</sup> The fact that the driver does not see the signal will not necessarily excuse him.<sup>95a</sup> Such a statute does not generally require that the running of the motor be stopped, but the obligation of the automobilist in respect to the noise so made is governed by the particular circumstances and his general obligation to use reasonable care in the operation of his machine.<sup>96</sup> Negligence in failing to stop an automobile, upon signal by the driver of a horse, that it has taken fright, is held to be sufficient to sustain a verdict for the plaintiff, even though other grounds of negligence are not sustained.<sup>97</sup> And it has been said that, if the jury were satisfied that a signal to stop given by a person driving horses was seen by a person driving an automobile, and that, without slacking speed, the latter unnecessarily kept on, passing within two feet of the horses and causing them to become unmanageable and run away, when the width of the roadway was sufficiently ample to have enabled him to go by at a distance of twenty feet, which might have prevented the accident, they would have been warranted in finding that the automobile was carelessly operated in violation of a statute, requiring the driver of an automobile to exercise every reasonable precaution when passing teams to avoid frightening the horses.<sup>98</sup> Thus, in a typical case, the plaintiff, who was about seventy years of age, testified that while driving on a dark evening, he met the defendant coming from the opposite direction on a public road in an automobile; that the defendant had no lights on his auto-

*Iowa*.—*Horak v. Dougherty*, 114 N. W. 883; *Walkup v. Beebe*, 139 Iowa, 395, 116 N. W. 321.

*Kansas*.—*Stern v. Issitt*, 89 Kan. 357, 131 Pac. 551.

*Minnesota*.—*Schaar v. Comforth*, 128 Minn. 460, 151 N. W. 275.

*Missouri*.—*State v. Wilson*, 188 Mo. App. 342, 174 S. W. 163; *Hays v. Hogan*, 273 Mo. 1, 200 S. W. 285, L. R. A. 1918 C. 715, Ann. Cas. 1918 E. 1127.

*New York*.—*Union Transfer & Storage Co. v. Westcott Express Co.*, 79 Misc. 408, 140 N. Y. Suppl. 98.

*North Dakota*.—*Messer v. Bruening*,

25 N. D. 599, 142 N. W. 158, 48 L. R. A. (N. S.) 945.

*Virginia*.—*Cohen v. Meader*, 119 Va. 429, 89 S. E. 876.

<sup>95</sup> *Hays v. Hogan*, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918 C. 715, Ann. Cas. 1918 E. 1127.

<sup>95a</sup> *King v. Hyndman*, 7 Canada C. C. 469.

<sup>96</sup> *Mahoney v. Maxfield*, 102 Minn. 377, 113 N. W. 904, 14 L. R. A. (N. S.) 251, 12 Ann. Cas. 289.

<sup>97</sup> *Brown v. Thorne*, 61 Wash. 18, 111 Pac. 1047.

<sup>98</sup> *Trombley v. Stevens-Duryea Co.*, 206 Mass. 516, 92 N. W. 764.

mobile, and that he, the plaintiff, was unable to notice its approach until it was almost on him; that he was driving a perfectly tractable and gentle horse on the proper side of the road; and when the automobile was about twenty-five steps away he recognized it, and rising in his buggy, held up his hand as a signal to the driver of the car to stop, and called out: "Hold on, wait, stranger, until I get out and hold my horse." The machine was either slowed down or stopped in obedience to this signal, and then the plaintiff attempted to get out of his buggy, in order to go to the head of his horse; and when in this situation the machine was suddenly started and approached the buggy with considerable noise, which caused the horse to shy and run against the fence, so that the plaintiff was thrown out over the wheel and quite seriously injured. This testimony was contradicted by the defendant and other persons who were in the automobile. Under the facts the case was held to be one for the jury, and it was decided that a verdict and judgment for plaintiff should be sustained.<sup>99</sup>

**Sec. 537. Statute requiring stopping on signal — discretion as to stopping.**

In most jurisdictions, the statute as to stopping on signal does not give the operator of the machine any discretion as to whether or not he should stop. He cannot speculate as to whether the horse is gentle or wild, or whether it will become frightened or not, but he must, if signaled, stop his machine.<sup>1</sup> The statute is peremptory and it is his duty to stop though he might be of the opinion that there would be less risk of injury in proceeding. Under such a statute, the violation of the statute is considered negligence, and the chauffeur is generally liable for all damages that proximately result from his wrongful act. But, under a statute requiring that the operator of an automobile on a signal of distress by a person driving horses shall cause the automobile to stop all motor power and remain stationary, unless a movement forward

<sup>99</sup>. *Spangler v. Markley*, 39 Pa. Super. Ct. 351.

<sup>1</sup>. *Cohen v. Meader*, 119 Va. 429, 89 S. E. 876.

shall be deemed necessary to avoid accident or injury, it is for the operator to determine whether a forward movement is necessary, and his determination is controlling unless he acts unreasonably or in bad faith.<sup>2</sup>

**Sec. 538. Statute requiring stopping on signal — effect of failure to give signal.**

The failure of the driver of a horse to give a signal to an approaching automobile operator, does not necessarily permit the latter to proceed. The driver of the machine is bound to exercise reasonable care to avoid injury to other travelers, and if due care requires the stopping of the automobile, negligence may be charged against him.<sup>3</sup> In other words, the enactment of the statute does not abrogate the duty of stopping which existed theretofore. And the failure of the driver of the horse to give the signal prescribed by statute, does not necessarily impute contributory negligence to him.<sup>4</sup>

**Sec. 539. Statute requiring stopping on signal — signal by passenger.**

Whether a signal given by a passenger in a horse-drawn vehicle is effective to call the statute into operation so as to place an imperative duty on the operator of a motor vehicle to stop, will, of course, depend on the construction of the particular statute. In at least one jurisdiction, the view has been taken that the statutory signal may be given by a passenger.<sup>5</sup> The contrary view is also sustained by the courts of

2. *McCummins v. State*, 132 Wis. 236, 112 N. W. 25.

3. *Walkup v. Beebe*, 139 Iowa, 395, 116 N. W. 321; *Nelson v. Holland*, 127 Minn. 188, 149 N. W. 194. And see section 530.

4. *Strand v. Automobile Garage Co.*, 136 Iowa, 68, 113 N. W. 488. As to contributory negligence, see sections 542-545.

5. **Motorist must stop on signal from any occupant of carriage under Indiana statute.**—A prosecution was lodged against an *Indiana* motorist for

refusing to bring his car to a stop, upon being signaled to do so, in compliance with the statutes of that State which provide a penalty for the driver of an automobile who fails to stop upon request by signal from any person "riding, leading, or driving a horse." In this case the signal, which was ignored by the motorist, came from a carriage containing two persons and was given by the occupant who was not driving, the driver being engrossed in his efforts to restrain the frightened horse. The motorist sought to escape

at least one jurisdiction.<sup>6</sup> But, though there does not exist a statutory duty to stop on the signal of a mere occupant of the carriage, nevertheless the duty of exercising reasonable care, which is placed on the operator of a motor vehicle under all circumstances, may be violated if he disregards a signal of distress from such a person. That is to say, the jury under some circumstances may be authorized to find the automobilist guilty of negligence if he fails to stop on receiving a signal from a passenger in the carriage.<sup>7</sup>

#### Sec. 540. Negligence after stop.

Though an automobilist has brought his machine to a stop to avoid frightening a horse, he has not necessarily fulfilled his entire duty to travelers in the carriage. He must continue to exercise reasonable care to avoid injury to them. Thus, if he starts the engine while the horse is being driven past his machine, and the horse thereby becomes frightened and causes injury, the jury may find the operator of the machine guilty of negligence.<sup>8</sup> And, even when the driver of the automobile

liability on the ground that the signal did not come from the person "driving" the horse, as required by the statute, but was given by some one in the carriage who was not actually engaged in driving. In other words, he asked the court to construe the statute to mean that it was not his duty to stop unless signaled to do so by the person handling the reins. As is usual in a case where a precise definition of a word is required, recourse was had to the dictionaries, where driving is found to mean "to ride in a vehicle drawn by horses, or other animals, or to direct or control the animals that draw it." While criminal statutes, as a rule, are to be strictly construed, courts refuse on one hand, to hold persons not clearly brought within the scope of the statute and, on the other hand, to discharge those not clearly within its scope. It was held that, to attach to the statute the construction claimed by the defense

would be unreasonable, if not absurd, and that the signal to stop, in order to be legally effective need not be given by the person holding the lines, but may be given by any occupant of the vehicle. *State v. Goodwin*, 169 Ind. 265, 82 N. E. 459.

6. *Messer v. Bruening*, 25 N. Dak. 599, 142 N. W. 158, 48 L. R. A. (N. S.) 945; *Messer v. Bruening*, 32 N. Dak. 515, 156 N. W. 241.

7. *Messer v. Bruening*, 32 N. Dak. 515, 156 N. W. 241.

8. *Fischer v. McGrath*, 112 Minn. 456, 128 N. W. 579. "If, as the jury has found, the defendant was aware that the machine in his possession and control had so far excited the plaintiff's horse as to render him dangerous and unmanageable, and if having stopped at the urgent solicitation of the occupants of the surrey in order to afford them an opportunity to alight, he, before they could do so, started the

on meeting a horse gets out of his machine to assist in getting the horse past, if he is guilty of negligence in handling the horse, he may be liable for injuries sustained by the occupant of the wagon.<sup>9</sup> In one case it appeared that the plaintiff and his sister were riding in an open wagon drawn by one horse, and, discovering the canopy top of an approaching automobile in which the defendant and a companion were traveling, the sister gave the statutory signal by raising the hand for the automobile to stop. The defendant disregarded the signal to stop and ran the automobile out of the highway two or three rods into a dooryard. The plaintiff was thereby induced to believe that he could drive along in safety, but the automobile unexpectedly turned and reappeared in the highway directly in front of the plaintiff, frightening his horse, and causing several personal injuries to the plaintiff. The verdict was for the plaintiff, who was awarded \$225 damages. If the defendant had regarded the plaintiff's signal and promptly stopped his machine, the plaintiff would have had an opportunity to drive into the dooryard himself, as he intended to do. If the defendant had kept his car stationary for a few seconds in the dooryard, the plaintiff could have driven along the highway safely. The defendant did neither of these things; but, having induced the plaintiff to believe that the car would remain beyond the area of danger, he suddenly reappeared with it in front of the plaintiff, partly in the highway. His explanation of this management of his car was that the team was so far up the road that it had passed out of his view. This must be deemed thoughtless inattention on his part, and "thoughtless inattention" has been declared by the Supreme Judicial Court of *Maine* to be the "essence of negligence." The court held that the defendant's thoughtless inattention under the circumstances was a failure of duty on his part toward the plaintiff, and the proximate cause of the injury, and that the

machine again and so caused the horse to run away, a question of fact was clearly presented for determination whether, under all the circumstances, his conduct was characterized by ordi-

nary care." *Knight v. Lanier*, 69 N. Y. App. Div. 454, 74 N. Y. Suppl. 999.

9. *Pekarek v. Myers*, 159 Iowa, 206, 140 N. W. 409.



verdict in favor of the plaintiff was warranted by the evidence.<sup>10</sup>

**Sec. 541. Lights on machine.**

The violation of a statute requiring the maintenance of lights on motor vehicles during certain hours may form the basis for a charge of negligence.<sup>11</sup> If such a violation results in the frightening of a horse, in the absence of contributory negligence, the automobilist is liable for damages which naturally follow from the fright.<sup>12</sup> Such a statute, however, generally applies only to public highways, not to private roads.<sup>13</sup>

**Sec. 542. Contributory negligence — general duty of driver of carriage to exercise reasonable care.**

The general duty of exercising reasonable care, which is imposed upon all classes of travelers, requires that one driving a horse along a public highway shall use a reasonable degree of caution to avoid injury to himself or vehicle. And, in case a horse is frightened by an automobile, if the driver is guilty of contributory negligence which is one of the proximate causes of its fright, as a general rule, there can be no recovery for damages ensuing to the owner or driver of the carriage.<sup>14</sup>

10. *Towle v. Morse*, 103 Me. 250, 68 Atl. 1044, citing *Tasker v. Farmingdale*, 85 Me. 523, 27 Atl. 464.

11. Sections 344-348.

12. *Stewart v. Smith* (Ala. App.), 78 So. 724.

13. *Stewart v. Smith*, 16 Ala. App. 461, 78 So. 724.

14. *Illinois*.—*Donovan v. Lambert*, 139 Ill. App. 532.

*Iowa*.—*Gipe v. Lynch*, 155 Iowa, 627, 136 N. W. 714; *Drier v. McDermott*, 157 Iowa, 726, 141 N. W. 315.

*Kansas*.—*Arrington v. Horner*, 88 Kans. 817, 129 Pac. 1159.

*Maine*.—*Hobbs v. Preston*, 115 Me. 553, 98 Atl. 757.

*New Hampshire*.—*Nadeau v. Sawyer*, 73 N. H. 70, 59 Atl. 369.

*North Dakota*.—*Messer v. Bruening*, 32 N. Dak. 515, 156 N. W. 241.

*Texas*.—*Carsey v. Hawkins* (Civ. App.), 165 S. W. 64.

**Instructions to jury.**—An instruction to the effect that, if the plaintiff was driving along the road and "using due care for his own safety," is not bad for failing to define the meaning of "due care," where other instructions were given defining negligence and contributory negligence, and the care required of the plaintiff. *Brinkman v. Pacholke*, 41 Ind. App. 662, 84 N. E. 762.

**Failure to jump.**—In an action to recover damages for personal injuries sustained by the plaintiff in consequence of the frightening of his horses

The right of a passenger in the carriage to recover for his injuries which are in part caused by the negligence of the driver, depends on whether the negligence of the driver is to be imputed to the passenger.<sup>15</sup>

The driver of a carriage is required to exercise such care as an ordinarily prudent person would under the circumstances.<sup>16</sup> The driver of a well broken horse may rely on the exercise of ordinary care by those approaching from the rear; for in using a street frequented by automobiles, he assumes only the risk incident to their operation in a reasonably careful manner.<sup>17</sup> But he may be guilty of negligence and be barred from recovering for his injuries, if a violation by him of the law of the road contributed to the accident.<sup>18</sup> So, too, one driving a horse or mule while intoxicated may be guilty of contributory negligence as matter of law.<sup>19</sup> He is not, however, necessarily guilty of contributory negligence because the seat was crowded with several passengers.<sup>20</sup> Nor is he guilty of negligence as a matter of law because he failed to give the statutory signal for the stopping of the automobile, and the driver of the machine therefore continued his course.<sup>21</sup>

by the defendant's automobile, an allegation in the declaration that at an earlier hour on the same day of the accident the defendant's automobile had passed the plaintiff's carriage and greatly frightened his horses, does not justify the court in presuming that it was contributory negligence for the plaintiff to fail to jump out of his carriage upon the second approach of the automobile. *McIntyre v. Orner*, 166 Ind. 57, 76 N. E. 750, 8 Ann. Cas. 1087, 4 L. R. A. (N. S.) 1130.

**Finding as to contributory negligence ambiguous.**—Where deceased was unloading gravel and it was claimed that, owing to the negligent operation of a motor, the horses used in hauling the gravel became frightened and ran away and the jury were asked, "Could deceased by the exercise of reasonable care and diligence have avoided the accident, and the answer was given, "No,

not under the custom of unloading gravel," it was held that the answer was open to some remark as being ambiguous and that the question should be answered plainly and without any attempt at or room for evasion. *Marshall v. Gowans*, 20 Ont. W. R. 37, 3 Ont. W. N. 69.

15. See sections 679-687.

16. *Donovan v. Lambert*, 139 Ill. App. 532.

17. *Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236; *Coco Cola Bottling Works v. Brown*, 139 Tenn. 640, 202 S. W. 926.

18. *Donovan v. Lambert*, 139 Ill. App. 532.

19. *Stewart v. Smith*, 16 Ala. App. 461, 78 So. 724.

20. *Shaffer v. Coleman*, 35 Super. Ct. 386.

21. *Strand v. Grinnell Automobile Garage Co.*, 136 Iowa, 68, 113 N. W.

**Sec. 543. Contributory negligence — leaving horse unattended.**

One who leaves a horse unattended and unfastened in the public streets, speaking in general terms, takes the risk of what it may do. A presumption of negligence arises from such conduct and the driver is called upon to explain.<sup>22</sup> The strength of the presumption depends largely on the surrounding circumstances. If the horse is young, skittish, nervous, or unused to the lights and sounds of a city street, the presumption would be strong; while, if he is old, staid and accustomed to city life, it might be slight. But even a staid and veteran horse may be liable to a sudden fright. It is a matter for the jury.<sup>23</sup> The unexplained presence on a public highway of a team of runaway horses, harnessed to a wagon, unattended by the owner or other person, raises a presumption of negligent management on the part of the owner; and if they collide with another vehicle on the street because they are not under proper control, the owner will be liable for damages resulting therefrom.<sup>24</sup> But, on the other hand, no inference of negligence arises from the mere fact that a gentle horse was left untied in a public street, free from the presence of anything that might disturb him, when the driver was within a few feet of the wagon, and it appears that the driver had been accustomed to use the horse in that way for many years without an accident.<sup>25</sup>

488; *Cusick v. Kinney*, 164 Mich. 35, 128 N. W. 1089.

22. *Henry v. Klopfer*, 147 Pa. St. 178, 23 Atl. 337. See also *Wade v. Brents*, 161 Ky. 607, 171 S. W. 188.

23. *Stevenson v. United States Express Company*, 221 Pa. St. 59, 70 Atl. 275.

24. *Kokoll v. Brohm & Buhl Lumber Co.*, 77 N. J. Law, 169, 71 Atl. 120.

**Injury by horse.**—One may recover for injury caused by a runaway horse which has been left unhitched, without proof that it had a habit of running

away, known to its owner, if it was left in the street unhitched under circumstances which made it negligence to do so. *Haywood v. Hamm*, 77 Conn. 158, 58 Atl. 695. A person in charge of a horse on a public highway is bound to take care that it will do no injury in consequence of being frightened, and if he leaves it, must see that it is securely fastened. *City of Denver v. Utzler*, 38 Colo. 300, 88 Pac. 143, 8 L. R. A. (N. S.) 77.

25. *Bellos v. Kellner*, 67 N. J. L. 255, 51 Atl. 700, 57 L. R. A. 627.

**Sec. 544. Contributory negligence — nature of horse.**

Though the disposition of a horse may not be such as can be characterized as "gentle," its owner is nevertheless entitled to drive it along the highway, exercising, however, such degree of caution as would be exercised by an ordinarily prudent man in driving an animal of similar nature.<sup>26</sup> Of course, it is possible that a horse be of such a wild or vicious nature that one knowing its propensities would be charged with contributory negligence if he drove the animal along a highway used by motor vehicles.<sup>27</sup> The question depends on the degree of the viciousness and its actions when confronted by an automobile. The contention that it is contributory negligence on the part of the owner of a horse of ordinarily gentle and tractable habits to use him on the highway, simply because the animal occasionally becomes frightened at an automobile, cannot be sustained.<sup>28</sup> As bearing on the questions of negligence and contributory negligence, evidence should be received as to the character of a horse alleged to have been frightened by a motor vehicle. Thus, it may be shown that the horse in question would become frightened and unmanageable at the sight of an automobile and would turn and run whether or not the machine made a noise, for such a circumstance is proper to be considered by the jury, together with the other facts, in order to arrive at the cause of the runaway and to determine whether the driver thereof was guilty of

26. *Spangler v. Markley*, 39 Pa. Super. Ct. 351; *Cohen v. Meader*, 119 Va. 429, 89 S. E. 876; *Ross v. Rose*, 109 Wash. 273, 186 Pac. 892.

27. "There may be exceptional cases in which the wild and dangerous character of a horse would make his use on a road frequented by automobiles negligence *per se*, but in the average case, and in such a case as we think the evidence, viewed most favorably for defendants, shows this one to be, it is a fair presumption that a horse which is likely to become frightened and unmanageable upon meeting an automo-

bile in motion can, with reasonable safety to the rider, be taken by the car if the conditions of the statute are complied with. The plaintiff's horse had been struck by a machine once before, and was "pretty shy of machines"; but there was nothing in the evidence to indicate that a man accustomed, as plaintiff was, to the use of horses, would experience any serious difficulty in riding the horse by a car if the driver thereof obeyed the statute." *Cohen v. Meader*, 119 Va. 429, 89 S. E. 876.

28. *Spangler v. Markley*, 39 Pa. Super. Ct. 351, 356, *per Orlady, J.*

negligence.<sup>29</sup> And, too, it is held, in an action for injuries from a runaway alleged to have been caused by a horse being frightened by an automobile, that evidence of the character of the horse as being vicious and having a propensity to run away is admissible, on the issue of whether the proximate cause of the injury was the negligence of the defendant or the vice of the animal. And evidence of the reputation of the horse in these respects would be admissible, where the issue of contributory negligence is raised, to show that the plaintiff had knowledge of its character as to viciousness.<sup>30</sup> One who has handled horses for twenty years and has observed their conduct and habits, especially when frightened, is competent to testify as an expert on the characteristics and habits of a horse.<sup>31</sup>

**Sec. 545. Contributory negligence — driving frightened horse past automobile.**

It has been held, that, where the driver of a frightened horse attempts to pass an automobile that stopped when the fright of the horse was discovered, he will be guilty of such contributory negligence as will defeat a recovery, unless the evidence shows that there was no other reasonable course that he could pursue, and that the negligence of the driver of the automobile placed him in the position of peril. So where a person who was driving a restive horse, turned off the road for the purpose of quieting his horse, and about the same time the driver of the automobile, discovering the fright of the horse, stopped the machine some distance away and the horse becoming more unmanageable, its driver undertook to force him by the standing machine, and in the attempt was thrown out of the vehicle, it was held that he could not recover.<sup>32</sup>

29. Bliss v. Wolcott, 40 Mont. 491, 107 Pac. 423. Compare Wells, Fargo & Co. v. Keeler (Tex. Civ. App.), 173 S. W. 926.

30. Cain v. Wintersteen, 144 Mo. App. 1, 128 S. W. 274.

31. Delfs v. Dunshee, 143 Iowa, 381, 122 N. W. 236.

32. Cumberland Telegraph & Telephone Co. v. Yeiser, 141 Ky. 15, 131 S. W. 1049, 31 L. R. A. (N. S.) 1137.

**Sec. 546. Joint wrong-doers.**

Where two defendants, each mounted on a motor tricycle with a gasoline engine emitting steam and making a loud noise, came up behind the plaintiff, who was driving slowly in a wagon and passed him at a high rate of speed, one on each side, causing his horse to shy so that injury resulted, it was held that it was a question for the jury whether each contributed to the accident, and that if both were found to be wrong-doers, it was not material that there was no concert between them or that it was impossible to determine what portion of the injury was caused by each.<sup>33</sup>

**Sec. 547. Pleading.**

Automobiles being lawful vehicles, a person who claims to have been injured by the operation of one, as where horses are frightened, must plead and prove that some act or acts of negligence on the part of the operator of the machine were the proximate cause of the injury.<sup>34</sup> A complaint alleging that a team was frightened by the negligence of the driver of an automobile in blowing his whistle when directly opposite the team, while driving at a high rate of speed in violation of a city ordinance, in such a manner as to frighten the team, fairly includes the rate of excessive speed as a proximate cause of the accident.<sup>35</sup>

An answer, in an action for injuries from a runaway, alleged to be caused by a horse being frightened by an automobile, which, in addition to a general denial, contains the allegation that "plaintiff's alleged damages and injuries, if any she sustained, were caused by and directly due to the plaintiff's own carelessness and negligence," is held not to be a plea of contributory negligence, but a direct negation of the cause of action pleaded.<sup>36</sup>

An order requiring a pleading to be made more definite and certain should not require the disclosure of matters which

33. *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69.

34. *Sapp v. Hunter*, 134 Mo. App. 685, 115 S. W. 463.

35. *Grant v. Armstrong*, 55 Wash. 365, 104 Pac. 632.

36. *Cain v. Wintersteen*, 144 Mo. App. 1, 128 S. W. 274.

are more properly the subject of a bill of particulars. Thus, in an action founded upon the negligence of the defendant in operating an automobile, allegations in the complaint that the defendant operated his automobile negligently and carelessly by not giving proper and adequate signals, and by running at a dangerous rate of speed, should not be required to be made more definite and certain; further information as to these allegations, if the defendant be entitled thereto, should be procured by motion for a bill of particulars. On the contrary, allegations that the defendant was negligent in not observing and obeying rules and regulations promulgated by the authorities having control of the highway and its use should be required to be made more definite and certain. The plaintiffs should be required to state the rules and regulations referred to, and the authorities by whom they were made and promulgated.<sup>37</sup>

Where the plaintiff alleged that the defendant drove its automobile on a street at a high rate of speed, and negligently ran it against the plaintiff's horses, frightening and injuring them, and causing them to run away, evidence that the automobile approached slowly, but that the driver failed to stop it, or slacken its speed when seeing that the horses were frightened and about to run, was proof of facts not legally identical with those alleged, and the plaintiff could not recover.<sup>38</sup>

#### **Sec. 548. Punitive damages.**

Punitive or exemplary damages are, as a general proposition, allowed to one injured by the wrong of another, when the act is maliciously perpetrated, or when the wrongful act is done knowingly, wantonly and recklessly, under such circumstances as indicate that the wrong-doer knew that the act was fraught with probable injury to person or property. To justify the imposition of such damages, malice must accompany the wrong complained of, or such gross negligence or

37. *Harrington v. Stillman*, 120 N. Y. App. Div. 659, 105 N. Y. Suppl. 75.

38. *Tront Brook Ice Co. v. Hartford Electric Light Co.*, 77 Conn. 338, 59 Atl. 405.

oppression or fraud as amounts to malice.<sup>39</sup> The circumstances attendant upon the perpetration of a wrong largely determine the character of the wrong. An act, done in one place, or under one set of circumstances, may not amount to an act of simple negligence even; the same act, done in another place or under another set of circumstances, may amount to that reckless disregard of persons, lives or property of others as to amount, in law, to wantonness.<sup>40</sup> Where, in an action for injuries to travelers on a highway by their horse becoming frightened by an automobile and running away, the evidence showed that the operator failed to comply with the statutory regulations as to the maximum speed and warning of his approach, and there was nothing to show that the horse showed symptoms of fright until the automobile was so near that it was probably impracticable to stop it, that the operator knew that the horse was frightened or that he purposely refrained from looking, punitive damages were held not to be recoverable.<sup>41</sup> But, where the driver of the automobile knows of the animal's fright and ignores it in violation of the statute relative to stopping, punitive damages may properly be awarded against him.<sup>42</sup>

### Sec. 549. Questions for jury.

Speaking in general terms, in an action to recover damages occasioned by the fright of a horse from a motor vehicle, the negligence of the defendant and the contributory negligence

39. *Bowles v. Lowery*, 5 Ala. App. 555, 59 So. 696; *Searcy v. Golden*, 172 Ky. 42, 188 S. W. 1098.

**Pleading.**—In *Alabama*, under a complaint averring only simple negligence, it is not permissible to recover punitive or vindictive damages. *Louisville & N. R. Co. v. Markee*, 103 Ala. 160, 15 So. 511; *Roach v. Wright*, 195 Ala. 333, 70 So. 271; *Bowles v. Lowery*, 5 Ala. App. 555, 59 So. 696.

**Evidence of words spoken after accident.**—Evidence that the defendant used language showing a disregard of

the plaintiff's rights may be sufficient to show such malice as to warrant the recovery of punitive damages, although the words were spoken after the happening of the accident. *Martin v. Garlock*, 82 Kans. 266, 108 Pac. 92.

40. *Bowles v. Lowery*, 5 Ala. App. 555, 59 So. 696; *Searcy v. Golden*, 172 Ky. 42, 188 S. W. 1098.

41. *National Casket Co. v. Powar*, 137 Ky. 156, 125 S. W. 279.

42. *Searcy v. Golden*, 172 Ky. 42, 188 S. W. 1098.



of the plaintiff are questions for the jury.<sup>43</sup> Thus, where it appeared that the plaintiff was leading his horse along the highway when defendant approached in his automobile and the horse became frightened while the car was some distance away, and, as defendant came nearer, reared, struck plaintiff down and injured him, and plaintiff did not signal for the driver to check the machine, it was held that the questions of negligence and contributory negligence were for the jury.<sup>44</sup> Especially are the issues for the jury, where there is a sharp conflict in the evidence and the determination depends on the credibility of the witnesses and the weight to be given to their testimony.<sup>45</sup> And even when there is no conflict in the testimony, if different conclusions can rationally be drawn from the evidence, a question is presented for the jury.<sup>46</sup>

**43. Arkansas.**—Byrd v. Smith, 215 S. W. 640.

**Iowa.**—Strand v. Grinnell Automobile Garage Co., 136 Iowa, 63, 113 N. W. 488; Horak v. Dougherty, 114 N. W. 883; Cresswell v. Wainwright, 154 Iowa, 167, 134 N. W. 594; Gipe v. Lynch, 155 Iowa, 627, 136 N. W. 714; Herdman v. Zwart, 167 Iowa, 500, 149 N. W. 631; Younkin v. Yetter, 181 N. W. 793.

**Kentucky.**—Wade v. Brechts, 161 Ky. 607, 171 S. W. 188; Coughlin v. Mark, 173 Ky. 728, 191 S. W. 503; Weiskopf v. Ritter, 29 Ky. Law Rep. 1268, 97 S. W. 1120.

**Maine.**—Blackden v. Blaisdell, 113 Me. 567, 93 Atl. 540; Hobbs v. Preston, 115 Me. 553, 98 Atl. 757.

**Michigan.**—Chapman v. Strong, 162 Mich. 623, 127 N. W. 741; Kasprzak v. Chapman, 197 Mich. 552, 164 N. W. 258.

**Minnesota.**—La Brash v. Wall, 134

Minn. 130, 158 N. W. 723.

**Missouri.**—Fields v. Sevier, 184 Mo. App. 685, 171 S. W. 610.

**North Carolina.**—Conrad v. Shuford, 94 S. E. 424.

**North Dakota.**—Messor v. Bruening, 32 N. Dak. 515, 156 N. W. 241.

**South Carolina.**—Rochester v. Bull, 78 S. Car. 249, 58 S. E. 766.

**Tennessee.**—Coco Cola Bottling Works v. Brown, 139 Tenn. 640, 202 S. W. 926.

**Washington.**—Ross v. Rose, 186 Pac. 892.

**44. Cusick v. Kinney,** 164 Mich. 25, 128 N. W. 1089.

**45. Kirlin v. Chittenden,** 176 Ill. App. 550; Kasprzak v. Chapman, 197 Mich. 552, 164 N. W. 258; Burchan v. Robinson, 113 Miss. 527, 74 So. 417; Mosser v. Bruening, 32 N. Dak. 515, 156 N. W. 241.

**46. Henderson v. Northam,** 176 Cal. 493, 168 Pac. 1044.

## CHAPTER XXI.

## RAILROAD CROSSINGS.

- SECTION 550.** Contributory negligence of auto driver, in general.
- 551. Statute requiring "highest" degree of care of automobilist.
  - 552. Distinction between automobiles and other vehicles.
  - 553. Burden of proof as to contributory negligence of autoist.
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### **Sec. 550. Contributory negligence of auto driver, in general.**

Reasonable care under the circumstances is the general doctrine in actions of negligence as to the measure of one's duty. And thus it is said that the driver of an automobile about to

cross a railroad track shall exercise such care as a reasonably prudent man would, taking into consideration all of the circumstances which should affect his conduct.<sup>1</sup> The obligation

1. *United States*.—Lehigh Valley R. Co. v. Kilmer, 231 Fed. 628, 145 C. C. A. 514. "The failure of one about to cross a railroad track to use due care deprives him of his right to recover damages, if such negligence proximately contributed to the injury, but not otherwise. . . . Due care in these cases means ordinary care. It implies the use of such watchfulness and precautions to avoid coming into danger as a person of ordinary prudence would use under the same circumstances in view of the danger to be avoided. But no greater care than that is required. Totten v. Phipps, 52 N. Y. 354; Davis v. Concord, etc., R. R. Co., 68 N. H. 247, 44 Atl. 388. A person is not bound to use extraordinary care or to exercise the best judgment or to use the wisest precaution." Lehigh Valley R. Co. v. Kilmer, 231 Fed. 628, 145 C. C. A. 514.

*Arkansas*.—St. Louis-San Francisco Ry. Co. v. Stewart, 137 Ark. 6, 207 S. W. 440; Smith v. Missouri Pac. R. Co., 138 Ark. 589, 211 S. W. 657.

*Delaware*.—Trimble v. Philadelphia, etc., R. Co., 4 Boyce (Del.) 519, 89 Atl. 370.

*Georgia*.—Seaboard Air Line Ry. v. Hallis, 20 Ga. App. 555, 93 S. E. 264.

*Idaho*.—Graves v. Northern Pac. Ry. Co., 30 Idaho, 542, 166 Pac. 571.

*Illinois*.—Marshall v. Illinois Central R. Co., 207 Ill. App. 619.

*Indiana*.—Pittsburgh, etc., R. Co. v. Dove, 184 Ind. 447, 111 N. E. 609; Central Indiana Ry. Co. v. Wishard, 186 Ind. 262, 104 N. E. 593; Ft. Wayne & N. I. Tr. Co. v. Schoeff, 56 Ind. App. 540, 105 N. E. 924; Central Indiana Ry. Co. v. Wishard, 114 N. E. 970; Union Traction Co. v. Elmore, 66 Ind. App. 95, 116 N. E. 837; Lake Erie & W. R. Co. v. Howarth (Ind. App.),

124 N. E. 687.

*Iowa*.—Wiar v. Wabash R. Co., 162 Iowa, 702, 144 N. W. 703; Dombrenos v. Chicago, etc., Ry. Co., 174 N. W. 596; Corbett v. Hines, 180 N. W. 690.

*Kentucky*.—Louisville & I. R. Co. v. Morgan, 174 Ky. 633, 192 S. W. 672; Louisville & N. R. Co. v. Treanor's Adm'r, 179 Ky. 337, 200 S. W. 634; Piersall's Adm'r. v. Chesapeake & O. Ry. Co., 180 Ky. 659, 203 S. W. 551; Louisville, etc., R. Co. v. Schuester, 183 Ky. 504, 209 S. W. 542, 4 A. L. R. 1344. "The duty ordinarily required of one about to cross a railroad track, if he would escape contributing to his own injury by negligence, is to exercise ordinary care to discover the approach of a car and to avoid being struck by it, and to so use and move his own vehicle as to avoid colliding with the car upon the railroad track. The care required of him is such care as an ordinarily prudent person would exercise under similar circumstances." Louisville & I. R. Co. v. Morgan, 174 Ky. 633, 192 S. W. 672.

*Louisiana*.—Perrin v. New Orleans Terminal Co., 140 La. 818, 74 So. 160.

*Nebraska*.—Morris v. Chicago, etc., R. Co., 101 Neb. 479, 163 N. W. 799.

*New Jersey*.—Jacobson v. New York, etc., 87 N. J. L. 378, 94 Atl. 577.

*Oklahoma*.—St. Louis & S. F. R. Co. v. Model Laundry, 42 Okla. 501, 141 Pac. 970.

*Oregon*.—Robison v. Oregon-Washington R. & Nav. Co., 90 Ore. 490, 176 Pac. 594.

*Pennsylvania*.—Follmer v. Pennsylvania R. Co., 246 Pa. St. 367, 92 Atl. 340.

*Tennessee*.—Hurt v. Yazoo, etc., R. Co., 140 Tenn. 623, 205 S. W. 437.

*Texas*.—Houston Belt & T. R. Co.

of reasonable care is required, not only for the safety of the automobilist, but also for the safety of the public.<sup>2</sup> But "reasonable care" varies according to the circumstances, being commensurate with the dangers involved.<sup>3</sup> The care which common prudence requires of a traveler on the highway where there is no such peril, is not the standard by which his conduct must be judged when approaching the tracks of a railroad in front of a rapidly moving train.<sup>4</sup> It is the duty of a traveler at a railroad crossing to assume a present danger which includes the immediate approach of a train within a dangerous distance.<sup>5</sup> A railroad track is, of itself, a proclamation of danger which imposes a positive duty on the automobilist of using care to avoid trains.<sup>6</sup> "A railroad cross-

v. Rucker (Civ. App.), 167 S. W. 301; Adams v. Galveston H. & S. A. R. Co. (Civ. App.), 164 S. W. 853; St. Louis Southwestern Ry. Co. v. Harrell, 194 S. W. 971; Beaumont, S. L. & W. Ry. Co. v. Myrich, 208 S. W. 935.

*Utah*.—Shortino v. Salt Lake & U. R. Co., 52 Utah 476, 174 Pac. 861.

*Virginia*.—Seaboard Air Line Ry. v. Abernathy, 121 Va. 173, 92 S. E. 913.

2. Wiar v. Wabash R. Co., 162 Iowa, 702, 144 N. W. 703; Wehe v. Atchison, etc., Ry. Co. 97 Kans. 794, 156 Pac. 742, L. R. A. 1916 E. 455.

3. Section 278.

4. Fogg v. New York, etc., R. Co., 223 Mass. 444, 111 N. E. 960.

5. Rickert v. Union Pac. R. Co. 100 Neb. 304, 160 N. W. 86.

6. Bush v. Brewer, 136 Ark. 248, 206 S. W. 322; Rayhill v. Southern Pac. Co. 35 Cal. App. 231, 169 Pac. 718; Walker v. Southern Pac. Co., 38 Cal. App. 377, 176 Pac. 175; Waking v. Cincinnati, etc., R. Co. (Ind. App.), 125 N. E. 799; Flannery v. Interurban Ry. Co., 171 Iowa, 238, 153 N. W. 1027; Buntion v. Atchison, etc., Ry. Co., 100 Kans. 165, 163 Pac. 801; Slipp v. St. Louis, etc., Ry. Co. (Mo. App.), 211, S. W. 730; Cathcart v. Oregon-Washington Rd. & Navigation Co., 86 Oreg. 250, 168 Pac. 308; Lawrence v.

Denver, etc., R. Co., 52 Utah, 414, 174 Pac. 817; Atlantic Coast Line R. Co. v. Church, 120 Va. 725, 92 S. E. 905.

**Track apparently abandoned.**— "That a railroad track across a highway is itself a proclamation of danger, and that travelers approaching such crossing on the highway must exercise proper precautions for their own safety, is perfectly well settled in this country. Even though the company may be guilty of negligence, the traveler cannot recover if his own neglect to take such proper precautions proximately contributed to his injury. In order to constitute such proclamation of danger, however, under this just rule of law, the company should not do, or omit to do, anything which is likely to disarm the traveler and reassure him of his safety. The reason of the law fails if the tracks in fact and beyond all question have been abandoned. If the rails were so covered with earth as not only to be invisible on the highway bed, but to convey the impression that the track was not in use by trains, if, in addition to this, the rails themselves were rusty, obscured by vegetation growing close to them, and if there was no crossing signal board, then these combined circumstances pre-

ing is a dangerous place, and the man who, knowing it to be a railroad crossing, approaches it, is careless unless he approaches it as if it were dangerous."<sup>7</sup> The surrounding circumstances may require greater care of the driver of a motor vehicle in some cases than in others.<sup>8</sup> The greater the difficulty of seeing and hearing an approaching train as it nears a crossing, the greater caution the law imposes on the traveler.<sup>9</sup> The degree of care to be exercised by automobiles on approaching railroad crossings may be modified by statute.<sup>10</sup>

**Sec. 551. Statute requiring "highest" degree of care of automobilist.**

A statutory enactment requiring the drivers of motor vehicles to use the "highest" degree of care to prevent injury or death to persons on, or traveling over, upon or across the public highways or places much used for travel, is applicable in a case where the driver is suing for injuries received at a railroad crossing. Such a statute requires the highest care on the part of the driver in looking out for the safety of himself as well as others, and hence furnishes the standard for the driver's care when approaching a railroad crossing.<sup>11</sup>

sented a question to be submitted to the jury to determine whether or not a prudent man exercising due care commensurate with the danger to be apprehended, in approaching such a track, would apprehend danger, or would feel assured of his safety because of the absence of the crossing sign, together with such other surrounding conditions." *Atlantic Coast Line R. Co. v. Church*, 120 Va. 725. 92 S. E. 905.

7. *McKinney v. Port Townsend & P. S. Ry.*, 91 Wash. 387, 158 Pac. 107; *Peck v. New York, etc., R. Co.*, 50 Conn. 379, 394; *quoted in Borhlum v. New York, etc., R. Co.*, 90 Conn. 52. 96 Atl. 174.

8. *Louisville & N. R. Co. v. Treanor's Adm'r*, 179 Ky. 337, 200 S. W. 634; *Cathcart v. Oregon-Washington*

*Rd. & Navigation Co.*, 86 Oreg. 250, 168 Pac. 308. "The care which a person who crosses a railroad track in a city is required to use, as well as that which the company is required to use, varies with the surrounding circumstances and is a question of fact for the jury." *Hauff v. S. D. Cent. Ry. Co.*, 34 S. Dak. 183, 147 N. W. 986. See also, *Pittsburgh, etc., Ry. Co. v. Nichols* (Ind. App.), 130 N. E. 546.

9. *Perrin v. New Orleans Terminal Co.*, 140 La. 818, 74 So. 160; *Washington & O. D. Ry. v. Zell's Adm'r*, 118 Va. 755, 88 S. E. 309.

10. *Gordon v. Illinois Cent. R. Co.*, 168 Wis. 244, 169 N. W. 570.

11. *Treadgill v. United Rys. Co. of St. Louis*, 279 Mo. 466, 214 S. W. 161; *Monroe v. Chicago, etc., R. Co.* (Mo.) 219 S. W. 68; *Daniel v. Pryor* (Mo.)

**Sec. 552. Distinction between automobiles and other vehicles.**

The courts in many States have said that the driver of a motor vehicle is required to use more caution in passing over a railroad crossing than is required of a pedestrian or traveler in a horse-drawn conveyance.<sup>12</sup> One of the reasons for imposing greater precautions on the driver of a motor car is that the heavy steel construction of the machine may, perhaps, cause injury to passengers on the train, whereas there is slight possibility of injury to such persons from a collision with a pedestrian or carriage.<sup>13</sup> The distinction between automobile

227 S. W. 102; *Carroll v. Missouri Pac. Ry. Co.* (Mo.) 229 S. W. 234.

*Compare Advance Transfer Co. v. Chicago, etc., R. Co.* (Mo. App.), 195 S. W. 566; *Slipp v. St. Louis, etc., Ry. Co.* (Mo. App.), 211 S. W. 730. The statute involved in these decisions was repealed in 1917. *Edmonston v. Barrock* (Mo. App.), 230 S. W. 650.

12. *Northern Pac. Ry. Co. v. Tripp*, 220 Fed. 286; *Chase v. New York Cent., etc., R. Co.*, 208 Mass. 137, 94 N. E. 377; *Olds v. Hines*, 95 Oreg. 580, 187 Pac. 586; *Washington & O. D. Ry. v. Zell's Adm'x.*, 118 Va. 755, 88 S. E. 309. See also *Rickert v. Union Pac. R. Co.*, 100 Neb. 304, 160 N. W. 86.

13. *Washington & O. D. Ry. v. Zell's Adm'x.*, 118 Va. 755, 88 S. E. 309. "A pedestrian is required to be diligent in looking out for his own safety in crossing a railroad track, but his duty is not very great to avoid running into a passing engine or train because of the danger of injury to those on the engine or train. The driver of a team of horses hitched to a vehicle is under the same duty to look out for his own safety as is the pedestrian. It is his duty to exercise some care for the safety of those riding on a train. The driver of an automobile must exercise care for himself, and because of the character of the machine that he is driving—a heavy steel structure, dangerous to others—he must exercise

some degree of care for the safety of those rightfully traveling on a railroad train when he is about to cross the track. His machine is easy of control. It will stand where he leaves it. It will not get frightened. If by his negligence he should derail the train, he would be responsible to passengers injured, even though the men in charge of the train were guilty of negligence, if the rule applied to a passenger in an automobile when the driver of the automobile is guilty of negligence is applied to passengers on a train." *Wehe v. Atchison, etc., Ry. Co.*, 97 Kans. 794, 156 Pac. 742, L. R. A. 1916 E. 455. "Because of the fact that a collision between a railroad train and an automobile, endangers, not only those in the automobile, but also those on board the train, and also because the car is more readily controlled than a horse vehicle and can be left by the driver, if necessary, the law exacts from him a strict performance of the duty to stop, look, and listen before driving upon a railroad crossing, where the view is obstructed, and to do so at a time and place where stopping, looking, and listening will be effective." *Callery v. Morgan's Louisiana, etc., S. S. Co.*, 139 La. 763, 72 So. 222. See also *Cathcart v. Oregon-Washington Rd. & Navigation Co.*, 86 Oreg. 250, 168 Pac. 308.

travelers and other travelers was expressed in one case in the following language: " With the coming into use of the automobile, new questions as to reciprocal rights and duties of the public and that vehicle have and will continue to arise. At no place are those relations more important than at the grade crossings of railroads. The main consideration hitherto with reference to such crossings has been the danger to those crossing. A ponderous, swiftly moving locomotive, followed by a heavy train is subject to slight danger by a crossing foot passenger, or a span of horses and a vehicle; but when the passing vehicle is a ponderous steel structure, it threatens not only the safety of its own occupants, but also those on the colliding train. And when to the perfect control of such a machine is added the factor of high speed, the temptation to drive over the track at terrific speed makes the automobile, unless carefully controlled, a new and grave element of crossing danger. On the other hand, when properly controlled, this powerful machine possesses possibilities contributing to safety. When a driver of horses attempts to make a crossing and is suddenly confronted by a train, difficulties face him to which the automobile is not subject. He cannot drive close to the track, or stop there, without risk of his horse frightening, shying, or overturning his vehicle. He cannot well leave his horse standing, and if he goes forward to the track to get an unobstructed view and look for coming trains, he might have to lead his horse or team with him. These precautions the automobile driver can take, carefully and deliberately, and without the nervousness communicated by a frightened horse. It will thus be seen that an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the side of safety, with less inconvenience, no danger and more surely than the driver of a horse. Such being the case, the law, both from the standpoint of his own safety and the menace his machine is to the safety of others, should, in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as go to his own safety and that of the traveling public. If the law demands such care, and those crossing make such care, and not chance, their protection the

possibilities of automobile crossing accidents will be minimized." <sup>14</sup>

According to the mode of expression used by other courts, it is said that "reasonable" or "ordinary" care is all that is required of travelers approaching a railroad crossing, and the same degree of care is required regardless of the conveyance in which he is traveling.<sup>15</sup> The argument that pas-

14. *New York Cent. & H. R. Co. v. Maidment*, 168 Fed. 21, 23, 93 C. C. A. 415, 21 L. R. A. (N. S.) 794, *per* Buffington, J.; *quoted* in *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 579, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; *Northern Pac. Ry. Co. v. Tripp*, 220 Fed. 286, and *cited* in *Chase v. New York Cent. R. Co.* (Mass.), 94 N. E. 377. See also *Anderson v. Great Northern Ry. Co.* (Minn.), 179 N. W. 687.

15. *Monroe v. Chicago, etc., R. Co.* (Mo.) 219 S. W. 68. "The fact that one is driving an automobile may have an influence on the question of contributory negligence, just as the number and qualities of horses and the kind of vehicles they are driving may have; but the standard of care to be used which is necessary to absolve from contributory negligence is the same whether the traveler is on foot, on horseback, in a wagon, a carriage, an automobile, or any other vehicle. It is that degree of care which one of ordinary prudence would use in the particular circumstances." *Pittsburgh, etc., R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609. "The care required of him is such care as an ordinarily prudent person would exercise under similar circumstances. The same standard of care applies to every one who undertakes to cross a railroad track. Whether he is upon horseback, on foot, or occupying a wagon or automobile. The danger of the crossing, the inability to observe, because of natural obstructions, the qualities of the horse driven, or the automobile

in use, the failure to sound a horn or to look for the train, and many other circumstances, are proper subjects for consideration in determining whether the traveler has or has not exercised ordinary care; but these are matters to be considered and passed upon by the jury in determining whether the traveler has or has not exercised ordinary care under the circumstances to look out for the car and keep out of its way." *Louisville & I. R. Co. v. Morgan*, 174 Ky. 633, 192 S. W. 672. "Appellant asserts that a distinction should be drawn between automobiles and vehicles drawn by horses in respect to the conduct of the driver in approaching a railway crossing. It is suggested that the speed of an automobile is under the complete control of a driver, and that, when moving at slow speed, it can be brought to a quick stop within a few feet of the tracks, if necessary to avoid danger, without exposing the occupant to the danger incident to the fright of horses, which would be likely if the vehicle were drawn by horses. There can be no doubt that it is possible for the driver of an automobile to take some precautions which are not available to the driver of horses, and the facts suggested, if they appear from the evidence, are all proper for the consideration of the jury in determining what precautions ordinary care required the driver of a motor car to use under the circumstances of the particular case. After all is said, however, the driver of a motor



sengers on the train may be endangered by a collision between the train and a motor vehicle is not sound, for experience has demonstrated that it is only the occupants of the vehicle who are injured.<sup>16</sup>

### Sec. 553. Burden of proof as to contributory negligence of autoist.

Under the common law rules, the burden of proof, as a general proposition, was placed on the plaintiff to show, not only the negligence of the defendant, but also his own absence of contributory negligence. The rule remains unchanged in some jurisdictions.<sup>17</sup> But, in other jurisdictions, statutory modifications have placed the burden on the issue with the defendant, requiring that he show the contributory negligence of the plaintiff as an affirmative defense.<sup>18</sup> Ordinarily, there

car is required to use only ordinary care; but what he should do in the exercise of due care must depend on the conditions surrounding him, as shown by the evidence, and the means available for controlling the speed and managing the car." *Central Indiana Ry. Co. v. Wishard*, 186 Ind. 262, 114 N. E. 970.

16. "We do not think the fact that the automobile is capable of inflicting more harm than the ordinary vehicle is sufficient to require at crossings the application of a rule different from that applied to heavy wagons or vehicles. It is a matter of common knowledge that when a collision occurs between an automobile and an engine, the result is the same as when the engine strikes a wagon, buggy, or other ordinary vehicle—the occupants of the automobile or vehicle are the ones who are crippled or killed, and not the passengers on the train or its employees." *Louisville & N. R. Co. v. Treanor's Adm'r.*, 179 Ky. 337, 200 S. W. 634.

17. *Sunnes v. Illinois Cent. R. Co.*, 201 Ill. App. 378; *Pittsburgh, etc., R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609; *Chicago, etc., Ry. Co. v. Van*

*Stone* (Ind. App.), 119 N. E. 874; *Fogg v. New York, etc., R. Co.*, 223 Mass. 444, 111 N. E. 960.

18. *United States*.—*Emens v. Lehigh Valley R. Co.*, 223 Fed. 810; *Lake Erie & W. R. Co. v. Schneider*, 257 Fed. 675.

*California*.—*Ellis v. Central California Tract. Co.*, 37 Cal. App. 390, 174 Pac. 407.

*Indiana*.—*Indiana Union Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005; *Lake Erie & W. R. Co. v. Howarth* (Ind. App.), 124 N. E. 687.

*Massachusetts*.—*Morel v. N. Y., etc., R. Co.*, 131 N. E. 175.

*Missouri*.—*Morrow v. Hines* (Mo. App.) 233 S. W. 493.

*Montana*.—*George v. Northern Pac. Ry. Co.* (Mont.), 196 Pac. 869.

*North Carolina*.—*Goff v. Atlantic Coast Line R. Co.*, 179 N. Car. 216, 102 S. E. 320; *Parker v. Seaboard Air Line Co.*, 106 S. E. 755.

*Texas*.—*Moye v. Beaumont, S. L. & W. Ry. Co.* (Tex. Civ. App.), 212 S. W. 471; *Chicago, etc., R. Co. v. Johnson* (Tex. Civ. App.), 224 S. W. 277.

*Washington*.—*Hines v. Chicago, etc., Ry. Co.*, 117 Pac. 795.

**Instructions.**—A charge to the jury

is no presumption that the driver of the machine was or was not in the exercise of due care at the time of the injury.<sup>19</sup> But, in some jurisdictions, the rule is adopted that a presumption of due care arises on the part of one who was killed while crossing a railroad track.<sup>20</sup>

### **Sec. 554. When contributory negligence not a bar.**

Under the common law system, contributory negligence on the part of the driver of a motor vehicle when crossing a railroad track, bars any recovery for the injuries to the driver or to the machine.<sup>21</sup> The negligence of the railway employees does not excuse the negligence of the operator of the car.<sup>22</sup> Of course, under the general principles of the law of negligence, contributory negligence is not a bar unless such negligence was one of the proximate causes of the injury on which the action is based.<sup>23</sup> But, if an automobilist negligently crosses or stops on a railroad track and is struck by a train, there is generally no difficulty with the question of proximate cause.<sup>24</sup> Statutory enactments have changed

that the burden of proving contributory negligence is upon the defendant, has been condemned, because the instruction should have concluded "unless such contributory negligence was disclosed by the plaintiff's evidence, or could fairly be inferred from the circumstances" or in language of similar import. *Norfolk Southern R. Co. v. Smith*, 122 Va. 302, 94 S. E. 789.

19. *Chicago, etc., Ry. Co. v. Van Stone* (Ind. App.), 119 N. E. 874. See also *Sohl v. Chicago, etc., Ry. Co.*, 183 Iowa 616, 167 N. W. 529.

20. *Graves v. Northern Pac. Ry. Co.*, 30 Idaho, 542 166 Pac. 571; *Rice v. Erie R. Co.* (Pa.), 114 Atl. 640; *Bartlett v. Chicago, etc., R. Co.* (Iowa), 175 N. W. 950; *Smith v. Inland Empire R. Co.* (Wash.), 195 Pac. 236; See also *Gillett v. Michigan United Tract. Co.*, 205 Mich., 410, 171 N. W. 536.

21. *Lehigh Valley R. Co. v. Kilmer*, 231 Fed. 628, 145 C. C. A. 514; *Hines*

*v. Cooper* (Ala.), 86 La. 396; *Smith v. Missouri Pac. R. Co.*, 138 Ark. 589, 211 S. W. 657; *Perrin v. New Orleans Terminal Co.*, 140 La. 818, 74 La. 160; *Lanier v. Minneapolis, etc., Ry. Co.* (Mich.), 176 N. W. 410; *Daniel v. Pryor* (Mo.), 227 S. W. 102; *Swegart v. Lush*, 196 Mo. App. 471, 192 S. W. 138; *Atlantic Coast Line R. Co. v. Church*, 120 Va. 725, 92 S. E. 905.

22. *Lehigh Valley R. Co. v. Kilmer*, 231 Fed. 628, 145 C. C. A. 514.

23. *Hines v. Champion* (Ala.), 85 So. 511; *Hines v. Paden* (Ala.), 87 So. 88; *Chicago, etc., R. Co. v. Neizgodski*, 66 Ind. App. 557, 118 N. E. 559; *Monroe v. Chicago, etc., R. Co.* (Mo.), 219 S. W. 68; *Cottam v. Oregon Short Line R. Co.* (Utah), 187 Pac. 827. See also *Lehigh Valley R. Co. v. Kilmer*, 231 Fed. 628, 145 C. C. A. 514. And see section 575.

24. *Bagdad Land & Lumber Co. v. Moneyway* (Fla.), 86 So. 687; *Andrews v. Mynier* (Tex. Civ. App.), 190 S. W. 1164.

many of the common law rules of negligence. For example, in a few States, the doctrine of "comparative" negligence has been created, under which contributory negligence in some cases is a partial, not an absolute, defense.<sup>25</sup> In Texas,

25. *Hines v. Hoover*, 271 Fed. 645; *Seaboard Air Line Ry. Co. v. Good* (Fla.), 84 So. 733; *Central of Ga. Ry. Co. v. McKey*, 13 Ga. App. 477, 79 S. E. 378; *Central of Ga. Ry. Co. v. Larsen*, 19 Ga. App. 413, 91 S. E. 517; *Yazos, etc., R. Co. v. Williams*, 114 Miss. 236, 74 So. 835; *Hines v. McCullers*, 121 Miss. 666, 83 So. 734.

**Instruction to jury.**—Where there is evidence of mutual negligence on the part of the driver of the automobile, as well as on the part of the defendant and the comparison of such negligence is, therefore, a question for the jury, it is error to refuse a written request to charge as follows: "If you believe that the plaintiff and defendant were both negligent, but that the negligence of the plaintiff exceeded that of the defendant, or equalled it, then the plaintiff could not recover, and you should find for the defendant." *Central of Ga. Ry. Co. v. McKey*, 13 Ga. App. 477, 79 S. E. 378.

**Comparative negligence in Georgia.**—In *Central of Ga. Ry. Co. v. Larson*, 19 Ga. App. 413, 91 S. E. 517, the court said: "While at common law, if the negligence of the plaintiff contributed to the injury, he could not recover in this State the liability of railroad companies for injury done by them to persons or property has been modified, so that the law governing such liability is as follows: Under the provisions of section 2781 of the Civil Code, no person shall recover damages from a railroad company for injury done to himself or his property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agent of the company are

both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him. The doctrine usually referred to as that of contributory negligence is not the law of this State, inasmuch as that term, properly used, expresses, not such negligence as would diminish, but only such negligence as would preclude, a recovery. The doctrine which here obtains can be and is more accurately and properly designated as that of comparative negligence. . . . Thus, if the plaintiff and the defendant were both negligent, the former can recover, unless his negligence was equal to or greater than the negligence of the defendant, except that this rule is further qualified by the provisions of section 4426 of the Civil Code, which provides that if the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not, in such event, entitled to recover. . . . The rule stated in section 4426, however, applies only where the defendant's negligence became apparent to the person injured, or where, by the exercise of ordinary care, he could have become aware of it, and he thereafter failed to exercise ordinary and reasonable diligence to avoid the consequences of the defendant's negligence. . . . Thus it will be seen that a plaintiff can recover partial damages for injuries caused by the negligence of a railway company, notwithstanding his own fault, which might, in some less degree, have contributed thereto provided that he exercised ordinary and reasonable caution by plaintiff to avoid the consequences of

the rule of comparative negligence applies as between common carriers and their employees, but not as between common carriers and persons injured by crossing their tracks.<sup>26</sup> In some jurisdictions gross or wanton negligence on the part of a railroad company may have the effect of excusing the contributory negligence of a traveler,<sup>27</sup> but not the gross negligence of the traveler.<sup>28</sup> But the mere fact that the railroad company in the running of its trains violated a municipal ordinance, or even several ordinances simultaneously, does not make wanton or willful negligence which will render the company liable for the injuries irrespective of simple negligence on the part of the traveler.<sup>29</sup> Wanton or willful misconduct cannot be charged against the railroad because it approaches a much used crossing without proper warning, where the speed of the train is very reasonable.<sup>30</sup>

#### **Sec. 555. Care of taxicab driver.**

As between the driver of a taxicab and a passenger riding therein, the driver is considered as a common carrier and is required to exercise what is sometimes termed as the "highest" degree of care.<sup>31</sup> This doctrine, however, has no application as between the driver and the railroad over whose track he attempts to pass but is struck by a train. In such a case, the rule of ordinary care measures the duty of the driver.<sup>32</sup>

the defendant's negligence, after it had or should have become apparent. Ordinarily the question of negligence, both on the part of the plaintiff and the defendant, is an issue to be determined by the jury; but where the plaintiff's petition shows on its face that he has no right to recover, and this question is raised by general demurrer, it is the duty of the court to sustain the demurrer and dismiss the petition."

<sup>26</sup> *Andrews v. Mynier* (Tex. Civ. App.), 190 S. W. 1164.

<sup>27</sup> See *Rouse v. Blair*, 185 Mich.

632, 152 N. W. 204.

<sup>28</sup> *Morel*, New York, etc., R. Co. (Mass.), 131 N. E. 175.

<sup>29</sup> *Fluckey v. Southern Ry. Co.*, 242 Fed. 469; *Chatelle v. Illinois Cent. R. Co.*, 210 Ill. App. 475.

<sup>30</sup> *Bailey v. Southern Ry. Co.*, 196 Ala. 133, 72 So. 67. See also, *Evans v. Illinois Cent. R. Co. (Mo.)*, 233 S. W. 327.

<sup>31</sup> Section 282.

<sup>32</sup> *Southern Ry. Co. v. Vaughan's Adm'r*, 118 Va. 692, 88 S. E. 305, L. R. A. 1916 E. 1222.

**Sec. 556. Relative rights of automobilist and railroad.**

At a point where a railroad track crosses a public highway, motor vehicles along the road and railroad trains along the railroad are said to have equal rights to the use of the crossing.<sup>33</sup> Such a statement, however, is not to be construed as

33. *Hurt v. Yazoo, etc., R. Co.*, 140 Tenn. 623, 205 S. W. 437; *Galveston-Houston Elec. Ry. Co. v. Patella* (Tex. Civ. App.), 222 S. W. 615. See also *Flannery v. Interurban Ry. Co.*, 171 Iowa, 238, 153 N. W. 1027.

**Erroneous instruction to jury.**—It has been held improper for the presiding judge to charge the jury "That as a matter of law the deceased (the driver of an automobile) had an equal right to travel on the dirt road at the intersection with the railroad, as the railroad had to run its train on its track at that point." *Baker v. Collins* (Tex. Civ. App.), 199 S. W. 519, wherein the court, holding that the charge was confusing and misleading and therefore erroneous, said: "As bearing upon the question of negligence charged against railroad companies in the operation of their trains, our Supreme Court has frequently said that railroads have no exclusive right to the use of their tracks where they cross public highways; that the public have the right to travel such highways, and in so doing to cross railroad tracks; and that the law imposes upon those operating railroad trains the duty of exercising due care to prevent injury to persons who may be so traveling. And in considering the question of negligence on the part of the railroad company, it is not improper to give such charge, if it is so framed as to limit it to that question. The charge now under consideration was not restricted to a consideration of the question of the defendant's negligence, and the jury had the right to consider it in determining the

question of contributory negligence. And when so considered, and in view of the fact that it specifically declared that Mr. Collins had an equal right to travel on the dirt road at the intersection of the railroad as the railroad had to run its trains on its track at that point, the jury may have concluded that the charge meant that as Collins had such right, proof of the fact that he knowingly and willfully ran his automobile upon the track at a time when he must have known that it was very dangerous to do so would not defeat the plaintiffs' right to recover. It is not sufficient answer to say that in its main charge the court instructed the jury otherwise, and therefore the requested charge was harmless. The point is that this charge when literally construed was in conflict with the main charge of the court, and therefore it was calculated to confuse and mislead the jury upon one of the most vital questions in the case. Of course, it is not true in either law or reason that when a person is traveling a public highway which crosses a railroad track, that such person and the railroad each have the right to pass the intersection at the same time. Under such circumstances, and in the very nature of things, one or the other must have the right of precedence, because they cannot both occupy the point of intersection at the same time. Such right of precedence is not fixed by statute in this State, but, generally speaking, common sense and the public welfare dictate that it should be accorded to railroad trains; and it is a matter of

interfering with the rights of priority which are accorded to railroad trains so far as its tracks are concerned.<sup>34</sup> "Travelers approaching a public crossing must bear in mind that, while their rights and those of the railroad company at that point are 'mutual,' 'reciprocal,' and 'coextensive' in general, the law has always accorded, and in the nature of the case must accord, to a moving train the right of way."<sup>35</sup>

### Sec. 557. Duty to look and listen — in general.

In some jurisdictions, an imperative duty is placed on the driver of a motor vehicle to stop, look and listen before crossing the tracks of a railroad company. This view, however, is the minority view; and the rule sustained in most States is that there is no imperative duty to stop under all circumstances.<sup>36</sup> But whatever difference of opinion there may be on the question of *stopping* an automobile before crossing the track, it is practically agreed that the driver is guilty of contributory negligence as a matter of law if he does not *look* and *listen* for approaching trains before venturing on the tracks.<sup>37</sup> Both looking and listening are ordinarily required;

common knowledge that, as a general rule, the traveling public recognize and accord such right of precedence to approaching trains. We do not state this as a rule of law to be given in charge to juries, though the writer, speaking for himself only, believes that it should be." See also, *Southern Traction Co. v. Kirksey* (Tex. Civ. App.), 222 S. W. 702.

34. *Indiana Union Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005; *Lake Erie & W. Ry. Co. v. Sams* (Ind. App.), 127 N. E. 566; *Dombrenos v. Chicago, etc., Ry. Co.* (Iowa), 174 N. W. 596; *Walters v. Chicago, etc., R. Co.*, 47 Mont. 501, 133 Pac. 357, 46 L. R. A. (N. S.) 702; *Olds v. Hines* 95 Oreg. 580, 187 Pac. 586; *Washington & O. D. Ry. v. Zell's Adm'x*, 118 Va. 755, 88 S. E. 309.

35. *Pittsburgh, etc., Ry. Co. v. Nichols* (Ind. App.), 130 N. E. 546; *Wash-*

*ington & O. D. Ry. v. Zell's Adm'x*, 118 Va. 755, 88 S. E. 309. "The use of the highway at these crossings by the railway and the general public is a common one, to be enjoyed by each consistently with the rights of the other. While the railroad has generally the priority of right of way, that priority depends upon the principle of equality as applied to the nature of the public service it performs and the character of the machinery and appliances necessary for its prosecution." *Jackson v. Southwest Missouri R. Co.* (Mo.), 189 S. W. 381.

36. Section 567.

37. *United States*.—*Northern Pac. Ry. Co. v. Tripp*, 220 Fed. 286; *Delaware L. & W. R. Co. v. Welshman*, 229 Fed. 82, 143 C. C. A. 358; *Lehigh Valley R. Co. v. Kilmer*, 231 Fed. 628, 143 C. C. A. 514.

the traveler has no right to depend exclusively on his hearing when there are attendant noises which materially interfere

*Alabama*.—Bailey v. Southern Ry. Co., 196 Ala. 133, 72 So. 67.

*Arkansas*.—Bush v. Brewer, 136 Ark. 248, 206 S. W. 322.

*California*.—Thompson v. Southern Pac. Co., 31 Cal. App. 567, 161 Pac. 21; Jones v. Southern Pac. Co., 34 Cal. App. 629, 168 Pac. 586; Murray v. Southern Pac. R. Co., 169 Pac. 675; Rayhill v. Southern Pac. Co., 35 Cal. App. 231, 169 Pac. 718; Walker v. Southern Pac. Co., 38 Cal. App. 377, 176 Pac. 175.

*Georgia*.—Hines v. Stevens (Ga. App.), 106 S. E. 298.

*Illinois*.—Sunnes v. Illinois Cent. R. Co., 201 Ill. App. 378; Elder v. Pittsburgh, etc., R. Co., 186 Ill. App. 199.

*Indiana*.—Pittsburgh, etc., R. Co. v. Dove, 184 Ind. 447, 111 N. E. 609; Central Indiana Ry. Co. v. Wishard, 186 Ind. 262, 114 N. E. 970; Waking v. Cincinnati, etc., R. Co. (Ind. App.), 125 N. E. 799.

*Iowa*.—Duggan v. Chicago, M. & St. P. Ry. Co., 159 N. W. 228; Beemer v. Chicago, R. I. & P. Co., 162 N. W. 43; Sohl v. Chicago, etc., Ry. Co., 183 Iowa 616, 167 N. W. 529; Hawkins v. Interurban Ry. Co., 184 Iowa 232, 168 N. W. 234; Corbett v. Hines (Iowa), 180 N. W. 690; Reynolds v. Interurban Ry. Co. (Iowa), 182 N. W. 804.

*Kansas*.—Corley v. Atchison, etc., Ry. Co., 90 Kans. 70, 133 Pac. 555; Jacobs v. Atchison, etc., Co., 97 Kans. 247, 154 Pac. 1023; Wehe v. Atchison, etc., Ry. Co., 97 Kans. 794, 156 Pac. 742, L. R. A. 1916 E. 455; Prichard v. Atchison, T. & S. F. Ry. Co., 99 Kans. 600, 162 Pac. 315; Buntton v. Atchison, etc., Ry. Co., 100 Kans. 165, 163 Pac. 801; Kirkland v. Atchison, etc., Ry. Co., 179 Pac. 362.

*Louisiana*.—Walker v. Rodriguez, 139 La. 251, 71 So. 499; Perrin v. New Orleans Terminal Co., 140 La. 818, 74

So. 160.

*Maine*.—Conant v. Grand Trunk Ry. Co., 114 Me. 92, 95 Atl. 444.

*Massachusetts*.—Fogg v. New York, etc., R. Co., 223 Mass. 444, 111 N. E. 960.

*Michigan*.—Pershing v. Detroit, etc., R. Co., 206 Mich. 304, 172 N. W. 530; Hardy v. Pere Marquette Ry. Co., 208 Mich. 622, 175 N. W. 462; Groves v. Grand Trunk Western Ry., 178 N. W. 232.

*Mississippi*.—Yazoo, etc., R. Co. v. Williams, 114 Miss. 236, 74 So. 835.

*Missouri*.—Coby v. Quiney, etc., R. Co., 174 Mo. App. 648, 161 S. W. 290; Swigart v. Lush, 196 Mo. App. 471, 192 S. W. 138; Tannehill v. Kansas City, etc., Ry. Co., 279 Mo. 158, 213 S. W. 818; Slipp v. St. Louis, etc., Ry. Co. (Mo. App.), 211 S. W. 730; Central Coal & Coke Co. v. Kansas City So. Ry. Co. (Mo. App.), 215 S. W. 914; Lyter v. Hines (Mo. App.), 223 S. W. 795; Alexander v. St. Louis, etc., Ry. Co. (Mo.), 233 S. W. 44; Evans v. Illinois Cent. R. Co. (Mo.), 233 W. 397.

*Montana*.—George v. Northern Pac. Ry. Co., 196 Pac. 869; Keith v. Great Northern Ry. Co., 199 Pac. 718.

*Nebraska*.—Rickert v. Union Pac. R. Co., 100 Neb. 304, 160 N. W. 86; Askey v. Chicago, etc., Ry. Co., 101 Neb. 266, 162 N. W. 647.

*New York*.—Kidd v. New York Central, etc., R. Co., 218 N. Y. 313, 112 N. E. 1051; Turch v. New York, etc., R. Co., 108 N. Y. App. Div. 142, 95 N. Y. Suppl. 1100; Bonert v. Long Island R. Co., 145 N. Y. App. Div. 552, 130 N. Y. Suppl. 271. "If at all places from a point in the highway one hundred and fifty feet from the railroad line he had a fair view of approaching trains, notwithstanding the darkness, it was certainly negligent to drive himself and his family on to death."

with the exercise of that function, and he has a convenient opportunity to look both ways along the track in safety before

Under the circumstances the commonest prudence required sufficient watchfulness to observe the train before it was too late." *Kidd v. New York Central, etc., R. Co.*, 218 N. Y. 313, 112 N. E. 1051.

*North Carolina*.—*Shepard v. Norfolk, etc., R. Co.*, 166 N. Car. 539, 82 S. E. 872; *Brown & Co. v. Atlantic Coast Line R. Co.*, 171 N. Car. 266, 88 S. E. 329; *Goff v. Atlantic Coast Line R. Co.*, 179 N. Car. 216, 102 S. E. 320; *Costin v. Tidewater Power Co.*, 106 S. E. 568.

*Oklahoma*.—*Thrasher v. St. Louis, etc., Ry. Co.*, 198 Pac. 97.

*Oregon*.—*Cathcart v. Oregon-Washington Rd. & Navigation Co.*, 86 Oreg. 250, 168 Pac. 308; *Robison v. Oregon-Washington R. & Nav. Co.*, 90 Oreg. 490, 176 Pac. 594.

*Pennsylvania*.—*Peoples v. Pennsylvania R. Co.*, 251 Pa. St. 275, 96 Atl. 652.

*Rhode Island*.—*Geoffrey v. New York, etc., R. Co.*, 104 Atl. 883.

*Tennessee*.—*Hurt v. Yazoo, etc., R. Co.*, 140 Tenn. 623, 205 S. W. 437.

*Texas*.—*Beaumont, etc., R. Co. v. Moy* (Civ. App.), 174 S. W. 697; *Ft. Worth, etc., R. Co. v. Hart* (Civ. App.), 178 S. W. 795; *Southern Tr. Co. v. Kicksey* (Civ. App.), 181 S. W. 545; *Texas, etc., R. Co. v. Harrington* (Civ. App.), 209 S. W. 685. *Compare St. Louis Southwestern Ry. Co. v. Harrell* (Civ. App.), 194 S. W. 971; *Beaumont, S. L. & W. Ry. Co. v. Myrieh* (Civ. App.), 208 S. W. 935; *Southern Traction Co. v. Kirksey*, (Civ. App.), 222 S. W. 702; *Hines v. Roan* (Civ. App.), 230 S. W. 1070.

*Utah*.—*Shortino v. Salt Lake & U. R. Co.*, 52 Utah 476, 174 Pac. 861.

*Virginia*.—*Virginia & S. W. Ry. Co. v. Skinner*, 119 Va. 843, 89 S. E. 887; *Washington & O. D. Ry. v. Zell's Adm'x.*, 118 Va. 755, 88 S. E. 309.

*Washington*.—*Golay v. Northern Pac. Ry. Co.*, 177 Pac. 804; *Miller v. Northern Pac. Ry. Co.*, 105 Wash. 645, 178 Pac. 808; *Hoyle v. Northern Pac. R. Co.*, 105 Wash. 652, 178 Pac. 810; *Monso v. Bellingham & N. Ry. Co.*, 106 Wash. 299, 179 Pac. 848.

*West Virginia*.—*Helvey v. Princeton Power Co.*, 99 S. E. 180.

*Wisconsin*.—*Puhr v. Chicago, etc., R. Co.*, 176 N. W. 767.

**Statutes** may modify the "look and listen" rule. *Baer v. Lehigh, etc., Ry. Co.*, 93 J. L. 85, 106 Atl. 421; *Gordon v. Illinois Cent. R. Co.*, 168 Wis. 244, 169 N. W. 570.

**Instruction to jury**.—The plaintiff's testator was run down and killed by a train of the defendant railroad corporation while he was endeavoring to drive his automobile over its tracks. The court, on request by defendant's counsel, refused to charge, substantially, that if the jury believed that the deceased had a fair view of approaching trains at all places within not less than one hundred and fifty feet from the crossing, he was negligent in not discovering the approaching train. *Held*, that as there was evidence from which the jury might have found facts as they were assumed in the request, the refusal to so charge was error. *Kidd v. New York Central, etc., R. Co.*, 218 N. Y. 313, 112 N. E. 1051.

**Muffling engine**.—If looking is ineffective and the noise of the engine interferes with his hearing, it may be his duty to muffle the engine. *Central Coal & Coke Co. v. Kansas City So. Ry. Co.* (Mo. App.), 215 S. W. 914; *Lyter v. Hines* (Mo. App.), 223 S. W. 795.

**Driver looking down at engine of auto**.—When, as an automobile was approaching a railroad track, the driver was looking down and listen-



crossing.<sup>38</sup> The general rule applies to a city crossing as well as to one in a rural section.<sup>39</sup> And it applies to a crossing over a siding or switch track as well as to a crossing over the main line track of the railroad.<sup>40</sup> But it may not be applicable when there is no evidence showing that looking and listening would have given notice in time to have avoided the collision.<sup>41</sup> Indeed, it is recognized that in some cases the surrounding circumstances may be such as to relieve one from the absolute duty of looking and listening for trains.<sup>42</sup> Thus, one may be excused from looking and listening for trains when he is not conscious that he is approaching a railroad track.<sup>43</sup>

ing to the engine of his machine, and the other occupants were joking and "kidding" the occupants of another automobile, none of them giving any attention to the crossing, it was held that all the occupants of the machine were guilty of negligence. *Conant v. Grand Trunk Ry. Co.*, 114 Me. 92, 95 Atl. 444.

A presumption arises that a person killed at such a crossing did look and listen and the defendant has burden of showing contributory negligence. *Emens v. Lehigh Valley R. Co.*, 223 Fed. 810; *Hines v. Hoover*, 271 Fed. 645.

38. *Catheart v. Oregon-Washington Rd. & Navigation Co.*, 86 Ore. 250, 168 Pac. 308; *Robison v. Oregon-Washington R. & Nav. Co.*, 90 Ore. 490, 176 Pac. 594. See also *Siejak v. United Rys. etc., Co.*, 135 Md. 367, 109 Atl. 107.

39. *Jacobs v. Atchison, etc., Ry. Co.*, 97 Kans. 247, 154 Pac. 1023.

40. *Morrow v. Hines* (Mo. App.), 233 S. W. 493; *Peoples v. Pennsylvania R. Co.*, 251 Pa. St. 275, 96 Atl. 652.

41. *Union Traction Co. of Indiana*

*v. Haworth*, 187 Ind. 451, 115 N. E. 753.

42. *Case v. Atlanta, etc., Ry.*, 107 S. C. 216, 92 S. E. 472; *Hurt v. Yazoo, etc., R. Co.*, 140 Tenn. 623, 205 S. W. 437; *Seaboard Air Line Ry. v. Abernathy*, 121 Va. 173, 92 S. E. 913. "The rule that it is negligence *per se* to enter upon a railroad track without looking or listening has been applied to the ordinary case in which the plaintiff, or the deceased, was not prevented from seeing or hearing by any other circumstances, and had the use of his faculties. In such case an ordinarily prudent man is deemed, under the law, to be guilty of such negligence as would bar a recovery if he entered upon the track without doing so. And it is only in exceptional cases that the rule does not apply, and in cases in which the facts relied upon as creating the exception itself are not superinduced by the want of due care. But what is due care in the circumstances of the exception is ordinarily a question for the jury." *Hurt v. Yazoo, etc., R. Co.*, 140 Tenn. 623, 205 S. W. 437.

43. *Hurt v. Yazoo, etc., R. Co.* 140 Tenn. 623, 205 S. W. 437.

### Sec. 558. Duty to look and listen—place of looking and listening.

The driver of a motor vehicle about to cross a railroad track must at an appropriate place use his faculties to learn of the approach of trains.<sup>44</sup> That is, he must look, where, by looking he can see; and must listen, where, by listening he can hear.<sup>45</sup> “To have looked too late was not to have looked

44. *United States*.—*Delaware*, L. & W. R. Co. v. Welshman, 229 Fed. 82, 143 C. C. A. 358.

*Arkansas*.—*Bush v. Brewer*, 136 Ark, 248, 206 S. W. 322.

*Illinois*.—*Sunnes v. Illinois Cent. R. Co.*, 201 Ill. App. 378.

*Indiana*.—*Pittsburgh, etc., R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609; *Central Indiana Ry. Co. v. Wishard*, 186 Ind. 262, 114 N. E. 970; *Indianapolis, etc., Tract. Co. v. Harrell* (Ind. App.), 131 N. E. 17. “The duty to use ordinary care to avoid injury which is imposed on one about to make use of a street over which railroad trains cross does not ordinarily require him to stop, but it does require him to look and listen and to exercise ordinary care to select a place where the act of looking and listening will be reasonably effective.” *Pittsburgh, etc., R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609.

*Massachusetts*.—*Fogg v. New York, etc., R. Co.*, 223 Mass. 444, 111 N. E. 960.

*Michigan*.—*Groves v. Grand Trunk Western Ry.*, 178 N. W. 232.

*Missouri*.—*Lyter v. Hines* (Ma. App.), 223 S. W. 795.

*New York*.—*Spencer v. New York Cent., etc., R. Co.*, 123 N. Y. App. Div. 789, 108 N. Y. Suppl. 245, affirmed without opinion, 197 N. Y. 507.

*Pennsylvania*.—*Peoples v. Pennsylvania R. Co.*, 251 Pa. St. 275, 96 Atl. 652.

*Tennessee*.—*Stem v. Nashville Ry.*, 142 Tenn. 494, 221 S. W. 192.

*Texas*.—*Texas, etc., R. Co. v. Hous-*

*ton Undertaking Co.* (Civ. App.), 218 S. W. 84.

*Virginia*.—*Virginia & S. W. Ry. Co. v. Skinner*, 119 Va. 843, 89 S. E. 887; *Norfolk & W. Ry. Co. v. Simmons*, 103 S. E. 609.

**Within last thirty feet.**—A chauffeur, forty years of age and in full possession of his faculties, who was injured by a railroad train while driving an automobile in broad daylight over a grade crossing, is guilty of contributory negligence, as matter of law, when the evidence shows that the train was in plain sight long enough to have enabled him to bring the machine to a standstill before reaching the track, and that he was driving so slowly that he could have stopped the car immediately. The fact that the plaintiff looked twice before reaching the track and did not see the train does not show freedom from contributory negligence if he traversed the last thirty feet before reaching the track without looking; nor is his failure to do so excused by the fact that the car was hemmed in by a crowd of people bound for a nearby railroad station. *Spencer v. New York Central, etc., R. Co.*, 123 N. Y. App. Div. 789, 108 N. Y. Suppl. 245, affirmed without opinion, 197 N. Y. 507.

45. *Delaware*, L. & W. R. Co. v. Welshman, 229 Fed. 82, 143 C. C. A. 358; *Jones v. Southern Pac. Co.*, 34 Cal. App. 629, 168 Pac. 536; *Rickert v. Union Pac. R. Co.*, 100 Neb. 304, 160 N. W. 86; *Askey v. Chicago, etc., Ry. Co.*, 101 Neb. 266, 162 N. W. 647;

at all."<sup>46</sup> Failing to use his faculties at a proper place may be as serious as a failure to use them at all; and may preclude a recovery for his injuries.<sup>47</sup> But the law does not require that the driver look at the precise place and time when and where looking would be of the most advantage.<sup>48</sup> All that is required of the driver is that he exercise reasonable care in selecting the place in view of the conditions before

*Cathcart v. Oregon-Washington Rd. & Navigation Co.*, 86 Oreg. 250, 168 Pac. 308; *Luken v. Pennsylvania R. Co.* (Pa.), 110 Atl. 151. "The incontestable conclusions of fact to be drawn from the facts established by the evidence are that Pritchard, had he looked when he was 30 feet from the track, or anywhere from that point until he reached the place where he was struck, could have seen the approaching train; that there was nothing to prevent his seeing the train, and that if he looked, he saw the train coming and attempted to cross the track in front of it. The facts show contributory negligence on the part of James A. Pritchard and prevent any recovery." *Pritchard v. Atchison, etc.*, Ry. Co., 99 Kans. 600, 162 Pac. 315.

46. *Walker v. Rodriguez*, 139 La. 251, 71 So. 499.

47. *Thompson v. Southern Pac. Co.*, 31 Cal. App. 567, 161 Pac. 21; *Indianapolis, etc., Tract. Co. v. Harrell* (Ind. App.), 131 N. E. 17; *Sturgeon v. Minneapolis, etc., R. Co.* (Iowa), 174 N. W. 381; *Walker v. Rodriguez*, 139 La. 251, 71 So. 499; *Rickert v. Union Pac. R. Co.*, 100 Neb. 304, 160 N. W. 86; *Shoemaker v. Central Railroad of New Jersey* (N. J.), 89 Atl. 517; *Cathcart v. Oregon-Washington Rd. & Navigation Co.*, 86 Oreg. 250, 168 Pac. 308. "The duty of due care is not discharged unless the traveler looks and listens at a place where looking and listening will be effective, unless a reasonable excuse exists for failing so to do." *Rickert v. Union Pac. R. Co.*,

100 Neb. 304, 160 N. W. 86. "It is undisputed that the plaintiff knew that he was approaching the railroad, because he had just crossed it, and he testifies that the automobile was moving slowly, and that he could have stopped it within a distance of 10 feet. It also appears that the train was coming from the north, and, when the plaintiff was within 42 feet of the track, he had a clear view along it of 900 or more feet; and the clear weight of the testimony shows that he did not look along the track in the direction from which the train was coming until he was very near to the track. It also appears that a number of other persons who were farther away than he saw the train coming, and shouted warnings to him. We fail to perceive how it was possible under this evidence for the jury to find that the plaintiff exercised even ordinary care in approaching the crossing. If he had looked when at least 42 feet from the track, he could have seen the train, and, if he did not see it, it can only be because he did not look." *Shoemaker v. Central Rd. of N. J.* (N. J. L.), 89 Atl. 517.

48. *Lehigh Valley R. Co. v. Kilmer*, 231 Fed. 628, 145 C. C. A. 514; *Alloggi v. Southern Pac. Co.* (Cal. App.), 173 Pac. 1117; *Pittsburgh, etc., R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609; *Central Indiana Ry. Co. v. Wishard*, 186 Ind. 262, 114 N. E. 970; *Rupner v. Cedar Rapids & Iowa City Railway & Light Co.*, 178 Iowa, 615, 159 N. W. 1048.

him and the danger reasonably to be anticipated.<sup>49</sup> Whether he used ordinary care in the selection of his view point, may be a question within the province of the jury.<sup>50</sup> The circumstances may require the autoist to continue to look as he approaches the crossing,<sup>51</sup> yet the courts recognize that prudence requires him to give at least a part of his attention to the road and the crossing. Especially is this so when the crossing is rough and in bad condition, and he is under no absolute duty to stop.<sup>52</sup> Where there is evidence that the driver stopped the machine within three or four yards of the track and looked for approaching cars but saw none, the courts will not say as a matter of law that he was guilty of contributory negligence in proceeding across the track.<sup>53</sup>

49. *Alloggi v. Southern Pac. Co.*, 37 Cal. App. 72, 173 Pac. 1117; *Pittsburgh, etc., R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609; *Lake Erie & W. R. Co. v. Sanders* (Ind. App.), 125 N. E. 793; *Waking v. Cincinnati, etc., R. Co.* (Ind. App.), 125 N. E. 799; *Hauff v. S. D. Cent. Ry. Co.*, 34 S. Dak. 183, 147 N. W. 986.

50. *Van Orsdal v. Illinois Cent. R. Co.*, 210 Ill. App. 619; *Pittsburgh, etc., R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609; *Union Traction Co. of Indiana v. Haworth*, 187 Ind. 451, 115 N. E. 753; *Littlewood v. Detroit United Ry.*, 189 Mich. 388, 155 N. W. 698; *Missouri, etc., R. Co. v. Thayer* (Tex. Civ. App.), 178 S. W. 988. "That point, however, in its precise relation to the track in feet, is seldom to be determined as a matter of law; the underlying test being: Was ordinary care used by the traveler in selecting the place in view of the conditions before him and the danger reasonably to be anticipated. It is only when ordinarily prudent, impartial, and sensible men could reach but one conclusion that the question becomes one of law. When different men equally possessing such qualities might draw different inferences from the facts as to the existence of contributory negligence,

then it is not a question of law." *Pittsburgh, etc., R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609.

51. See *Wingert v. Philadelphia, etc., Ry. Co.*, 262 Pa. 21, 104 Atl. 859; *Jester v. Philadelphia, etc., R. Co.* (Pa.), 109 Atl. 774; *Luken v. Pennsylvania R. Co.* (Pa.), 110 Atl. 151. "If, from a place of safety on his way, the traveler in control of the vehicle in which he is riding can obtain a view of the coming train, he must look upon the course of the train from that point, and this responsibility is constant until the danger is past; that is, until he is safely across the railway track. The duty is constant because the danger is incessant. Instead of being intermittent, it grows as the traveler gets near the crossing, and reaches its climax only as he actually crosses the track in his passage." *Robison v. Oregon-Washington R. & Nav. Co.*, 90 Oreg. 490, 176 Pac. 594.

52. *Louisville, etc., R. Co. v. Schuester*, 183 Ky. 504, 209 S. W. 542; 4 A. L. R. 1344.

53. *Littlewood v. Detroit United Ry.*, 189 Mich. 388, 155 N. W. 698; *Compare Canody v. Norfolk, etc., Ry. Co.* (Va.), 105 S. E. 585.

And one stopping and listening when twenty-one feet from the track may be justified in proceeding without again looking.<sup>54</sup> But, when one could have seen the approaching train when comparatively near the track, he is guilty of contributory negligence when he looks only at a distance of a hundred yards therefrom.<sup>55</sup>

### **Sec. 559. Duty to look and listen — obstructed view.**

The presence of obstructions along the railroad track which have the effect of interfering with a traveler's view, are material in considering whether he has fulfilled his duty of observing proper care.<sup>56</sup> The fact that the driver is aware of obstructions imposes on him care proportionate to the known danger.<sup>57</sup> The greater the difficulty of seeing and hearing an approaching train as it nears a crossing, the greater caution the law imposes upon the traveler.<sup>58</sup> So long as buildings and other objects obstruct his view, a traveler is perhaps, excused from looking for approaching trains, for the law does not compel one to do the impossible.<sup>59</sup> But, when the traveler reaches a point where his view is no longer obstructed, due care requires that at such place, or at some place nearer the track, he use his faculties to learn of the approach of trains.<sup>60</sup> Where the obstruction continues until

<sup>54</sup> *Advance Transfer Co. v. Chicago, etc., R. Co.* (Mo. App.), 195 S. W. 566.

<sup>55</sup> *Virginia & S. W. Ry. Co. v. Skinner*, 119 Va. 843, 89 S. E. 887.

**One hundred fifteen feet.**—One looking at a distance of 115 feet from the track, does not necessarily fulfill his duty. *Sturgeon v. Minneapolis, etc., Ry. Co.* (Iowa), 174 N. W. 381.

<sup>56</sup> *Catheart v. Oregon-Washington Rd. & Navigation Co.*, 86 Oreg. 250, 168 Pac. 308; *Texas & P. Ry. Co. v. Eddleman* (Tex. Civ. App.), 175 S. W. 775; *Seaboard Air Line Ry. v. Abernathy*, 121 Va. 173, 92 S. E. 913.

**Smoke and dust.**—May constitute an obstruction to the driver's view, and may have a bearing on his negligence. *Smith v. Missouri Pac. R. Co.* (Ark.), 211 S. W. 657.

<sup>57</sup> *Murray v. Southern Pac. R. Co.* 177 Cal. 1, 169 Pac. 675; *Sunnes v. Illinois Cent. R. Co.*, 201 Ill. App. 378; *Piersall's Adm'r. v. Chesapeake & O. Ry. Co.* (Ky.), 203 S. W. 551.

<sup>58</sup> *Piersall's Adm'r v. Chesapeake & O. Ry. Co.*, 180 Ky. 659, 203 S. W. 551; *Perrin v. New Orleans Terminal Co.*, 140 La. 818, 74 So. 160; *Blanchard v. Maine Cent. R. Co.* 116 Me. 179, 100 Atl. 666; *McKinney v. Port Townsend & P. S. Ry. Co.*, 91 Wash. 387, 158 Pac. 107.

<sup>59</sup> See *Ohio Electric Ry. Co. v. Weingartner*, 93 Ohio St. 124, 112 N. E. 203; *Case v. Atlanta, etc., Ry.*, 107 S. C. 216, 92 S. E. 472; *Hubenthal v. Spokane, etc., R. Co.*, 97 Wash. 581, 166 Pac. 797.

<sup>60</sup> *United States.—Fluckey v. Southern Ry. Co.*, 242 Fed. 469.

comparatively close to the track, the operator of the machine should have his car under such control and running at such speed so that, if he sees a train, he can stop his car in time to avoid a collision.<sup>61</sup> Where the track was obscured until he was within forty-three feet of the track, he was deemed guilty of negligence in failing to look for an approaching train while passing over the interval of forty-three feet.<sup>62</sup> If the obstructions continue so close to the track that the traveler cannot look effectively until he is in a place where he will be struck by the train, reasonable care would seem to require that he stop his machine previously and listen.<sup>63</sup> Thus, if a

*Alabama.*—Rothrock v. Alabama Great Southern R. Co., 78 So. 84.

*Iowa.*—Corbett v. Hines, 180 N. W. 690.

*Missouri.*—Gersman v. Atchison, etc., R. Co., 229 S. W. 167; Alexander v. St. Louis, etc., Ry. Co., 233 S. W. 44.

*Pennsylvania.*—Luken v. Pennsylvania R. Co., 110 Atl. 151.

*Virginia.*—Canody v. Norfolk, etc., Ry. Co., 105 S. E. 585.

61. Fluckey v. Southern Ry. Co., 242 Fed. 469; Gersman v. Atchison, etc., R. Co. (Mo.), 229 S. W. 167; Spencer v. New York Cent., etc., R. Co., 123 N. Y. App. Div. 789, 108 N. Y. Suppl. 245, affirmed without opinion, 197 N. Y. 507; Washington & O. D. Ry. v. Zell's Adm'x, 118 Va. 755, 88 S. E. 309; McKinney v. Port Townsend & P. S. Ry. Co., 91 Wash. 387, 158 Pac. 107. And see section 572.

62. Northern Pac. Ry. v. Tripp, 220 Fed. 286. And see Fluckey v. Southern Ry. Co., 242 Fed. 469, wherein the court explained the situation as follows: "When the automobile reached a point 40 feet from the rail, the buildings and the standing cars on the driver's left had so far ceased to obstruct his view that he could see 120 feet along the straight track upon which the car was approaching, and at that moment the car was not more than 100 feet from the point of col-

lision. It was broad daylight, there was neither smoke nor dust to obscure the view, there was no other moving train to drown the noise of the approaching car, nor was there anything to distract the driver's attention. It is not to be disputed that, if the driver had looked at the first instant when looking would do any good, he would have seen the car coming. He was familiar with the crossing, and knew that, by reason of the obstructions, it was a dangerous crossing and must be approached cautiously. His clear duty was not only to look as soon as he could see, but to have his machine under such control that, if necessary, he could stop before getting into the danger zone. In this respect, the case is to be distinguished from that of one driving horses, where to undertake to stop so near the rail may involve danger.

63. Chicago Great Western R. Co. v. Biber, 266 Fed. 965; Rothrock v. Alabama Great Southern R. Co. (Ala.), 78 So. 84; Thompson v. Southern Pac. R. Co., 31 Cal. App. 567, 161 Pac. 21; Nailor v. Maryland, D. & V. Ry. Co., 6 Boyce's (29 Del.) 145, 97 Atl. 418; Wehe v. Atchison, etc., Ry. Co., 97 Kans. 794, 156 Pac. 742, L. R. A. 1916 E. 455; Turch v. New York, etc., R. Co., 108 N. Y. App. Div. 142, 95 N. Y. Suppl. 1100; Washington & O. D. Ry. v. Zell's Adm'x, 118 Va. 755, 88

passing train obstructs the view of the automobilist so as to render the crossing unsafe, it is his duty to delay the crossing until that train has passed so far that a sufficient view may be had.<sup>64</sup> Even the motor should be stopped, if necessary to make listening effective.<sup>65</sup> Or it may be that the circumstances will require the automobilist to alight from his machine before crossing the track.<sup>66</sup> Where the plaintiff admitted that he knew of the crossing and that he ran his machine at from eighteen to twenty miles an hour over a very rough road up to within fifty feet of the crossing, which was in plain view, by the side of a hedge which he could not see over, although he looked until he was satisfied that no train was coming, it was held that his evidence showed a want of ordinary care amounting to gross negligence which would prevent a recovery.<sup>67</sup>

**Sec. 560. Duty to look and listen — failure to observe approaching train, though looking.**

When the driver of a motor vehicle is struck by a railroad train at a crossing, and the evidence shows that the train was plainly visible for a considerable distance from the crossing, the law places the driver in a dilemma. Either he looked or he did not look. If he did not look, the law may charge him with negligence as a matter of law for his failure in that respect.<sup>68</sup> If he looked, he either saw the approaching train

S. E. 309; *Robison v. Oregon-Washington R. & Nav. Co.* 90 Or<sup>g</sup>. 400, 176 Pac. 594. And see section 567.

64. *Langley v. Hines* (Mo. App.), 227 S. W. 877; *Turch v. New York, etc., R. Co.*, 108 N. Y. App. Div. 142, 95 N. Y. Suppl. 1100.

**Question for jury.**—Where, in an action for injuries from a collision between an automobile and a train, there was evidence to the effect that the traveler's view was obstructed by freight cars, and that a twenty-mile per hour wind was blowing carrying the roar of the train away from the traveler, and the crossing was dusty, and the train was running at a speed

of thirty miles an hour to within sixty or ninety feet of the crossing when the emergency brakes were applied, it was held that the question of contributory negligence was for the jury. *Stone v. Northern Pac. Ry. Co.*, 29 N. Dak. 480, 151 N. W. 36.

65. *Rayhill v. Southern Pac. Co.*, 35 Cal. App. 231, 169 Pac. 718.

66. *Murray v. Southern Pac. Ry. Co.*, 177 Cal. 1, 169 Pac. 675; *Blanchard v. Maine Cent. R. Co.* 116 Me. 179, 100 Atl. 666.

67. *Sunnes v. Illinois Cent. R. Co.*, 201 Ill. App. 378.

68. Section 557.

or he did not see it. If he saw it, he may be found guilty of negligence in taking the chances of beating the train over the crossing.<sup>69</sup> If he claims that he looked and did not see the danger, even if the courts believe his statement, he may be charged with negligence in failing to see what was plainly visible.<sup>70</sup> A person before attempting to cross a railroad track, and when an approaching train is in full view, is chargeable with seeing what he could have seen if he had looked, and with hearing what he would have heard if he had listened. In other words, where he apparently looks and listens, but does not see or hear the approaching train, it will be presumed that he did not look or listen at all, or, if he did, that he did not heed what he saw or heard.<sup>71</sup> Thus, where one at a point five feet from the track has an unobstructed view over a straight track for nine hundred feet, but he testifies that he did not see an approaching train which struck him before he passed the track, it was held that there was no evidence of freedom from contributory

69. Section 569.

70. *California*.—Jones v. Southern Pac. Co., 34 Cal. App. 629, 168 Pac. 586.

*Connecticut*.—Lassen v. New York, etc., R. Co., 87 Conn. 705, 87 Atl. 734.

*Iowa*.—Anderson v. Dickinson, 174 N. W. 402; Waters v. Chicago, etc., R. Co., 178 N. W. 534; Swearington v. U. S. Railroad Administration, 183 N. W. 330.

*Kansas*.—Prichard v. Atchison, T. & S. F. Ry. Co., 99 Kans. 600, 162 Pac. 315.

*Louisiana*.—Perrin v. New Orleans Terminal Co., 140 La. 818, 74 So. 160.

*Massachusetts*.—Fogg v. New York, etc., R. Co., 223 Mass. 444, 111 N. E. 960.

*New Hampshire*.—Collins v. Hustis, 111 Atl. 286.

*New Jersey*.—Shoemaker v. Central Railroad of New Jersey, 89 Atl. 517. See also Barber v. McAdoo, 110 Atl. 119.

*Oregon*.—Olds v. Hines, 95 Oreg. 580, 187 Pac. 586.

*Pennsylvania*.—Smith v. McAdoo, 266 Pa. 328, 109 Atl. 759.

*Texas*.—Baker v. Collins (Civ. App.), 199 S. W. 519.

*Utah*.—Lawrence v. Denver, etc., R. Co., 52 Utah 414, 174 Pac. 817.

*Virginia*.—Virginia & S. W. Ry. Co. v. Skinner, 119 Va. 843, 89 S. E. 887.

**Disbelief of jury.**—Where the jury finds that there is nothing to obstruct the view of a person approaching a railway crossing, nothing to prevent him seeing a train for a quarter of a mile or more, such finding in effect is an expression of the jury's disbelief of his evidence that he looked and listened and saw no train approaching. Bunton v. Atchison, etc., Ry. Co., 100 Kans. 165, 163 Pac. 801.

71. Anderson v. Great Northern Ry. Co. (Minn.) 179 N. W. 687; George v. Northern Pac. Ry. Co. (Mont.) 196 Pac. 869; Olds v. Hines, 95 Oreg. 580, 187 Pac. 586; Louisiana Western Ry. Co. v. Jones (Tex. Civ. App.), 233 S. W. 363; Lawrence v. Denver, etc., R. Co., 52 Utah 414, 174 Pac. 817.



negligence sufficient to go to the jury on the issue.<sup>72</sup> But, if the traveler's view is obstructed, the circumstances may be such that he can fairly claim that he exercised reasonable care and looked for approaching trains but did not see the one which struck him.<sup>73</sup> Or, if traveling in the night time, a driver who is struck by a backing train or car, with no lights may be entitled to go to the jury on the question of his negligence.<sup>74</sup> The courts are not always compelled to believe the testimony of a person in a motor vehicle when he says that he looked for an approaching train and did not see one. The relative speeds of the machine and train and their respective distances from the crossing may show conclusively that the train was in plain sight when the machine was at a place where there was a duty to look for trains.<sup>75</sup> But, if there is any doubt as to whether or not the train was in sight when the traveler says that he looked and did not see it, the testimony will not be held to be incredible as a matter of law.<sup>76</sup>

72. *Virginia & S. W. Ry. Co. v. Skinner*, 119 Va. 843, 89 S. E. 887.

73. *Ft. Smith, etc., R. Co. v. Pence*, 122 Ark. 611, 182 S. W. 568; *De Vriendt. Chicago, etc., R. Co. (Minn.)*, 175 N. W. 99; *Smith v. Inland Empire R. Co. (Wash.)*, 195 Pac. 236. See also *Golay v. Northern Pac. Ry. Co. (Wash.)*, 177 Pac. 804; *Pogue v. Great Northern Ry. Co.*, 127 Minn. 79, 148 N. W. 889, wherein it was said: "It is contended that the evidence is conclusive that plaintiff was guilty of contributory negligence. We cannot so hold. Plaintiff's view of the train was obscured by a long string of box cars on an intervening track. The distance between these standing cars and the passing train was less than 30 feet. Not until he passed these cars could he have a clear view of the approaching train. Plaintiff's testimony as given on this trial was to the effect that after passing these standing cars, he stopped his automobile and looked up and down the track, did not see anything, and went ahead; that he did not discover the train until 'just like a flash of your eye it was right there,

and then a blow.' It is conceded that, if this testimony is believable, plaintiff was not guilty of contributory negligence. The evidence is conflicting as to just how dark it was. Plaintiff's witnesses testified that it was very dark. There is some evidence that the evening was cloudy and gloomy. The lights of the village were lighted. The lights on plaintiff's automobile were lighted. There is evidence that the trainmen were giving signals with lighted lanterns. The trainmen themselves deny this, but it is admitted that they lighted their lanterns for this purpose at Solway, the station above. If it was as dark as plaintiff now claims, it is not unbelievable that he might look and still fail to see the approaching engine beyond the range of his own lights."

74. *Louisville & N. R. Co. v. English*, 78 Fla. 211, 82 So. 819; *Mills v. Waters*, 198 Mich. 637, 165 N. W. 740; *De Vriendt v. Chicago, etc., R. Co.*, 144 Minn. 467, 175 N. W. 99.

75. *Coby v. Quincy, etc., R. Co.*, 174 Mo. App. 648, 161 S. W. 290.

76. *Loomis v. Brooklyn Heights R*

**Sec. 561. Duty to look and listen — looking by passenger.**

When an action is brought by a passenger to recover injuries sustained in a collision at a grade crossing, the general rule is that the negligence of the driver is not imputed to the passenger. There are, however, various exceptions to the general rule, and in some States a passenger is required to exercise more or less diligence in looking for approaching trains independently of the duty cast upon the driver in that respect. The negligence of passengers, so far as it bars an action for their injuries, is discussed in another place in this work.<sup>77</sup> Where the employer of the driver is riding with him and has undertaken to look out for approaching trains, such situation is a circumstance to be considered in judging the driver's conduct on an issue of his negligence.<sup>78</sup> An employee riding with his employer, the latter driving the machine, may be under the duty of looking for trains.<sup>79</sup>

Co., 133 N. Y. App. Div. 247, 117 N. Y. Suppl. 292.

**Not necessarily incredible.**—Where in an action to recover for injuries received from a collision at a crossing between defendant's train and an automobile which plaintiff was driving, there is evidence that the train was running under full headway, and that although the view of the track was partly obstructed by a house and a sign, plaintiff looked south, the direction from which the train came, until he passed the sign, when, his view being entirely obstructed in that direction by a hedge, he looked north, and that he did not see the train until within eight feet of the track, it cannot be held as matter of law that plaintiff's testimony is incredible although at one point a view between the house and the sign could be had for 450 feet down the track and the train would have reached this point unless it were going at the rate of

sixty miles an hour, which was thought impossible, as it had stopped at a station 1,000 feet south of the crossing. Where, in addition, it appears that the train gave no signal of its approach to the crossing; that plaintiff listened all the time while nearing the track but heard nothing, a judgment entered on the dismissal of the complaint will be reversed, since the calculation on which it was based did not take into account the constantly increasing speed of the train, and there was no evidence that it was impossible for the train to attain a speed of sixty miles an hour within 500 feet. *Loomis v. Brooklyn Heights R. Co.*, 133 N. Y. App. Div. 247, 117 N. Y. Suppl. 292.

**77.** Sections 688-695.

**78.** *Lehigh Valley R. Co. v. Kilmer*, 231 Fed. 628, 145 C. C. A. 514.

**79.** *Hoyle v. Northern Pac. R. Co.*, 105 Wash. 652, 178 Pac. 810.

**Sec. 562. Duty to look and listen — reliance on flagman.**

It is held that the fact that a railroad company maintains at a crossing a flagman to warn travelers of the approach of a train, does not necessarily justify the driver of a motor vehicle in relying on the flagman for information as to approach of trains; but, on the contrary, the driver is required to exercise his own faculties and to look and listen for approaching trains.<sup>80</sup> Indeed the presence of the flagman renders it possible for the traveler to call to him and ascertain whether the crossing is safe. In a close case, however, the fact that the traveler relied on the flagman for warning from trains, may be an important circumstance to be considered with the other circumstances surrounding the accident.<sup>81</sup> If the driver proceeds across the track on the signal of the flagman, the courts will not condemn him of negligence as a matter of law because he does not thereafter stop and look and listen for the approach of a train.<sup>82</sup> Of course, the act of the flagman in giving a signal that the way is safe, may reasonably

80. *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; *Haynes v. New York, etc., R. Co.* 91 Conn. 301, 99 Atl. 694; *Reynolds v. Inter-Urban Ry. Co. (Iowa)*, 182 N. W. 804; *Stepham v. Chicago, etc., R. Co. (Mo. App.)*, 199 S. W. 273.

81. *Derr v. Chicago, M. & St. P. Ry. Co.*, 163 Wis. 234, 157 N. W. 753. See also, *Brink v. Erie R. Co.*, 190 App. Div. 527, 180 N. Y. Suppl. 931.

"It is further held that the presence or absence of signal warning or other precautionary measures usually observed by the company at a given crossing is always relevant and must be given due weight in deciding as to whether the traveler has been observant of proper care before entering on the crossing and in failing to come to a complete stop." *Shepard v. Norfolk, etc., R. Co.*, 166 N. Car. 539, 82 S. E. 872. "If the facts are that such a flagman customarily signaled to approaching travelers to protect them

against existing dangers of approaching cars and trains and plaintiff knew this and relied on the absence of such signal when he approached the crossing as indicating that no car or train was approaching, then plaintiff's conduct as to looking and listening for moving cars while approaching the crossing must be considered in the light of these circumstances." *Derr v. Chicago, etc., R. Co.*, 163 Wis. 234, 157 N. W. 753. "While it is true that the failure of the flagman to perform his duty will not wholly absolve the traveler from the duty to look out, yet the fact that a flagman is maintained and he gives no warning has its influence, and may frequently be allowed to relieve a traveler of what might otherwise have been culpable negligence." *Stephan v. Chicago, etc., R. Co. (Mo. App.)*, 199 S. W. 273.

82. *Deheave v. Hines*, 217 Ill. App. 427; *Lake Erie & W. R. Co. v. Sanders (Ind. App.)*, 125 N. E. 793.

dissuade the driver from making an independent lookout for trains, and his conduct in this respect is not necessarily negligent.<sup>83</sup> But the fact that the flagman beckons him to pass over the crossing does not relieve the driver from the exercise of due care or necessarily excuse him from taking some precautions for his safety.<sup>84</sup> Where the flagman has his back to an approaching automobile and is waving a white flag as a signal for the train to come on, the driver of the machine is guilty of contributory negligence if he attempts to cross, and he cannot excuse his conduct by claiming that the waving of the flag was an assurance of safety rather than a warning of danger.<sup>85</sup> Where the flagman ordered the driver to stop, then ordered him to go back, but then ordered him to proceed, but the driver seeing a train approaching jumped from the car which was destroyed, it was held that the driver's negligence was a question for the jury.<sup>86</sup>

### **Sec. 563. Duty to look and listen — reliance on open gates.**

Where a grade crossing is equipped with gates which are lowered to bar the passage of travelers at times of danger, and the driver of an automobile does not attempt to cross the tracks until the gates are raised, he is not necessarily guilty of contributory negligence because he fails to look and listen before starting across the tracks.<sup>87</sup> As has been said,<sup>88</sup>

83. *Deheave v. Hines*, 217 Ill. App. 427; *Stephan v. Chicago, etc., R. Co.* (Mo. App.), 199 S. W. 273. See also *Shepard v. Norfolk, etc., R. Co.*, 166 N. Car. 539, 82 S. E. 872.

84. *Haynes v. New York, etc., R. Co.*, 91 Conn. 301, 99 Atl. 694.

85. *Borglum v. New York, etc., R. Co.*, 90 Conn. 52, 96 Atl. 174, wherein it was said: "It is claimed that the jury might have found that the plaintiff's decedent was in the exercise of due care on the theory that he had a right to interpret the flagman's presence in the highway, waving a white flag across the line of travel, as an assurance of safety and an invitation to cross the track. We think the jury could not reasonably have come to that

conclusion. 'It is a matter of common knowledge that flagmen appointed to guard railway crossings do not stand in the traveled path waving flags except when a train is approaching the crossing. There was nothing in the conduct of this flagman, who stood with his back to the approaching automobile waving his flag across its line of travel, which would reasonably suggest to the plaintiff's decedent that he was inviting him to cross in front of the approaching train.'

86. *Central of Ga. Ry. Co. v. Howell* 23 Ga. App. 269, 98 S. E. 105.

87. *Delaware, L. & W. R. Co. v. Welshman*, 229 Fed. 82, 143 C. C. A. 358. See also *Shepard v. Norfolk, etc., R. Co.*, 166 N. Car. 539, 82 S. E. 872;

"We think the experience and judgment of every day life is that the raised gate is an index of the railroad's view that crossing may be safely made, and that a crosser may reasonably accept it as an invitation to go forward." The fact that the gates are open, when the driver does not know that they are out of order, is some assurance of safety.<sup>89</sup> The fact that the gate is raised does not establish freedom from contributory negligence, but permits the question to go to the jury who are to determine whether the traveler exercised proper care under the circumstances.<sup>90</sup> Though he may place

Director-General v. Lucas (Va.), 107 S. E. 675.

**Traveler struck by gate.**—It is the duty of a railroad company to exercise reasonable care in the operation of safety gates so as to protect a traveler from the gates; and the jury may be authorized to find negligence on the part of the railroad when the gates are so operated that a traveler is struck thereby. *Sgier v. Philadelphia, etc., Ry. Co.*, 260 Pa. 243, 103 Atl. 730; *Sikorski v. Philadelphia, etc., Ry. Co.*, 260 Pa. 243, 103 Atl. 618.

88. *Delaware, L. & W. R. Co. v. Welshman*, 229 Fed. 82, 143 C. C. A. 358.

89. *Hines v. Smith*, 270 Fed. 132; *Stepp v. Minneapolis, etc., R. Co.*, 137 Minn. 117, 162 N. W. 1051.

90. *Blanchard v. Maine Central R. Co.*, 116 Me. 179, 100 Atl. 666. "Of course, the raising of the gates did not make the railroad either an insurer or the sole guardian of the crosser's safety. The duty of care, of the use by the crosser of sight, hearing, and such other factors of safety as the situation and circumstances permitted and required of one intent on his own safety, still rested on him. The raised gate is not an invitation to cross without care, but an invitation to cross with the use of all care the situation permits. To hold otherwise would be to make gates and flagman harmful creators of negligence instead of help-

ful aids to safety. The crossing driver must bear in mind that the flagman is human and therefore liable to make mistakes, and that in so important a thing as his own safety and life the driver must not intrust them to any one man, but that common sense as well as common law require him, notwithstanding the invitation, to himself use all possible care to aid in a safe crossing. If the driver does not contribute such care, he contributes lack of care, and lack of care is contributory negligence." *Delaware, L. & W. R. Co. v. Welshman*, 229 Fed. 82, 143 C. C. A. 358. "The fact that the gates are open is an important fact for consideration in the determination of the question whether the deceased exercised due care. The weight properly to be given to this fact necessarily will vary in different cases and will be affected by consideration of the location of the gates, whether on a street in a populous city or in the country, the presence or absence of traffic on the highway at the particular time and place, the presence or absence of obstructions near the track, the presence or absence of a gateman, etc. If the facts are in controversy or if fair-minded men can draw different conclusions from facts which are not controverted the question of contributory negligence would be then properly submitted to a jury." *Geoffrey v. New York, etc., R. Co.* (R. I.), 104 Atl. 883.

some reliance on the circumstances that the gates are open, he is not thereby relieved from the obligation of exercising all care for his safety.<sup>91</sup> And, in a particular case, the circumstances may be such that the court is able to say as a matter of law that the driver was guilty of negligence, if he proceeded across the track without looking for trains, although the gates were open.<sup>92</sup> In *Pennsylvania*, it is held that the fact that the safety gates are raised at the time the driver approaches, does not relieve him of the duty to stop, look and listen for approaching trains.<sup>93</sup> In at least one jurisdiction, it is provided by statute that when the gates are not down, the question of contributory negligence shall be one for the jury; but it is held that this statute does not deprive the court of the power to determine the question as one of law when the facts are undisputed.<sup>94</sup>

#### Sec. 564. Duty to look and listen — reliance on automatic signals.

It has been held to be contributory negligence as a matter of law for the driver of a motor vehicle to attempt to cross a railroad crossing without looking and listening for approaching trains, although an electric warning bell is maintained at the crossing and such bell is not ringing at the time.<sup>95</sup> But, while a traveler cannot blindly rely on auto-

91. *Blanchard v. Maine Central R. Co.*, 116 Me. 179, 100 Atl. 666.

92. *Geoffroy v. New York, etc., R. Co.* (R. I.), 104 Atl. 883.

93. *Earle v. Philadelphia & R. R. Co.*, 248 Pa. St. 193, 93 Atl. 1001.

94. *Hall v. West Jersey & Seashore R. Co.*, 244 Fed. 104, construing a statute of *New Jersey*.

95. *Jacobs v. Atchison, etc., Ry. Co.*, 97 Kans. 247, 154 Pac. 1023, wherein it was said: "In the present case an electrical mechanical device was intended to give warning of approaching trains. Sometimes this bell would not ring when trains were passing, and at other times it rang when no train was in sight. An electric bell, which at

most can be nothing but a warning of an approaching train to those who listen, cannot be classed with a gate thrown across a street to prevent passing over railroad tracks; neither can it be classed with a flagman who stands in the street and stops those who desire to cross when there is danger. It is more nearly analogous to the locomotive bell and whistle. Failure to ring the engine bell or sound the whistle does not relieve the traveler from the duty to look and listen before attempting to cross a railroad track. If the plaintiff's contention in this respect is correct, a railroad increases its responsibility and liability by putting in electric bells at highway

matic signals, the fact that the signal was not given according to the usual custom may be considered, and in a close case it may be sufficient to carry the traveler's contributory negligence to the jury.<sup>96</sup>

### Sec. 565. Duty to look and listen — reliance on signal from engineer.

In some States it is held that the driver of a vehicle when approaching a grade crossing cannot assume that the railroad employees will ring the bell and blow the whistle as required by law and thus give him warning of the approach of the train. The law requires the traveler to look and listen for cars approaching on the railroad tracks, and his neglect of duty in this respect is not excused by the failure of the railroad employees to fulfill their duty in respect to warnings. The absence of proper warning will not carry the question of contributory negligence to the jury, but the matter will be disposed of as a question of law.<sup>97</sup> In other decisions

and street crossings. The object in putting in electric bells is to promote public safety, not to increase railroad liability. Silence of such a bell is not an invitation to cross railroad tracks without taking the ordinary precautions. . . . We think the better rule is that the failure of an electric bell to ring does not relieve one about to cross a railroad track of the imperative duty to look and listen before crossing; if he fails to do so, he is guilty of such contributory negligence as will prevent his recovery for any injuries sustained, and there is nothing to submit to the jury." See, to the same effect, *McSweeney v. Erie Railroad Co.*, 93 N. Y. App. Div. 496, 87 N. Y. Suppl. 836, making the same ruling with reference to a buggy crossing a railroad track.

Statutes may make a different rule in some jurisdictions. *Baer v. Lehigh, etc., R. Co.*, 93 N. J. L. 85, 106 Atl. 421.

96. *Birmingham So. Ry. Co. v. Harrison*, 203 Ala. 284, 82 So. 534; *Bush*

*v. Brewer*, 136 Ark. 248, 206 S. W. 322; *Swigart v. Lush*, 196 Mo. App. 471, 192 S. W. 138; *Director-General v. Lucas (Va.)*, 107 S. E. 675.

97. *Hines v. Smith*, 270 Fed. 132; *Swearingen v. U. S. Railroad Administration (Iowa)*, 183 N. W. 330; *Jacobs v. Atchison, etc., Ry. Co.*, 97 Kans. 247, 154 Pac. 1023; *Fogg v. New York, etc., R. Co.*, 223 Mass. 444, 111 N. E. 960; *Central Coal & Coke Co. v. Kansas City So. Ry. Co. (Mo. App.)*, 215 S. W. 94; *Gersman v. Atchison R. Co. (Mo.)*, 229 S. W. 167; *Loiselle v. Rhode Island Co. (R. I.)*, 110 Atl. 407. See also *Robison v. Oregon-Washington R. & Nav. Co.* 90 Oreg. 490, 176 Pac. 594. "Coming to a place of danger like a railroad crossing, where there is opportunity for sight and hearing, a traveler is not in the exercise of due care unless he uses his senses, looks and listens, and governs his conduct accordingly. He cannot, entirely, rely upon signals and the performance of duty by the agents of the defendant. He must actively seek to

the rule obtains, that, if the view is obstructed, the traveler may ordinarily rely upon his sense of hearing, and if he listens and is induced to enter on the crossing because of the negligent failure of the company to give the ordinary signals this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence.<sup>98</sup> It has been said that these cases may be harmonized so that the rule may be deduced to the effect that the traveler may, in regulating his conduct, have some regard to the presumption that the railroad will give proper signals, and, if he hears none, the same preparedness and caution will not be expected of him as would be required in case proper signals were given; but that he cannot wholly omit the duty of looking and listening simply because he hears none of the customary or required signals of the approach of a train.<sup>99</sup>

safeguard his own safety by using his faculties and making use of the means at hand to save himself from danger." *Fogg v. New York, etc., R. Co.*, 223 Mass. 444, 111 N. E. 960.

98. *Smith v. Missouri Pac. R. Co.*, 138 Ark. 589, 211 S. W. 657; *Union Tract. Co. v. McTurnan* (Ind. App.), 129 N. E. 404; *Barrett v. Chicago, etc., R. Co.* (Iowa), 175 N. W. 950; *Slipp v. St. Louis, etc., Ry. Co.* (Mo. App.), 211 S. W. 730; *Brown & Co. v. Atlantic Coast Line R. Co.*, 171 N. C. 266, 88 S. E. 329; *Goff v. Atlantic Coast Line R. Co.*, 179 N. Car. 216, 102 S. E. 320; *Costin v. Tidewater Power Co.* (N. Car.), 106 S. E. 568; *Parker v. Seaboard Air Line Co.* (N. C.), 106 S. E. 755. See also *Union Traction Co. v. Elmore*, 66 Ind. App. 95, 116 S. E. 837; *Waking v. Cincinnati, etc., R. Co.* (Ind. App.), 125 N. E. 799. "We believe that the driver did all that was required of him when he stopped, looked, and listened for trains. At least we cannot say as a matter of law that he was required to do more. As it has already been stated, when the driver stopped, looked and listened, his truck was 21

feet 9 inches from the west rail of the track, and his view of the track to the south was obstructed. Not having heard any signal, the driver had the right to presume that in handling its cars the railroad company would act with appropriate care, and that the usual signals of approach would be seasonably given, and he was justified in proceeding to cross the track without again looking." *Advance Transfer Co. v. Chicago, etc., R. Co.* (Mo. App.), 195 S. W. 566. "Reasonable minds might, we think, have differed as to whether a reasonably prudent person, having the right to expect that the bell of the engine would be ringing if it was moving, would have concluded, when he saw and heard nothing indicating that it was moving, that the engine was standing still, and that he could safely pass." *Texarkana & Ft. Smith Ry. Co. v. Rea* (Tex. Civ. App.), 180 S. W. 945.

99. *Pogue v. Great Northern Ry. Co.*, 127 Minn. 79, 148 N. W. 889, wherein it was said: "There are cases which hold that a person cannot rely upon signals to remind him of danger, that the failure of the traveler



**Sec. 566. Duty to look and listen — running into train.**

When the driver of a motor vehicle runs his machine into a train or a car at a crossing, the courts have no difficulty in finding, as a matter of law, that the accident would have been avoided had he exercised reasonable care.<sup>1</sup> A recovery may be justified, however, if a car is permitted to stand at a crossing with no lights or attending watchman.<sup>2</sup>

**Sec. 567. Duty to stop before crossing track — majority rule.**

While, in a few jurisdictions, it is held that there is a positive duty on the driver of an automobile to stop the machine before crossing a railroad track,<sup>3</sup> the rule adopted in the larger number of jurisdictions is that there is no such imperative duty.<sup>4</sup> The question whether the operator of the

to look and listen is negligence or not, according to the circumstances, but that the negligence of the employees of a railroad company in failing to whistle or ring a bell is no excuse for negligence on the part of the person about to cross in failing to use his senses to discover danger. . . . On the other hand, numerous cases hold that when a traveler is approaching a railroad track, he may, in regulating his own conduct, have a right to presume that the railroad company will act with proper care in giving signals of the approach of its trains. . . . We think these cases may be harmonized, and that the rule deducible from them is that the traveler may, in regulating his conduct, have some regard to the presumption that the railroad company will give proper signals, and, if he hears none, the same preparedness and caution will not be expected of him as would be required in case proper signals were given; but he cannot in any case wholly omit the duty of looking and listening simply because he hears none of the customary or required signals of the approach of a train. . . . In other words, the failure of the defendant to give expected signals may excuse a traveler in relaxing

somewhat in his vigilance, but it has never been held to dispense with vigilance altogether. If such were the law, then there would be little left of the rule which requires the traveler to look and listen, for the rule is only applied as bearing upon the question of his contributory negligence, and that question is never reached unless there is some negligent act or omission in the operation of the train. See also, *Sandry v. Hines* (Mo. App.), 226 S. W. 646.

1. *Ft. Worth, etc., R. Co. v. Hart* (Tex. Civ. App.), 178 S. W. 795 *Southern Tr. Co. v. Kicksey* (Tex. Civ. App.), 181 S. W. 545.

2. *Prescott v. Hines* (S. Car.), 103 S. E. 543.

3. *Section 568.*

4. *United States*.—*Hines v. Hoover*, 271 Fed. 645.

*Arizona*.—*Davis v. Boggs*, 199 Pac. 116.

*Arkansas*.—*St. Louis-San Francisco Ry. Co. v. Stewart*, 137 Ark. 6, 207 S. W. 440; *Hines v. Gunnells*, 222 S. W. 10.

*Idaho*.—*Graves v. Northern Pac. Ry. Co.*, 30 Idaho, 542, 166 Pac. 571.

*Indiana*.—*Pittsburgh, etc., R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609;

machine is guilty of negligence under the circumstances is for the jury.<sup>5</sup> Of course, the traveler must look for approach-

Central Indiana Ry. Co. v. Wishard, 186 Ind. 262, 114 N. E. 970; Cleveland, etc., R. Co. v. Baker (Ind.), 128 N. E. 836.

*Kansas*.—Jacobs v. Atchison, etc., Ry. Co., 97 Kans. 247, 154 Pac. 1023; Bunton v. Atchison, etc., Ry. Co., 100 Kans. 165, 163 Pac. 801.

*Kentucky*.—Louisville & I. R. Co. v. Morgan, 174 Ky. 633, 192 S. W. 672; Louisville & N. R. Co. v. Treanor's Adm'r, 179 Ky. 337, 200 S. W. 634; Louisville, etc., R. Co. v. Clore, 183 Ky. 261, 209 S. W. 55; Louisville & N. R. Co. v. Scott, 184 Ky. 319, 211 S. W. 747.

*Michigan*.—Rouse v. Blair, 185 Mich. 632, 152 N. W. 204. See also Nichols v. Grand Trunk Western Ry. Co., 203 Mich. 372, 168 N. W. 1046; Deland v. Michigan Ry. Co. (Mich.), 180 N. W. 389.

*Minnesota*.—Laurisch v. Minneapolis, St. P., R. & D. Electric Traction Co., 132 Minn. 114, 155 N. W. 1074.

*Missouri*.—Monroe v. Chicago, etc., R. Co., 219 S. W. 68; Slipp v. St. Louis, etc., Ry. Co. (Mo. App.), 211 S. W. 730.

*Montana*.—Walters v. Chicago, etc., R. Co., 47 Mont. 501, 133 Pac. 357, 46 L. R. A. (N. S.) 702.

*New Jersey*.—Dickinson v. Erie R. Co., 81 N. J. L. 464, 81 Atl. 104; Wilson v. Central Railroad of N. J., 88 N. J. L. 342, 96 Atl. 79.

*New York*.—Brooks v. Erie R. Co., 177 App. Div. 290, 164 N. Y. Suppl. 104; Brink v. Erie R. Co., 190 App. Div. 527, 180 N. Y. Suppl. 931.

*North Carolina*.—Shepard v. Norfolk, etc., R. Co., 166 N. Car. 539, 82 S. E. 872; Hunt v. North Carolina R. Co., 170 N. Car. 442, 87 S. E. 210; Brown v. R. R., 171 N. C. 269, 88 S. E. 329; Perry v. McAdoo, 104 S. E. 673.

*North Dakota*.—Pendroy v. Great

Northern Ry. Co., 17 N. D. 433, 117 N. W. 531.

*Oregon*.—Cathcart v. Oregon-Washington Rd. & Navigation Co., 86 Ore. 250, 168 Pac. 308; Robison v. Oregon-Washington R. & Nav. Co., 90 Ore. 490, 176 Pac. 594. "While failure to stop may be considered on the subject of contributory negligence with other evidence, it is not necessarily controlling in the matter. If, by the use of his faculties of hearing and seeing, one approaching a crossing can safely determine whether there is danger or not, stopping would not essentially add to or detract from his diligence. Stopping is necessary only when continued advancing would materially affect his senses of seeing or hearing." Cathcart v. Oregon-Washington Rd. & Navigation Co., 86 Ore. 250, 168 Pac. 308.

*Tennessee*.—Hurt v. Yazoo, etc., R. Co., 140 Tenn. 623, 205 S. W. 437; Hines v. Partridge, 231 S. W. 16.

*Texas*.—Texas & Pac. R. Co. v. Hilgartner (Civ. App.), 149 S. W. 1091; Chicago, etc., Ry. Co. v. Zumwalt (Civ. App.), 226 S. W. 1080.

*Virginia*.—Seaboard Air Line Ry. v. Abernathy, 121 Va. 173, 92 S. E. 913.

*Washington*.—McKinney v. Port Townsend & P. S. Ry. Co., 91 Wash. 387, 158 Pac. 107; Hines v. Chicago, etc., Ry. Co., 177 Pac. 795; Kent v. Walla Walla Valley Ry. Co., 108 Wash. 251, 183 Pac. 87.

5. St. Louis-San Francisco Ry. Co. v. Stewart, 137 Ark. 6, 207 S. W. 440; Hawkins v. Interurban Ry. Co., 184 Iowa 232, 168 N. W. 234; Louisville & N. R. Co. v. Treanor's Adm'r, 179 Ky. 337, 200 S. W. 634; Monroe v. Chicago, etc., R. Co. (Mo.), 219 S. W. 68, (citing Huddy on Automobiles). Walters v. Chicago, etc., R. Co., 47 Mont. 501, 133 Pac. 357, 46 L. R. A. (N. S.) 702; Dickinson v. Erie R. Co., 81 N. J. L. 464, 81 Atl. 104; Brooks v. Erie

ing trains,<sup>6</sup> and he must take all other reasonable precautions for his safety.<sup>7</sup> And, though it is not negligence *per se* to fail to stop before crossing the track, the jury may in a particular case properly find that he was guilty of negligence in driving on the track without stopping.<sup>8</sup> Moreover, the facts may be such in particular cases that the court can say that the driver was guilty of negligence as a matter of law in failing to stop under the circumstances.<sup>9</sup> Thus, where obstructions continue close to the track so that a view cannot be had of approaching trains until the driver of the machine

R. Co., 177 N. Y. App. Div. 290. 164 N. Y. Suppl. 104; Shepard v. Norfolk, etc., R. Co., 166 N. Car. 539, 82 S. E. 872; Kent v. Walla Walla Valley Ry. Co., 108 Wash. 251, 183 Pac. 87.

6. Section 557.

7. Louisville & N. R. Co. v. Treanor's Adm'r, 179 Ky. 337, 200 S. W. 634; St. Louis Southwestern Ry. Co. v. Harrell (Tex. Civ. App.), 194 S. W. 971. "Now when a traveler has exercised such care as a person of ordinary prudence would exercise, considering all the surrounding conditions, to learn of the approach of trains and keep out of their way, this measure of care is, we think, sufficient to meet all reasonable requirements. It is true this rule does not prescribe any specific thing the traveler must do, but it puts on him the duty of doing everything that a person of ordinary prudence would think it necessary to do for his own safety. This is the usual and generally approved standard of care that the common sense law demands that men shall observe when they are under a duty to exercise care in the regulation of their own conduct, and is as great as the average person should be expected to observe. Louisville & N. R. Co. v. Treanor's Adm'r, 179 Ky. 337, 200 S. W. 634.

8. Central Indiana Ry. Co. v. Wishard, 186 Ind. 262, 114 N. E. 970; Union Traction Co. v. Elmore, 66 Ind. App. 95, 116 N. E. 837; Kimbrough v. Hines (N. Car.), 104 S. E. 684.

**Inability to stop.**—Evidence that the driver applied the brakes, but they failed to stop the car, may carry the case to the jury. Norfolk & W. Ry. Co. v. Simmons (Va.), 103 S. E. 609; Puhr v. Chicago, etc., R. Co. (Wis.), 176 N. W. 767.

9. Waking v. Cincinnati, etc., R. Co. (Ind. App.), 125 N. E. 799; Keith v. Great Northern Ry. Co. (Mont.), 199 Pac. 718; Cline v. McAdoo (W. Va.), 102 S. E. 218.

"The duty to keep a sharp lookout for trains at a public crossing has often been expounded by this court. A railroad crossing is itself a danger signal. One who proposes to cross a railroad must look and listen. It is not required, in this State, that a person must necessarily stop, in order to look and listen, unless the surroundings and circumstances demand that unusual prudence. If the circumstances do demand such prudence, then there is a duty to stop, look and listen." Bunton v. Atchison, etc., Ry. Co., 100 Kans. 165, 163 Pac. 801.

**Place of stopping.**—Though the driver is required by the surrounding circumstances to stop, in selecting the stopping place, he is not required to exercise more than the ordinary care that a reasonably prudent man would exercise for his own protection under the circumstances. Pittsburgh, etc., R. Co. v. Dove, 184 Ind. 447, 111 N. E. 609.

is in a position of danger, it may be his absolute duty to stop his car and listen for approaching trains.<sup>10</sup> Or, if he sees an approaching train as he nears the track, it may be negligence as a matter of law for him to attempt to pass ahead of the train.<sup>11</sup> And, if the running of the automobile interferes with his hearing or looking, it is his duty to stop and look and listen so as to make looking and listening effective.<sup>12</sup>

### Sec. 568. Duty to stop before crossing track — minority rule.

In a few jurisdictions, a positive duty is imposed on the driver of a motor vehicle to stop before passing over a grade crossing of a railroad, and a failure to observe this precaution renders the driver guilty of negligence as a matter of law.<sup>13</sup> Indeed, under some circumstances of obstructed view,

10. *Wehe v. Atchison, etc., Ry. Co.*, 97 Kans. 794, 156 Pac. 742, L. R. A. 1916 E. 455; *Acker v. Union Pac. R. Co.*, 106 Kans. 401, 188 Pac. 419; *Rule v. Atchison Ry. Co.*, 107 Kans. 479, 192 Pac. 729; *Sanford v. Grand Trunk Western Ry. Co.*, 190 Mich. 390, 157 N. W. 38; *Woodard v. Bush (Mo.)*, 220 S. W. 839 (discussing the rule in Kansas); *Gersman v. Atchison, etc., R. Co. (Mo.)*, 229 S. W. 167 (discussing the rule in Kansas); *Bonert v. Long Island R. Co.*, 145 N. Y. App. Div. 552, 130 N. Y. Suppl. 271. And see section 559.

11. *Corley v. Atchison, etc., Ry. Co.*, 90 Kans. 70, 133 Pac. 555; *McKinney v. Port Townsend & P. S. Ry. Co.*, 91 Wash. 387, 158 Pac. 107. And see section 569.

12. *Washington & O. D. Ry. v. Zell's Adm'x*, 118 Va. 755, 88 S. E. 309.

13. *United States*.—*New York Cent. & H. R. R. Co. v. Maidment*, 168 Fed. 21, 93 C. C. A. 415, 21 L. R. A. (N. S.) 924; *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924. *Compare*, *Lake Erie & W. R. Co. v. Schneider*, 257 Fed. 675; *Hines v. Hoover*, 271 Fed. 645.

*Alabama*.—*Bailey v. Southern Ry.*

*Co.*, 196 Ala. 133, 72 So. 67; *Fayet v. St. Louis P. S. F. R. Co.*, 203 Ala. 3, 81 So. 671; *Central of Georgia Ry. Co. v. Faust (Ala. App.)*, 82 So. 36; *Hines v. Cooper*, 86 So. 396; *Hurt v. Southern Ry. Co.*, 87 So. 533; *Hines v. Cooper*, 88 So. 133.

*California*.—*Griffin v. San Pedro, etc., R. Co.*, 170 Cal. 772, 151 Pac. 282, L. R. A. 1916 A. 842; *Thompson v. Southern Pac. R. Co.*, 31 Cal. App. 567, 161 Pac. 21; *Walker v. Southern Pac. Co.*, 38 Cal. App. 377, 176 Pac. 175. "It is true, as declared in the opinions, that the rule requiring the traveler to stop is not an absolute one. If the view is entirely unobstructed, the traveler, while going toward a crossing, may see whether a train is approaching in dangerous proximity. Of course, in a case like that it would be idle to require the traveler to stop to find out something that he can ascertain just as well without stopping. He must, however, avail himself of the vision, and if he is exercising ordinary care, he need not stop except to allow an approaching train to pass so as to avoid a collision. But where the view is obstructed, he must place himself in a position where he can use his faculties of observation to advantage. In

the driver should alight or stop the motor of his vehicle in order that listening may be effective.<sup>14</sup> The existence of obstructions to the driver's view emphasizes his duty to observe the rule.<sup>15</sup> His duty is to "stop, look and listen" for the

such case he stops—not primarily to avoid a collision—but to ascertain whether a collision is threatened. Whereas, if the view is unobstructed, if he stops, it is to allow the approaching train to pass." *Thompson v. Southern Pac. R. Co.*, 31 Cal. App. 567, 161 Pac. 21.

*Louisiana*.—*Callery v. Morgan's Louisiana, etc.*, S. S. Co., 139 La. 763, 72 So. 222; *Perrin v. New Orleans Terminal Co.*, 140 La. 818, 74 So. 160.

*Massachusetts*.—*Chase v. New Cent. R. Co.*, 208 Mass. 137, 94 N. E. 377. See also *Fogg v. New York, etc., R. Co.*, 223 Mass. 444, 111 N. E. 960.

*Pennsylvania*.—*Craig v. Pennsylvania R. Co.*, 243 Pa. St. 455, 90 Atl. 135; *Senft v. Western Md. Ry. Co.*, 246 Pa. St. 446, 92 Atl. 553; *Earle v. Philadelphia & R. R. Co.*, 248 Pa. St. 193, 93 Atl. 1001; *Peoples v. Pennsylvania R. Co.*, 251 Pa. St. 275, 96 Atl. 652; *Hamilton v. Philadelphia, B. & W. R. Co.*, 252 Pa. St. 615, 97 Atl. 850; *Knepp v. Baltimore, etc., R. Co.*, 262 Pa. 421, 105 Atl. 636; *Martin v. Pennsylvania R. Co.*, 265 Pa. St. 282, 108 Atl. 631; *Thompson v. Philadelphia & R. Ry. Co.*, 263 Pa. St. 569, 107 Atl. 330; *Gordon v. Director-General*, 112 Atl. 68; *Serfs v. Lehigh, etc., R. Co.*, 113 Atl. 370; *Sefton v. Baltimore & Ohio R. Co.*, 64 Pa. Super. Ct. 218.

**Darkness.**—"The duty to stop is unbending, and darkness is no excuse for failure to perform it." *Eline v. Western Maryland R. Co.*, 262 Pa. 33, 104 Atl. 857. See also, *Serfas v. Lehigh, etc., R. Co. (Pa.)*, 113 Atl. 370.

**Unknown crossing.**—The obligation of a driver when passing over a crossing which is unknown to him, is not so strict, and a question may be left

with the jury as to his care in discovering the danger of the passage. *McClure v. Southern Pac. Co. (Cal. App.)*, 183 Pac. 248; *Wanner v. Philadelphia, etc., Ry. Co. (Pa.)*, 104 Atl. 570. See also *Whitney v. Northwestern Pac. R. Co.*, 39 Cal. App. 139, 178 Pac. 326.

**Railroad siding.**—The duty of stopping is applied to one crossing a siding as well as to one crossing a main line. *Peoples v. Pennsylvania R. Co.*, 251 Pa. St. 275, 96 Atl. 652, wherein it was said: "We know of no case in which a distinction has been made between the degree of care required of a person driving along a highway at a public crossing over the main tracks of a railroad and that which is required at a public crossing over a railroad siding. No good reason for any such distinction is apparent, especially where, as here, the siding was in frequent and at least daily use by the railroad company. It appears from the testimony that plaintiff lived near the crossing, was familiar with the locality, had used the crossing at intervals during a period of four years, and knew that the siding was used by the railroad company at least once each day. It is hardly necessary to say that there has been, in this State, no relaxation of the rule making it the duty of a traveler on a public highway, as he approaches a railroad crossing, to stop, look and listen." See also, *Serfas v. Lehigh, etc., R. Co. (Pa.)*, 113 Atl. 370.

14. *Murray v. Southern Pac. R. Co.*, 177 Cal. 1, 169 Pac. 675; *Rayhill v. Southern Pac. Co.*, 35 Cal. App. 231, 169 Pac. 718; *Knepp v. Baltimore, etc., R. Co.*, 262 Pa. 421, 105 Atl. 636.

15. *Hines v. Cooper (Ala.)*, 86 So. 396.

approach of trains, and he should stop at a place where his conduct will be effective in discovering whether a train is approaching.<sup>16</sup> His stopping place should be sufficiently close to the railroad to enable him to look up and down the track and to see or hear any approaching train,<sup>17</sup> and should not be so close that a slight unexpected movement of the machine will cause it to enter a place of danger.<sup>18</sup> But the fact that there was a better stopping place which the traveler disregarded is not conclusive on the question of his negligence.<sup>19</sup> Unless it affirmatively appears that the stopping place he used was an improper one, the question is for the jury. If there is any doubt as to the stopping place being a proper one, the court cannot decide the question as a matter of law, although it may be that there is a place nearer the track where a better view could be had.<sup>20</sup> If the driver stops at the place where people usually do so, it may be sufficient to exonerate him from a charge of negligence.<sup>21</sup> And, if the traveler has stopped to look and listen for trains, but is nevertheless struck when he continues his journey, he is not necessarily guilty of contributory negligence. If he failed to see the

16. *New York Cent. & H. R. R. Co. v. Maidment*, 168 Fed. 21, 93 C. C. A. 415, 21 L. R. A. (N. S.) 924; *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; *Delaware, L. & W. R. Co. v. Welshman*, 229 Fed. 82, 143 C. C. A. 358; *Fayet v. St. Louis P. S. F. R. Co.*, 203 Ala. 3, 81 So. 671; *Hines v. Cooper* (Ala.), 88 So. 133; *Knepp v. Baltimore, etc., R. Co.* (Pa.), 105 Atl. 636; *Thompson v. Philadelphia & R. Ry. Co.*, 263 Pa. St. 569, 107 Atl. 330.

**On track.**—Stopping on the track is not a compliance with the rule. *Serfas v. Lehigh, etc., R. Co.* (Pa.), 113 Atl. 370.

**Forty-five feet from track.**—The driver of a motor vehicle was held guilty of contributory negligence where he stopped forty-five feet from the track and looked, but did not stop again, although just before going on the track he had an unobstructed

view for four hundred and eighty feet. *Sefton v. Baltimore & Ohio R. Co.*, 64 Pa. Super. Ct. 218.

17. *Perrin v. New Orleans Terminal Co.*, 140 La. 818, 74 So. 160.

18. *Gordon v. Director-General* (Pa.), 112 Atl. 68.

19. *Allogi v. Southern Pac. Co.*, 37 Cal. App. 72, 173 Pac. 1117; *Bush v. Philadelphia, etc., Ry. Co.*, 232 Pa. St. 327, 81 Atl. 409; *Hamilton v. Philadelphia, B. & W. R. Co.*, 252 Pa. 615, 97 Atl. 850.

20. *Walker v. Southern Pac. Co.*, 38 Cal. App. 377, 176 Pac. 175; *Bush v. Philadelphia, etc., Ry. Co.*, 232 Pa. St. 327, 81 Atl. 409; *Hamilton v. Philadelphia, B. & W. R. Co.*, 252 Pa. St. 615, 97 Atl. 850; *Wingert v. Philadelphia, etc., Ry. Co.*, 262 Pa. 21, 104 Atl. 859; *Jester v. Philadelphia, etc., R. Co.* (Pa.), 109 Atl. 774.

21. *Knepp v. Baltimore, etc., R. Co.*, 262 Pa. 421, 105 Atl. 636.

train by which he was struck, whether he exercised due caution in proceeding may be a question for the jury.<sup>22</sup>

### Sec. 569. Crossing in front of observed train.

When one about to pass over a railroad crossing sees a train approaching, as a general proposition, it is his duty to stop his machine and permit the train to pass.<sup>23</sup> The law does not permit him to indulge in a race with the train and then recover if he misjudged the speed of the train. The traveler cannot assume that the train will not move over the crossing at a rate faster than that allowed by statute or

22. *Firth v. Southern Pac. Co.* (Cal. App.), 186 Pac. 815; *Witmer v. Bessemer, etc.*, R. Co., 241 Pa. St. 112, 88 Atl. 314; *Clinger v. Payne* (Pa.), 113 Atl. 830; *Rice v. Erie R. Co.* (Pa.), 114 Atl. 640.

Whether a driver stopped a sufficient length of time and whether he exercised due caution before going on a railroad track are questions for the jury. *Rush v. Philadelphia & R. Ry. Co.*, 232 Pa. St. 327, 81 Atl. 409.

23. *Alabama*.—*Hurt v. Southern Ry. Co.*, 87 So. 533.

*California*.—*Jones v. Southern Pac. Co.*, 34 Cal. App. 629, 168 Pac. 586.

*Connecticut*.—*Lessen v. New York, etc.*, R. Co., 87 Conn. 705, 87 Atl. 734.

*Iowa*.—*Sohl v. Chicago, etc.*, Ry. Co., 183 Iowa 472, 167 N. W. 529; *Corbett v. Hines*, 180 N. W. 690.

*Kansas*.—*Corley v. Atchison, etc.*, Ry. Co., 90 Kans. 70, 133 Pac. 555; *Pritchard v. Atchison, T. & S. F. Ry. Co.*, 99 Kans. 600, 162 Pac. 315; *Kirkland v. Atchison, etc.*, Ry. Co., 179 Pac. 362.

*Maine*.—*Thompson v. Lewiston, etc.*, St. Ry., 115 Me. 560, 99 Atl. 370.

*Massachusetts*.—*Fogg v. New York, etc.*, R. Co., 223 Mass. 444, 111 N. E. 960.

*Minnesota*.—*Wesler v. Chicago, etc.*, R. Co., 143 Minn. 159, 173 N. W. 563; *Anderson v. Great Northern Ry. Co.*, 179 N. W. 687.

*Missouri*.—*Coby v. Quiney, etc.*, R.

*Co.*, 174 Mo. App. 648, 161 S. W. 290.

*Nebraska*.—*Rickert v. Union Pac. R. Co.*, 100 Neb. 304, 160 N. W. 86. "A traveler on the highway who, being aware of an approaching train at a railroad crossing, attempts to beat the train over the crossing, must suffer the consequences of his own experiment." *Rickert v. Union Pac. R. Co.*, 100 Neb. 304, 160 N. W. 86.

*New Hampshire*.—*Collins v. Hustis*, 111 Atl. 286.

*New York*.—*Turch v. New York, etc.*, R. Co., 108 N. Y. App. Div. 142, 95 N. Y. Suppl. 1100.

*Rhode Island*.—*Fillmore v. Rhode Island Co.*, 105 Atl. 564.

*South Carolina*.—*Gibson v. Atlantic Coast Line R. Co.*, 170 S. Car. 331, 96 S. E. 519.

*Texas*.—*Baker v. Collins* (Civ. App.), 199 S. W. 519. Compare, *St. Louis, etc.*, Ry. Co. v. *Morgan* (Civ. App.), 220 S. W. 281.

*Washington*.—*McKinney v. Port Townsend & P. S. Ry. Co.*, 91 Wash. 387, 158 Pac. 107.

*Wisconsin*.—*Puhr v. Chicago, etc.*, R. Co., 176 N. W. 767.

**Presumption.**—In an action for the death of a driver of an automobile at a railroad crossing, there is no presumption that the decedent was guilty of negligence in attempting to make the crossing ahead of the train. *Galveston, etc.*, R. Co. v. *Sloman* (Tex. Civ. App.), 195 S. W. 321.

municipal ordinance, and calculate that he can pass if the train does not exceed such limit, and then blindly go ahead without determining the true rate of speed.<sup>24</sup> There may be cases where the approaching train is so far distant that one in the exercise of reasonable care may be justified in attempting to cross without waiting. But, he may be charged with contributory negligence as a matter of law in attempting to cross, though he would have made the passage in safety had he not struck a depression between the rails which caused the engine to stop.<sup>25</sup> Contributory negligence will not be charged as a matter of law against an automobilist who does not stop as a protection from a train standing still with the rear car near the highway, though it happens that a collision ensues from the sudden starting of the train.<sup>26</sup>

24. *Coby v. Quincy, etc., R. Co.*, 174 Mo. App. 648, 161 S. W. 290. "While a railway company may not operate its trains over highway crossings at such a speed as, in view of local conditions, will endanger the lives of those prudently making use of these, a traveler is not permitted to make nice calculations as to whether he will be able to pass over in front of a rapidly approaching train in safety. The latter is under the same duty of exercising ordinary care to avoid a collision as is the company. The degree of care to be observed by each is to be measured by the threatened danger, and the traveler is no more excusable for risking himself before an oncoming train than the company is in running him down when it knows long enough beforehand to enable it to avoid the collision that he cannot or will not get out of its way." *Sohl v. Chicago, etc., Ry. Co.*, 183 Iowa 616, 167 N. W. 529.

25. *Bunton v. Atchison, etc., Ry. Co.*, 100 Kans. 165, 163 Pac. 801.

26. *DeHardt v. Atchison R. & S. F. Ry. Co.*, 100 Kans. 24, 163 Pac. 650, wherein it was said: ". . . Where one end of a string of cars is standing still near a crossing, an engine being at the other end, ordinary pru-

dence does not require a traveler to stop and look up the track before attempting to cross, because whatever risk he runs is that the engine may suddenly start up, and stopping his own vehicle and going upon the track to look would not give him any additional information as to the likelihood of that taking place." . . . "Where a single freight car, or a small group of cars, is standing near the crossing, it would be possible to ascertain, by looking from a point in the road close to the track, whether a train is about to run into it and drive it across the highway. But we do not think it can be said as a matter of law that the driver of an approaching vehicle is guilty of negligence if he neglects to take this precaution. He is bound to act upon the assumption that a train may at any moment be approaching upon an otherwise unoccupied track, until he has employed all reasonable means to assure himself to the contrary. He may not rely on the fact that no signal has been given, for that affirmative precaution on the part of the trainmen may be thoughtlessly omitted. But if he sees that the track is obstructed by a detached car or string of cars, the probability of in-



**Sec. 570. Choice of crossings.**

In an action for the recovery of damages caused by a collision with a railroad train, the fact that the crossing used by the driver was dangerous to his knowledge and that there was another crossing which was safer and which could have been used without inconvenience, is a matter which may be considered by the jury on the question of his contributory negligence.<sup>27</sup>

**Sec. 571. Sounding of horn by automobilist.**

It is held that the failure of an automobilist to sound his horn when approaching the crossing of an interurban railroad does not necessarily convict him of contributory negligence, but that such failure is to be considered by the jury with the other surrounding circumstances in determining whether he exercised proper precautions.<sup>28</sup>

jury resulting to him from a train coming from that direction is so far diminished that we think the question whether ordinary prudence forbids his attempting to cross without further investigation is a fair one for a jury."

27. *Ft. Smith and W. R. Co. v. Seran*, 44 Okla. 169, 143 Pac. 1141.

28. *Louisville & I. R. Co. v. Morgan*, 174 Ky. 633, 192 S. W. 672, wherein it was said: "As a matter of fact, the horn was not sounded as the automobile approached the crossing, and the question is presented whether the failure of an automobile to sound its horn while approaching a railroad crossing is such negligence *per se* as to bar a recovery for damages to the automobile, when it is demolished upon the crossing by the negligence of the railroad company. The rule in this State is that contributory negligence, such as without which the injury would not have been received, bars a recovery, and in the instructions to the jury in such cases the courts have not established any other rule for an automobilist, who is suing a railroad for damages to his automo-

bile, than is applied to the owner of a wagon, threshing machine, or other vehicle, whose owner undertakes to cross a railroad track with it, and is struck by a train being operated upon the track. If one with a traction engine proposes to cross a railroad track, the jury is not told that it becomes the duty of the owner of the engine to sound a whistle from it, nor is the owner of a wagon or other vehicle required, before crossing a railroad track, to shout, or to sound a horn, as a warning to the ones operating the cars upon the railroad tracks. The duty ordinarily required of one about to cross a railroad track, if he would escape contributing to his own injury by negligence, is to exercise ordinary care to discover the approach of a car and to avoid being struck by it, and to so use and move his own vehicle as to avoid colliding with the car upon the railroad track. The care required of him is such care as an ordinarily prudent person would exercise under similar circumstances. The same standard of care applies to every one who undertakes to cross a railroad track,

**Sec. 572. Speed and control.**

The driver of an automobile may be guilty of contributory negligence in running his machine over a railroad crossing at an unreasonable speed so that he will be barred from any remedy for injuries sustained in a collision with a railroad train.<sup>29</sup> Reasonable care requires that the driver of a motor vehicle have the machine under such control at a railroad crossing that it may be stopped if necessary to avoid a train.<sup>30</sup> His contributory negligence is especially clear, when

whether he is upon horseback, on foot, or occupying a wagon or automobile. The danger of the crossing, the inability to observe, because of natural obstructions, the qualities of the horse driven, or the automobile in use, the failure to sound a horn or to look for the train, and many other circumstances, are proper subjects for consideration in determining whether the traveler has or has not exercised ordinary care; but these are matters to be considered and passed upon by the jury in determining whether the traveler has or has not exercised ordinary care under the circumstances, to look out for the car and keep out of its way. Our attention has not been called to any case in any jurisdiction where it has been held that it was the duty of the court to specifically direct the jury that, when an automobilist proposes to cross a railroad track, to avoid the imputation of contributory negligence, he must sound the automobile's horn."

29. *Hayes v. New York, etc., R. Co.*, 91 Conn. 301, 99 Atl. 694; *Central of Ga. Ry. Co. v. Larsen*, 19 Ga. App. 413, 91 S. E. 517; *Gage v. Atchison, etc., R. Co.*, 91 Kans. 253, 137 Pac. 938; *Farmer v. New York, etc., R. Co.*, 217 Mass. 158, 104 N. E. 492; *Askey v. Chicago, etc., Ry. Co.*, 101 Neb. 266, 162 N. W. 647. See section 305.

**Question for jury.**—It is a question for the jury whether one is operating a motor vehicle at a rate of speed greater than is reasonable and proper.

*Central of Ga. R. Co. v. Larsen*, 19 Ga. App. 413, 91 S. E. 517.

30. *Great Western Ry. Co. v. Lee* (Colo.), 198 Pac. 270; *Corbett v. Hines* (Iowa), 180 N. W. 690; *Gage v. Atchison, etc., R. Co.*, 91 Kans. 253, 137 Pac. 938; *Walker v. Rodriguez*, 139 La. 251, 71 So. 499; *Farmer v. New York, etc., R. Co.*, 217 Mass. 158, 104 N. E. 492; *Sanford v. Grand Trunk Western Ry. Co.*, 190 Mich. 390, 157 N. W. 38; *Evans v. Illinois Cent. R. Co. (Mo.)*, 233 S. W. 397; *Askey v. Chicago, etc., Ry. Co.*, 101 Neb. 266, 162 N. W. 647. See also *Sandresky v. Erie R. Co.*, 91 Misc. 67, 153 N. Y. Suppl. 612; *Craig v. Pennsylvania R. Co.*, 243 Pa. St. 455, 90 Atl. 135; *Benedict v. Hines* (Wash.), 188 Pac. 512. "It is the duty of one operating an automobile and approaching a crossing with which he is familiar, and where the view is obstructed until near the track, to drive his car at such speed that he can stop it after discovering a train in time to avoid a collision. The high speed which prevents such control at a railroad crossing is negligence as a matter of law. . . . This rule springs from the rule which recognizes a railroad crossing as a place of danger and requires one, knowing he is approaching it, to look and listen before attempting to cross. Control of the vehicle is essential. The decedent either did not look for a train at a time when he could have saved himself as he was approaching the crossing, or he was driving at a rate of

he has exceeded the limit of speed fixed by statute or municipal ordinance.<sup>31</sup> And in some cases regulations prescribe the speed at which a motor traveler shall approach a railroad crossing.<sup>32</sup> Of course, there may be a question for the jury whether the excessive speed was one of the proximate causes of the injury.<sup>33</sup> But, when the car is driven at such a speed that, after the driver has reached the place to look for trains, he is unable to stop without being propelled on the track, his negligent speed is the cause of the collision.<sup>34</sup> It is the rule, however, in most States that the driver is not required, as a matter of law under all circumstances, to stop his machine,<sup>35</sup> and hence, if his speed is not clearly excessive, there may be a question for the jury whether speed of the machine constitutes contributory negligence.<sup>36</sup> A margin is allowed the

speed which made his discovery of the train unavailing. The failure to do these things is more than a slight negligence as a matter of law." *Ask-ey v. Chicago, etc., Ry. Co.*, 101 Neb. 266, 162 N. W. 647.

31. Sections 321, 322.

32. *Central of Ga. R. Co. v. Larsen*, 19 Ga. App. 413, 91 S. E. 517; *Collins v. Hustis* (N. H.), 111 Atl. 286; *Texas, etc., R. Co. v. Harrington* (Tex. Civ. App.), 209 S. W. 685. See also *Texas & Pac. R. Co. v. Hilgartner* (Tex. Civ. App.), 149 S. W. 1091; *Schaff v. Bearden* (Tex. Civ. App.), 211 S. W. 503; *Chicago, etc., R. Co. v. Johnson* (Tex. Civ. App.), 224 S. W. 277.

33. *Central Indiana Ry. Co. v. Wis-hard*, 186 Ind. 262, 114 N. E. 970; *Shepard v. Norfolk Southern R. Co.*, 169 N. Car. 239, 84 S. E. 277; *Hinton v. Southern Ry. Co.*, 172 N. Car. 587, 90 S. E. 756; *Case v. Atlanta, etc., Ry. Co.*, 107 S. Car. 216, 92 S. E. 472; *Houston, etc., Ry. Co. v. Wilkerson* (Tex. Civ. App.), 224 S. W. 574.

34. *Christman v. Southern Pac. Co.*, 38 Cal. App. 196, 175 Pac. 808; *Lan-ier v. Minneapolis, etc., Ry. Co.* (Mich.), 176 N. W. 410.

35. Section 567.

36. *Payne v. Wallis* (Tex. Civ. App.), 231 S. W. 1114. "The law accords with common experience and reason that persons approaching a railroad crossing when the view is obstructed depend on the sense of hearing to inform them of approaching trains and this hearing includes the hearing of such warning signals as law or custom, or both, require. And in such a case, when a person is regulating his speed and conduct so as to make hearing effectual and listens attentively and hears no train, because of defendant's fault in not giving the required signals, then he may proceed at an ordinarily safe speed on the theory that the crossing is safe; and where the evidence tends to show that he did this, the court cannot declare him guilty of contributory negligence." *Swigart v. Lush*, 196 Mo. App. 471, 192 S. W. 138.

A statute requiring a stop, and making it a misdemeanor not to do so, but containing provisions limiting its application so as not to affect damage cases, was held not applicable to an action for injuries at a grade crossing. *Hines v. Partridge* (Tenn.), 231 S. W. 16.

operator of the machine for a miscalculation of the distance within which he can stop the car.<sup>37</sup>

In many States statutes have been enacted restricting the speed of motor vehicles at the intersection of "highways." The term "highway" may be construed to include such public ways as railroads and hence such regulations may be applicable to railroad crossings.<sup>38</sup> This question, however, is not free from difficulty, and a contrary conclusion has been reached.<sup>39</sup>

### Sec. 573. Violation of statute regulating automobiles.

The violation of a statute regulating the operation of motor vehicles is generally negligence; and, if such violation is a proximate cause to injuries sustained by the operator, as a general rule he cannot recover for his injuries. Thus, an automobilist who attempts to cross a railroad track at a rate of speed greater than that prescribed by statute or municipal ordinance, is guilty of such conduct that, if the collision with a train is the proximate result of the speed, he cannot recover for his injuries.<sup>40</sup> The question of proximate cause is an important one, when contributory negligence is sought to be charged against the operator of a motor vehicle on account of the violation of some positive regulation. In most jurisdictions, the failure of the owner to have the machine registered and licensed in accord with the statutes on the subject does not bar an action for injuries received in a collision with a train.<sup>41</sup> Similarly, the fact that the chauffeur's badge was not in sight as required by law does not bar the action.<sup>42</sup>

37. *Bush v. Brewer*, 136 Ark. 248, 206 S. W. 322.

38. *Hinton v. Southern Ry. Co.*, 172 N. C. 587, 90 S. E. 756.

39. *Dobbins v. Seaboard Air Line R. Co.* 108 S. Car. 254, 93 S. E. 932.

40. Section 572.

41. *Central of Ga. Ry. Co. v. Moore*, 149 Ga. 581, 101 S. E. 668; *Central of Ga. Ry. Co. v. Moore* (Ga. App.), 102

S. E. 168; *Gilman v. Central Vt. Ry. Co.* (Vt.), 107 Atl. 122; *Southern Ry. v. Vaughan's Adm'r*, 118 Va. 692, 88 S. E. 305, L. R. A. 1916 E. 1222; *Derr v. Chicago, M. & St. P. Ry. Co.*, 163 Wis. 234, 157 N. W. 753. And see section 126.

42. *Latham v. Cleveland, etc., R. Co.*, 164 Ill. App. 559.

**Sec. 574. Machine stalled on track.**

Where the operator of a motor vehicle exercises due care in approaching a railroad crossing and is justified in attempting to pass over because no train is in sight, he is not necessarily guilty of contributory negligence because his machine becomes "stalled" on the track so that he cannot remove it before the approach of a train.<sup>43</sup> Questions of negligence in such cases are generally for the jury.<sup>44</sup> And, on the other hand, if the engineer sees the machine stalled on the track, it is his duty to bring the train to a stop if reasonably possible without danger to his passengers.<sup>45</sup> In these cases, the last clear chance or "humanitarian" doctrine may be ap-

**43.** *Littlewood v. Detroit United Ry.*, 189 Mich. 388, 155 N. W. 698; *Gembell v. Minneapolis, etc., Ry. Co.*, 129 Minn. 262, 152 N. W. 408; *Packard v. New York, etc., R. Co.*, 160 N. Y. App. Div. 856, 146 N. Y. Suppl. 878; *Denkers v. Southern Pac. Co.*, 52 Utah 18, 171 Pac. 999; *Norfolk-Southern R. Co. v. Whitehead*, 121 Va. 139, 92 S. E. 916; *Hull v. Seattle, etc., R. Co.*, 60 Wash. 162, 110 Pac. 804.

**Defective automobile.**—If the machine stops on the track on account of its defective engine, and the railroad employees do everything in their power to stop the train before it reaches the automobile, the company is not liable. *Louisville & Nashville R. Co. v. Harrison*, 78 Fla. 38, 83 So. 89.

**Duty of flagman.**—Where, as an automobile was close to a railroad track, for some unexplained reason its gears became locked and it could not be moved away from the track and was so close that the front part was struck by a passing train a few minutes later, it was held that the proximate cause of the injury was the stopping of the automobile and not the statement of a flagman stationed at such crossing that no train would come along for a long time. Furthermore the court held that such a statement was outside his duty as a flag-

man and not binding on the railroad company. And it was also held that he was under no duty to leave the crossing and go up the track and signal the approaching train to stop. *Carnochan v. Erie R. Co.*, 73 Misc. 131, 130 N. Y. Suppl. 514.

**44.** *Southern Pac. Co. v. Martinez*, 270 Fed. 770; *Gembell v. Minneapolis, etc., Ry. Co.*, 129 Minn. 262, 152 N. W. 408; *Taylor v. Lehigh Valley R. Co.*, 87 N. J. L. 673, 94 Atl. 566; *Packard v. New York, etc., R. Co.*, 160 N. Y. App. Div. 856, 146 N. Y. Suppl. 878; *San Antonio, etc., Ry. Co. v. Moore* (Tex. Civ. App.), 208 S. W. 754.

**Guilty of negligence.**—Where the driver of an automobile got on the wrong road, crossed the railroad track, and discovering his mistake, turned and started to recross the track, got off the planking, which was sixteen feet wide over the track, and got his machine stalled crosswise of the track near the cattle guards, and it appeared that the night was bright, and that the stars were shining, and that all the lights on his machine were lighted and in good condition, it was thought that he was clearly guilty of contributory negligence. *Nicol v. Oregon-Washington R. & Nav. Co.*, 71 Wash. 409, 128 Pac. 628.

**45.** *Taylor v. Lehigh Valley R. Co.*, 87 N. J. L. 673, 94 Atl. 566; *Costin v.*

plied with some force.<sup>46</sup> But the train operators are not required to presume that an automobile crossing the track in front of the engine will stop on the track.<sup>47</sup> An occupant may, however, be guilty of contributory negligence as a matter of law, where with plenty of time to leave the car, he remains therein until it is struck by the train.<sup>48</sup> Not only for the rescue of the machine, but also to avoid possible injury to the passengers on the railroad train, the operator of the motor vehicle owes a duty to remove the car if possible before the arrival of a train; and he will not be held guilty of negligence merely because he attempts to use the self starter for that purpose.<sup>49</sup>

### Sec. 575. Last clear chance.

Under the "last clear chance" doctrine, as limited in the larger number of States, an automobilist who has negligently placed himself in a dangerous position on a railroad crossing may nevertheless recover for his injuries where the engineer of the approaching train discovered his peril and could by the exercise of reasonable diligence have stopped the train in time to have avoided the injury but negligently failed to do so.<sup>50</sup> Moreover, when the engineer sees one in a danger-

Tidewater Power Co. (N. Car.), 106 S. E. 568; San Antonio, etc., Ry. Co. v. Moore (Tex. Civ. App.), 208 S. W. 754.

46. *Monson v. Chicago, R. I. & P. Ry. Co.* (Iowa), 159 N. W. 679; *McGuire v. Chicago, etc., R. Co.* (Mo. App.), 228 S. W. 541; *Taylor v. Lehigh Valley R. Co.*, 87 N. J. L. 673, 94 Atl. 566; *Norfolk-Southern R. Co. v. Whitehead*, 121 Va. 139, 92 S. E. 916; *Nicol v. Oregon-Washington R. & Nav. Co.*, 71 Wash. 409, 128 Pac. 628. And see section 575.

47. *Bagdad Land & Lumber Co. v. Moneyway* (Fla.), 86 So. 687.

48. *Smith v. Erie R. Co.*, 182 N. Y. App. Div. 528, 169 N. Y. Suppl. 831; *Coleman v. Pittsburgh, etc., St. Ry. Co.*, 251 Pa. 498, 96 Atl. 1051. *Compare Taylor v. Lehigh Valley R. Co.*, 87 N. J. L. 673, 94 Atl. 566.

49. *Taylor v. Lehigh Valley R. Co.*, 87 N. J. L. 673, 94 Atl. 566.

50. *Alabama*.—*Hines v. Champion*, 85 So. 511; *Miles v. Hines*, 87 So. 837. *Iowa*.—*Barrett v. Chicago, etc., R. Co.*, 175 N. W. 950. See *Waters v. Chicago, etc., R. Co.*, 178 N. W. 534.

*Kansas*.—*Springer v. Chicago, etc., R. Co.*, 95 Kans. 408, 148 Pac. 611.

*Maryland*.—*Payne v. Healey*, 114 Atl. 693.

*Missouri*.—*Sandry v. Hines* (Mo. App.) 226 S. W. 646.

*New Hampshire*.—*Chellis Realty Co. v. Boston & M. R. Co.*, 106 Atl. 742;

*North Carolina*.—*Goff v. Atlantic Coast Line R. Co.*, 179 N. Car. 216, 102 S. E. 320.

*Oklahoma*.—*Wichita Falls, etc., R. Co. v. Groves*, 196 Pac. 677.

*Texas*.—*Texas Cent. R. Co. v. Lumas* (Tex. Civ. App.), 149 S. W. 543; *Gal-*

ous position, it may be his duty to blow his whistle or otherwise give warning of his approach.<sup>51</sup> If the engineer sees that an automobile is stalled on the track, he must use a reasonable degree of care to stop the train before it strikes the machine, and he may be charged with negligence for his failure.<sup>52</sup> And where an automobile collided with the rear of a freight train, and was pushed for a considerable distance along the track and then overturned, and an occupant was run over and killed, it was held that the railroad company was liable for the death, notwithstanding any negligence of the decedent prior to the collision, if its employees could by exercising reasonable care, after becoming aware of the danger, have stopped the train before the overturning of the automobile.<sup>53</sup>

The discovery of the peril in time to avoid the accident is generally an essential element of liability under this doctrine; there is no liability where the railroad employees did not discover, or could not by the exercise of reasonable care have discovered, the danger of the automobilist in time to have avoided the accident.<sup>54</sup> Where the operator of the

veston, etc., R. Co. v. Soloman (Tex. Civ. App.), 195 S. W. 321.

*Washington.*—Nicol v. Oregon-Washington R. & Nav. Co., 71 Wash. 409, 128 Pac. 628.

51. Costin v. Tidewater Power Co. (N. Car.), 106 S. W. 568; Galveston, etc., R. Co. v. Sloman (Tex. Civ. App.), 195 S. W. 321.

52. Monson v. Chicago, R. I. & P. Ry. Co. (Iowa), 159 N. W. 679; McGuire v. Chicago, etc., R. Co. (Mo. App.), 228 S. W. 541; Taylor v. Lehigh Valley R. Co., 87 N. J. Law 673, 94 Atl. 566; Costin v. Tidewater Power Co. (N. Car.), 106 S. E. 568; Norfolk Southern R. Co. v. Whitehead, 121 Va. 139, 92 S. E. 916. And see section 574.

53. Springer v. Chicago, etc., R. Co., 95 Kans. 408, 148 Pac. 611. See also, Cleveland, etc., R. Co. v. Baker (Ind.), 128 N. E. 836.

54. McBeth v. Atchison, etc., R. Co.,

95 Kans. 364, 148 Pac. 621; Coby v. Quincy, etc., R. Co., 174 Mo. App. 648, 161 S. W. 290; Tannehill v. Kansas City, etc., Ry. Co., 279 Mo. 158, 213 S. W. 818; Andrews v. Mymer (Tex. Civ. App.), 190 S. W. 1164; Galveston, etc., R. Co. v. Sloman (Tex. Civ. App.), 195 S. W. 321; Hines v. Foreman (Tex. Civ. App.), 229 S. W. 630; Hubenthal v. Spokane, etc., R. Co., 97 Wash. 591, 166 Pac. 797; Monso v. Bellingham & N. Ry. Co., 106 Wash. 299, 179 Pac. 848. See also Lassen v. New York, etc., R. Co., 87 Conn. 795, 87 Atl. 734.

**Automobile light shining across track.**—The fact that the lights from an automobile which is out of sight are shining across the track does not, of itself, charge the engineer with information that the occupants of the machine are in danger. Coby v. Quincy, etc., R. Co., 174 Mo. App. 648, 161 S. W. 290.

motor vehicle drives on the track but a short distance ahead of a rapidly approaching train, there is no opportunity for application of the doctrine.<sup>55</sup> Until the engineer sees that the automobilist intends to hazard a crossing in the face of the train, he may properly assume that the car will be stopped before reaching the track.<sup>56</sup> As a general proposition, it is also an essential element for the operation of the last clear chance doctrine that the negligence of the plaintiff should have spent itself before the injury; if it continues up to the time of the collision, it bars his action.<sup>57</sup>

### Sec. 576. Acts in emergencies.

If the operator of a motor vehicle, while crossing a railroad track, is suddenly confronted with a rapidly approaching train, he is not expected to use the judgment which he would exercise when not in such a position of peril.<sup>58</sup> His

#### Machine struck and left near track.

—An automobile owner who negligently attempts to drive his car across a railroad track cannot recover from the railroad company for the injury done to the car, where it is hit by a passing train, which leaves the car by the side of the track in such a position that in a few minutes it is struck by another train, the engineer on which does not see it in time to stop his train before colliding with it. *Greene v. Atchison, etc., R. Co. (Kans.)*, 198 Pac. 956.

**55.** *Coby v. Quincy, etc., R. Co.*, 174 Mo. App. 648, 161 S. W. 290; *Virginia & S. W. Ry. Co. v. Skinner*, 119 Va. 843, 89 S. E. 887; *Norfolk-Southern R. Co. v. Smith*, 122 Va. 302, 94 S. E. 789.

**56.** *Hurt v. Southern Ry. Co. (Ala.)*, 87 So. 533; *Trasher v. St. Louis, etc., Ry. Co. (Okla.)*, 198 Pac. 97; *Miller v. Northern Pac. Ry. Co.*, 105 Wash. 645, 178 Pac. 808.

**57.** *Borglum v. New York, etc., R. Co.*, 90 Conn. 52, 96 Atl. 174; *Rule v. Atchison Ry. Co.*, 107 Kans. 479, 192 Pac. 729; *Callery v. Morgan's Louisiana, etc., S. S. Co.*, 139 La. 763, 72 So.

222; *Krouse v. Southern Mich. Ry. Co. (Mich.)*, 183 N. W. 768. "The doctrine of last clear chance is applied perhaps most frequently to cases where the plaintiff's negligence has terminated, and where the defendant thereafter, in the exercise of reasonable care and owing a duty to exercise it, should have discovered the peril in time to have prevented an injury. It has also often been applied where it would be apparent to one in control of a dangerous agency, if exercising reasonable vigilance, that a traveler is unconscious of his danger or so situated as to be incapable of self-protection, and in such cases, if the one controlling the agency could have averted the danger by exercising reasonable care and failed to do so, liability follows. It is based upon the principle that the negligence of the one is remote, and that the negligence of the other is the proximate and efficient cause of the catastrophe; he having the last clear opportunity of preventing it." *Nicol v. Oregon-Washington R. & Nav. Co.*, 71 Wash. 409, 128 Pac. 628.

**58.** *United States*.—*Lehigh Valley*



conduct is not closely scrutinized, and his negligence may be a question for the jury though he did not in the emergency use the best method of avoiding injury.<sup>59</sup> He may jump from the vehicle or he may stay with the machine in the hope of passing the danger point before he is struck; and his contributory negligence in taking either alternative, though it develops that the other would have better availed him, is generally a question for the jury.<sup>60</sup> And it has been held that one approaching a railroad track and having his vehicle under such control that he could have stopped it without injury, is not necessarily charged with negligence because he became confused and scared by reason of the negligence of the railroad and thus failed to stop the machine before reaching the tracks.<sup>61</sup> The rule releasing one from responsibility for careless acts committed in an emergency, cannot be invoked in behalf of one who has placed himself in such a position through his own lack of care.<sup>62</sup>

*R. Co. v. Kilmer*, 231 Fed. 628, 145 C. A. 514; *McClure v. Southern Pac. Co.* (Cal. App.), 183 Pac. 248.

*Indiana*.—*Indiana Union Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005.

*Michigan*.—*Littlewood v. Detroit United Ry.*, 189 Mich. 388, 155 N. W. 698.

*Missouri*.—*Swigart v. Lusk*, 196 Mo. App. 471, 192 S. W. 138.

*New Jersey*.—*Dickinson v. Erie R. Co.*, 81 N. J. L. 464, 81 Atl. 104.

*North Carolina*.—*Brown & Co. v. Atlantic Coast Line R. Co.*, 171 N. C. 266, 88 S. E. 329. "If without fault, he went upon the track and was then confronted suddenly by a grave peril, and exercised such care as a man of ordinary prudence and presence of mind would have used under the same circumstances, negligence will not be imputed to him, and the court so charged the jury. Not having brought the danger upon himself, or, if he did, the defendant having a fair opportunity to prevent the injury, he was not required to act wisely or discretely, but only with such care and judg-

ment as would be expected of a man of ordinary prudence in a like situation." *Brown & Co. v. Atlantic Coast Line R. Co.*, 171 N. Car. 266, 88 S. E. 329.

*Texas*.—See *Baker v. Collins* (Civ. App.), 199 S. W. 519.

**59.** *Indiana Union Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005; *Dombrenos v. Chicago, etc., Ry. Co.* (Iowa), 174 N. W. 596; *Brown & Co. v. Atlantic Coast Line R. Co.*, 171 N. C. 266, 88 S. E. 329.

**60.** *Indiana Union Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005; *Sherwood v. New York Central, etc., R. Co.*, 120 N. Y. App. Div. 639, 105 N. Y. Suppl. 547. See also *Northern Pac. R. Co. v. Vidal*, 184 Fed. 707; *Krouse v. Southern Mich. Ry. Co.* (Mich.), 183 N. W. 768.

**61.** *Central of Georgia Ry. Co. v. Faust* (Ala. App.), 82 So. 36; *Gillipie v. Pryor* (Mo. App.), 204 S. W. 835.

**62.** *Fogg v. New York, etc., R. Co.*, 223 Mass. 444, 111 N. E. 960; *Dobbins v. Seaboard Air Line R. Co.*, 108 S. Car. 254, 93 S. E. 932.

**Sec. 577. Function of jury.**

While negligence and contributory negligence of parties are essentially questions within the province of the jury,<sup>63</sup> the contributory negligence of an automobilist while crossing

**63. United States.**—Lake Erie & W. R. Co. v. Schneider, 257 Fed. 675; Fish v. Pennsylvania Co., 259 Fed. 201; Hines v. Hoover, 271 Fed. 645.

**Alabama.**—Illinois Cent. R. Co. v. Camp, 201 Ala. 4, 75 So. 290.

**Arizona.**—By the State Constitution, contributory negligence is a jury question. Davis v. Boggs, 199 Pac. 116.

**Arkansas.**—Bush v. Brewer, 136 Ark. 248, 206 S. W. 322; St. Louis-San Francisco Ry. Co. v. Stewart, 137 Ark. 6, 207 S. W. 440.

**Delaware.**—Nailor v. Maryland D. & V. Ry. Co., 6 Boyce's (29 Del.) 145, 97 Atl. 418.

**Florida.**—Louisville & N. R. Co. v. English, 78 Fla. 38, 82 So. 819.

**Georgia.**—Seaboard Air Line Ry. v. Hallis, 20 Ga. App. 555, 93 S. E. 264.

**Illinois.**—Moore v. Bloomington, etc., R. Co., 295 Ill. 173, 128 N. E. 72; Boggs v. Iowa Central Ry. Co., 187 Ill. App. 621; McDonell v. Lake Erie & Western Ry. Co., 208 Ill. App. 442.

**Indiana.**—Lake Erie & W. R. Co., v. Hawarth (Ind. App.), 124 N. E. 687; Lake Erie & W. R. Co. v. Griswold (Ind. App.), 125 N. E. 783.

**Iowa.**—Rupener v. Cedar Rapids & Iowa City Railway Co., 178 Iowa 615, 159 N. W. 1048; Fuller v. Illinois Central R. Co., 186 Iowa 686, 173 N. W. 137; Dombresnos v. Chicago, etc., Ry. Co., 174 N. W. 596; Black v. Chicago Great Western R. Co., 174 N. W. 774; Barrett v. Chicago, etc., R. Co., 180 N. W. 670.

**Kansas.**—Keys v. Schaff, 193 Pac. 322, 107 Kans. 620.

**Kentucky.**—Louisville, etc., R. Co. v. Clore, 183 Ky. 261, 209 S. W. 55.

**Massachusetts.**—See Stretton v. N. Y., etc., R. Co., 198 Mass. 573, 84 N.

E. 799.

**Michigan.**—Mills v. Waters, 198 Mich. 637, 165 N. W. 740; Fillingham v. Detroit, etc., R. Co., 207 Mich. 644, 175 N. W. 227.

**Minnesota.**—Green v. Great Northern R. Co., 123 Minn. 279, 143 N. W. 722; Stepp v. Minneapolis, etc., R. Co., 137 Minn. 117, 162 N. W. 1051; DeVriendt v. Chicago, etc., R. Co., 144 Minn. 467, 175 N. W. 99.

**Missouri.**—Gillipie v. Pryor (Mo. App.), 204 S. W. 835; Monroe v. Chicago, etc., R. Co., 219 S. W. 68.

**New Jersey.**—Baer v. Lehigh, etc., Ry. Co., 93 N. J. Law. 85, 106 Atl. 421.

**Oklahoma.**—By constitutional provisions, contributory negligence is a jury question. See Wichita Falls, etc., R. Co. v. Groves (Okla.), 196 Pac. 677.

**Oregon.**—Robinson v. Oregon-Washington R. & Navigation Co., 90 Oreg. 490, 176 Pac. 594.

**Tennessee.**—Hines v. Partridge, 231 S. W. 16.

**Texas.**—Kirksey v. Southern Traction Co., 217 S. W. 139; Harrell v. St. Louis, etc., R. Co., 222 S. W. 221; Southern Pac. R. Co. v. Walker (Civ. App.), 171 S. W. 264; Missouri, etc., R. Co. v. Thayer (Civ. App.), 178 S. W. 988; Galveston H. & S. A. R. Co. v. Marti (Civ. App.), 183 S. W. 846; Beaumont S. L. & W. Ry. Co. v. Myrich (Civ. App.), 208 S. W. 935; Schaff v. Merchant (Civ. App.), 212 S. W. 970; Moyer v. Beaumont, S. L. & W. Ry. Co. (Civ. App.), 212 S. W. 471; Galveston-Houston Elec. Ry. Co. v. Patella (Civ. App.), 222 S. W. 615; St. Louis, etc., Ry. Co. v. Morgan (Civ. App.), 220 S. W. 281; Hines v. Foreman (Civ. App.), 229 S. W. 630.

a railroad track is many times decided as a matter of law. Thus, if he attempts to cross the track without properly looking and listening for approaching trains, he will be denied recovery for his injuries as a matter of law.<sup>64</sup> If the question is, however, presented to the jury, a verdict for the railroad company would not be disturbed, except under the most unusual circumstances.<sup>65</sup> As a general rule it is only in clear cases where the facts are undisputed and but one inference can be drawn from them, that courts can declare as a matter of law a party guilty of contributory negligence.<sup>66</sup>

*Utah.*—*Shortino v. Salt Lake & U. R. Co.*, 52 Utah 476, 174 Pac. 861.

*Washington.*—*Brand v. Northern Pac. Ry. Co.*, 6 A. L. R. 669 n. 105 Wash. 138, 177 Pac. 806.

*Wisconsin.*—*Gordon v. Illinois Cent. R. Co.*, 168 Wis. 244, 169 N. W. 570.

64. Section 557.

65. *Jerolleman v. New Orleans Terminal Co.*, 140 La. 895, 74 So. 186.

66. *Delaware.*—*Nailor v. Maryland, etc., R. Co.*, 97 Atl. 418.

*Georgia.*—*Seaboard Air Line Ry. v. Hallis*, 20 Ga. App. 555, 93 S. E. 264.

*Indiana.*—*Indiana Union Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005; *Union Traction Co. of Indiana v. Haworth*, 187 Ind. 451, 115 N. E. 753. "The law imposes a duty on travelers on a highway approaching a railway crossing to use reasonable care. This duty arises out of the relation of parties, and is declared to exist as a matter of law; but, when the question arises as to what acts or conduct ordinary care requires under the circumstances of a particular case, this must generally be determined as a question of fact. The court cannot say as a matter of law that ordinary care requires a designated act to be done, or that it required a specific act to be omitted, unless the act in question was of such a character as to be wholly incompatible with the exercise of reasonable care when considered in the light of attending circumstances. It must be so absolutely inconsistent

with the exercise of ordinary care that there could be no room for reasonable minds to differ on the question. So long as there is room for an honest difference between reasonable minds as to whether or not the doing (or the omission to do, as the case might be) of the particular act was consistent with the care that a man of ordinary prudence would use under the circumstances, the question is one of fact for the jury." *Central Indiana Ry. Co. v. Wishard*, 186 Ind. 262, 114 N. E. 970.

*Iowa.*—*Hawkins v. Interurban Ry. Co.*, 184 Iowa 232, 168 N. W. 234.

*Pennsylvania.*—*Witmer v. Bessemer, etc., R. Co.*, 241 Pa. St. 112, 88 Atl. 314.

*Tennessee.*—*Hurt v. Yazoo, etc., R. Co.*, 140 Tenn. 623, 205 S. W. 437.

*Texas.*—"Before this court can say that any of the alleged acts of the driver on the occasion in question was contributory negligence as a matter of law, such acts must have been in violation of some law, or that the facts were undisputed and admitted of but one inference regarding the care of the party in doing the acts in question. In other words, to have authorized the court to take the question from the jury, the evidence must have been of such character that there was no room for ordinary minds to differ as to the conclusion to be drawn from it." *Houston Belt & Terminal Ry. Co. v. Hardin Lumber Co.* (Tex. Civ. App.), 189 S. W. 518.

But, if one blindly crosses a railroad track without taking any measures to ascertain whether a train is approaching, but one inference can be drawn; no reasonable person would say that the driver was in the exercise of ordinary care.<sup>67</sup> The failure to stop before attempting to cross the track, in most States, will present under ordinary circumstances a question of contributory negligence for the jury;<sup>68</sup> in some States, however, the courts dispose of the question by holding as a matter of law that the traveler is guilty of negligence.<sup>69</sup>

**Sec. 578. Negligence of railroad in operation of train—in-  
evitable accident.**

A railroad company is not an insurer of the safety of travelers crossing its tracks over a grade crossing;<sup>70</sup> its duty is to exercise ordinary care under the circumstances and to comply with such regulations as are imposed by State and municipalities upon the operation of its trains.<sup>71</sup> If the rail-

*Utah.*—*Shortino v. Salt Lake & U. R. Co.*, 52 Utah 476, 174 Pac. 861. "If there is any substantial doubt whether a plaintiff was or was not guilty of contributory negligence, or whether, if negligent, such negligence was the proximate cause of the injury, the court cannot determine the right to recover as a matter of law, but must submit the question of contributory negligence or of proximate cause, or both, to the jury as questions of fact." *Shortino v. Salt Lake & U. R. Co.*, 52 Utah 476, 174 Pac. 861.

*Virginia.*—*Seaboard Air Line Ry. v. Abernathy*, 121 Va. 173, 92 S. E. 913.

67. *Singer v. Erie R. Co.*, 231 N. Y. 268. "While it is true that the traveler, in attempting to cross a railroad track at a public crossing, is required to exercise only ordinary care, yet what constitutes ordinary care under such circumstances, or, as it is sometimes termed, 'the measure of duty,' is prescribed by law, and therefore is not left to the whim or caprice of either

court or jury. The measure of duty in such case is to look and listen, and, under certain circumstances, it may even be necessary to stop. If, therefore, the evidence discloses that the traveler has failed to comply with the duty, the law imposes, and his failure is the proximate cause of the accident and injury, the law prevents a recovery." *Shortino v. Salt Lake & U. R. Co.*, 52 Utah 476, 174 Pac. 861.

68. Section 567.

69. Section 568.

70. *Greiner v. Pennsylvania Co.*, 198 Ill. App. 260.

**Oiled road.**—A railroad company is not required to anticipate that on account of oil on the road an autoist will be unable to stop his car when approaching the track. *Gilman v. Central Vt. Ry. Co. (Vt.)*, 107 Atl. 122.

71. *Taylor v. Lehigh Valley R. Co.*, 87 N. J. L. 673, 94 Atl. 566; *Nicol v. Oregon-Washington R. & Nav. Co.*, 71 Wash. 409, 128 Pac. 628.

road employees comply with all requirements of the law, but an automobilist suddenly drives upon the track in front of the train, the ensuing accident is due either to inevitable accident or to the contributory negligence of the traveler. In either contingency, the railroad is not responsible for damages.<sup>72</sup>

### **Sec. 579. Negligence of railroad in operation of train—speed.**

Municipal ordinances or statutes regulating the speed of railroad trains over street or highway crossings are to be obeyed, and their violation may render it liable for injuries proximately resulting to one traveling in a motor vehicle and exercising due care for his safety.<sup>73</sup> But, in the absence of ordinance or statute, it is not a breach of duty to operate a train at any speed over such a public crossing unless the operative of the train knows that the use of the crossing by the public is so frequent and so constant as that people or property are likely, probably, in exposed positions at or about the crossing.<sup>74</sup> Ordinarily, the engineer is not required to

72. *Bagwell v. Southern Ry. Co.*, 167 N. Car. 611, 83 S. E. 814; *Andrews v. Mynier* (Tex. Civ. App.), 190 S. W. 1164.

73. *Van Orsdale v. Illinois Cent. R. Co.*, 210 Ill. App. 619; *Pittsburgh, etc., R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609; *Black v. Chicago Great Western R. Co.*, 174 N. W. 774; *Broussard v. Louisiana Western R. Co.*, 140 La. 517, 73 So. 606; *Dyer v. Maine Cent. R. Co.* (Me.), 113 Atl. 26; *Laurisch v. Minneapolis, St. P. R. & D. Electric Traction Co.*, 132 Minn. 114, 155 N. W. 1074; *Brinkley v. Southern Ry. Co.*, 113 Miss. 367, 74 So. 280; *Hines v. Moore* (Miss.), 87 So. 1; *Houston Belt & Terminal Ry. Co. v. Hardin Lumber Co.* (Tex. Civ. App.), 189 S. W. 518; *Baker v. Streater* (Tex. Civ. App.), 221 S. W. 1039; *Shortino v. Salt Lake & U. R. Co.*, 52 Utah 476, 174 Pac. 861. See also *Hubenthal v. Spokane, etc., R. Co.*, 97 Wash. 581,

166 Pac. 797.

**Interurban car.**—It is not necessarily negligence to run an interurban electric car across a city street at a speed of from ten to fifteen miles an hour. *Union Traction Co. v. Howard*, 173 Ind. 335, 90 N. E. 764. Or, in the absence of some regulation fixing the speed, at a rate of thirty miles over a country highway. *Indiana Union Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005. But in some cases the speed of an interurban car will present a question for the jury. *Stern v. Nashville Interurban Ry.*, 142 Tenn. 494, 221 S. W. 192.

74. *Rothroek v. Alabama Great Southern R. Co.* (Ala.), 78 So. 84; *Pittsburgh, etc., Ry. Co. v. Nichols* (Ind. App.), 130 N. E. 546; *Piersall's Adm'r. v. Chesapeake & O. Ry. Co.*, 180 Ky. 659, 203 S. W. 551; *Denkers v. Southern Pac. Co.*, 52 Utah 18, 171 Pac. 999.

stop his train because there are automobile travelers in the vicinity of a crossing. If such travelers are apparently under no disability, either mentally or physically, he may properly assume that they will not place themselves in a dangerous position; or, if they are on the track when the train is at some distance, that they will go forward or backward and avoid a collision.<sup>75</sup> But, if the engineer sees that a motor vehicle is apparently stalled on the tracks, it is his duty to stop his train, as quickly as is consistent with the safety of his passengers.<sup>76</sup>

### Sec. 580. Negligence of railroad in operation of train—warning.

In nearly all jurisdictions, the railroad employees running an engine are required by statute to ring the bell or blow the whistle, or both, when the engine is approaching a grade crossing. The failure to give the proper warning affords ample ground for liability; and, if an automobilist in the exercise of due care receives injuries by reason of a neglect to give the proper warning, the railroad must generally respond in damages.<sup>77</sup> And, after sunset, it is a general requirement

75. *Yazos, etc., R. Co. v. Williams*, 114 Miss. 236, 74 So. 835; *McMillian v. Atlanta, etc., Ry. Co.*, 172 N. C. 853, 90 S. E. 683.

76. *McBeth v. Atchison, etc., R. Co.*, 95 Kans. 364, 148 Pac. 621; *Taylor v. Lehigh Valley R. Co.*, 87 N. J. Law, 673, 94 Atl. 566. And see section 574.

77. *United States*.—*Lake Erie & W. R. Co. v. Schneider*, 257 Fed. 675; *Charleston, etc., R. Co. v. Alwang*, 258 Fed. 297.

*Arizona*.—*Davis v. Boggs*, 199 Pac. 116.

*California*.—*Ellis v. Central California Tract. Co.*, 37 Cal. App. 390, 174 Pac. 407.

*Georgia*.—*Seaboard Air Line Ry. v. Hallis*, 20 Ga. App. 555, 93 S. E. 264.

*Idaho*.—*Graves v. Northern Pac. Ry. Co.*, 30 Idaho 542, 166 Pac. 571.

*Illinois*.—*McDonell v. Lake Erie &*

*Western Ry. Co.*, 208 Ill. App. 442; *Van Orsdale v. Illinois Cent. R. Co.*, 210 Ill. App. 619.

*Indiana*.—*Pittsburgh, etc., R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609; *Lake Erie & W. R. Co. v. Howarth* (Ind. App.), 124 N. E. 687; *Cleveland, etc., R. Co. v. Baker* (Ind.), 128 N. E. 836.

*Kentucky*.—*Piersall's Adm'r v. Chesapeake & O. Ry. Co.*, 180 Ky. 659, 203 S. W. 551; *Louisville, etc., R. Co. v. Clore*, 183 Ky. 261, 209 S. W. 55.

*Louisiana*.—*Clements v. Texas, etc., Ry. Co.*, 148 La. —, 88 So. 394.

*Massachusetts*.—*Lydon v. New York, etc., R. Co.*, 126 N. E. 794.

*Michigan*.—*Nichols v. Grand Trunk Western Ry. Co.*, 203 Mich. 372, 168 N. W. 1046.

*Minnesota*.—*Laurisch v. Minneapolis, St. P. R. & D. Electric Traction*

that the engine shall have a headlight, the absence of which may justify a charge of negligence.<sup>78</sup> If, however, the per-

Co., 132 Minn. 114, 155 N. W. 1074; *Anderson v. Great Northern Ry. Co.*, 179 N. W. 687.

*Mississippi*.—*Yazos, etc.*, R. Co. v. Williams, 114 Miss. 236, 74 So. 835.

*North Carolina*.—*Goff v. Atlantic Coast Line R. Co.*, 179 N. Car. 216, 102 S. E. 320; *Perry v. McAdoo*, 104 S. E. 673; *Costin v. Tidewater Power Co.*, 106 S. E. 568.

*Oklahoma*.—*Midland Valley R. Co. v. Lawhorn*, 198 Pac. 586.

*Pennsylvania*.—*Wanner v. Philadelphia, etc., Ry. Co.*, 261 Pa. 273, 104 Atl. 570; *Eline v. Western Maryland Ry. Co.*, 262 Pa. 33, 104 Atl. 857; *Wingert v. Philadelphia, etc., Ry. Co.*, 262 Pa. 21, 104 Atl. 859.

*Tennessee*.—*Tennessee Cent. R. Co. v. Vanhoy*, 226 S. W. 225.

*Texas*.—*Texarkana & Ft. Smith Ry. Co. v. Rea* (Civ. App.), 180 S. W. 945; *Houston Belt & Terminal Ry. Co. v. Hardin Lumber Co.* (Civ. App.), 189 S. W. 518; *Chicago, etc., Ry. Co. v. Johnson* (Civ. App.), 224 S. W. 277; *Hines v. Foreman* (Civ. App.), 229 S. W. 630.

*Virginia*.—*Norfolk & W. Ry. Co. v. Simmons*, 103 S. E. 609.

*Washington*.—*McKinney v. Port Townsend & P. S. Ry. Co.*, 91 Wash. 387, 158 Pac. 107; *Kent v. Walla Walla Valley Ry. Co.*, 108 Wash. 251, 183 Pac. 87.

"In almost every State it is made by statute the duty of an engineer, in approaching a crossing, to sound his whistle or ring his bell, or both. Where the statute imposes the duty, the failure to comply with it is negligence *per se*. Unless the duty is imposed by statute, the failure to give such signals is not as matter of law a neglect of duty. In such a case the failure to give the signals would be a question of fact for the jury to decide whether, under the circumstances, the omission

amounted to a failure to exercise due care." *Lehigh Valley R. Co. v. Kilmer*, 231 Fed. 628, 145 C. C. A. 514.

**Testimony of occupants of automobile.**—In the absence of evidence showing that the noise of the vehicle would drown the sound of the bell upon the locomotive, the courts will not say that the occupants of the vehicle were prevented from hearing the signal of the locomotive, and will not hold as a matter of law that their testimony that no signal was given is valueless. *Advance Transfer Co. v. Chicago, etc., R. Co.* (Mo. App.), 195 S. W. 566.

**Negative testimony.**—Testimony of witnesses that they did not hear the bell rung, or the whistle sounded, will not sustain a finding of the jury that such warnings were not given where the witnesses testified that they were not paying any particular attention to that occurrence and that the signals might have been given without their knowledge, and other witnesses testified positively that the signals were given. *Rickert v. Union Pac. R. Co.*, 100 Neb. 304, 160 N. W. 86. See also, as to negative testimony, *Fayet v. St. Louis & S. F. R. Co.*, 203 Ala. 3, 81 So. 671; *Collins v. Hustis* (N. H.), 111 Atl. 286; *Schaff v. Bearden* (Tex. Civ. App.), 211 S. W. 503; *Hines v. Roan* (Civ. App.), 230 S. W. 1070; *McKinney v. Port Townsend & P. S. Ry. Co.*, 91 Wash. 387, 158 Pac. 107; *Matutinovich v. New York Central R. Co.*, 182 App. Div. 451, 162 N. Y. Suppl. 350.

**Question for jury.**—In case of conflict in the testimony whether the proper warning was given, a question is presented within the province of the jury. *Louisville & N. R. Co. v. Treanor's Adm'r.* 179 Ky. 337, 200 S. W. 634; *Advance Transfer Co. v. Chicago, etc., R. Co.* (Mo. App.), 195 S. W. 566.

78. *Laurisch v. Minneapolis. St. P.*

son injured had actual knowledge of the approach of the train, the failure to give the statutory warning cannot be deemed the proximate cause of his injuries.<sup>79</sup> A railroad is not required to have a gate or flagman or brakeman, or to maintain signals and lights at every crossing of a highway, but only at such places as may be regarded as reasonably necessary for the protection of travelers. What might be considered as reasonably necessary for such protection at one crossing might be deemed wholly needless and unnecessary at another, in each case depending upon the amount of travel upon the highway, the frequency with which trains passed over it, upon the view which could be obtained of trains as they approached the crossing and upon other conditions.<sup>80</sup> It is not incumbent upon a railroad to keep and maintain a gong at a crossing, since other modes of warning might equally suffice, but having so established it and educated travelers to rely upon such a warning, it is the duty of the railroad either to keep it in efficient operation, or to give notice that it is not in working order.<sup>80a</sup>

R. & D. Electric Traction Co., 132 Minn. 114, 155 N. W. 1074; Hines v. Chicago, etc., Ry. Co. (Wash.), 177 Pac. 795.

**Backing a train over a crossing at night without a warning or light, is negligence.** Parker v. Seaboard Air Line Ry. (N. Car.), 106 S. E. 755.

**79.** Central of Ga. Ry. Co. v. McKee, 13 Ga. App. 477, 79 S. E. 378; Frush v. Waterloo, etc., Ry. Co. 185 Iowa 156, 169 N. W. 360.

**Sign.**—The failure to obey a statute requiring a sign at a crossing is not the proximate cause of an injury, where the driver has actual knowledge of the crossing. Hines v. McCullers, 121 Miss. 666, 83 So. 734.

**80.** Opp v. Pryor (Ill.), 128 N. E. 580; Glanville v. Chicago, etc., R. Co.

(Iowa), 180 N. W. 152; Trask v. Boston & M. R. Co., 219 Mass. 410, 106 N. E. 1022; Southern Pac. R. Co. v. Walker (Tex. Civ. App.), 171 S. W. 264; Baker v. Streater (Tex. Civ. App.), 221 S. W. 1039; Chicago, etc., R. Co. v. Shockley (Tex. Civ. App.), 214 S. W. 716; Chicago, etc., Ry. Co. v. Zumwalt (Tex. Civ. App.), 226 S. W. 1080. See also Conant v. Grand Trunk Ry. Co., 114 Me. 92, 95 Atl. 444.

**80-a.** Washington v. Birmingham Southern R. Co., 203 Ala. 295, 82 So. 545; Birmingham So. R. Co. v. Harrison, 203 Ala. 284, 82 So. 534.

**Negligence of flagman.**—See Lake Erie & W. R. Co. v. Griswold (Ind. App.), 125 N. E. 783; Lake Erie & W. R. Co. v. Sanders (Ind. App.), 125 N. E. 793.



**Sec. 581. Negligence of railroad in operation of train — obstruction along railroad.**

While a railroad company cannot be charged with negligence because the railroad station or some other building or object useful in the operation of the railroad obstructs the view of approaching travelers,<sup>81</sup> in some jurisdictions the maintenance of unnecessary obstructions may afford ground for an allegation of negligence.<sup>82</sup> In any event, the existence of obstructions may influence the precautions to be taken by the railroad; if a view of the crossing is obstructed, it is reasonable to expect the train to be propelled at a lower speed and the warning signals to be given with greater care.<sup>83</sup> In an action for injuries arising from a collision with a car standing on a crossing, the automobilist cannot recover on the theory that the railroad company violated the statute forbidding the blocking of a crossing for more than five minutes, where he fails to show how long the car had remained at the crossing.<sup>84</sup>

**Sec. 582. Negligence of railroad in operation of train — defective crossing.**

A duty is imposed on a railroad company to exercise reasonable care to keep its grade crossings in repair for the avoidance of injury, not only to its own passengers, but also to vehicular travelers using the crossing.<sup>85</sup> The duty of the company in this respect is generally affirmed by statute.<sup>86</sup> If,

81. *Corley v. Atchison, etc., Ry. Co.*, 90 Kans. 70, 133 Pac. 555; *Bickert v. Union Pac. R. Co.*, 100 Neb. 304, 160 N. W. 86.

82. *Corley v. Atchison, etc., Ry. Co.*, 90 Kans. 70, 133 Pac. 555; *Burzio v. Joplin, etc., Ry. Co.*, 102 Kans. 287-562, 171 Pac. 351; *Texas & P. Ry. Co. v. Eddleman* (Tex. Civ. App.), 175 S. W. 775.

83. *Schaefer v. Arkansas Valley Interurban Ry. Co.* (Kans.), 179 Pac. 323; *Fimple v. Southern Pac. Co.*, 38 Cal. App. 727, 177 Pac. 871.

84. *Trask v. Boston & M. R. Co.*, 219

Mass. 410, 106 N. E. 1022. And see *Central Indiana Ry. Co. v. Wishard*, 186 Ind. 262, 114 N. E. 970; *Galveston, H. & S. A. R. Co. v. Marti* (Tex. Civ. App.), 183 S. W. 846.

85. *Southern Pac. Co. v. Martinez*, 270 Fed. 770; *Southern Ry. Co. v. Flynt*, 203 Ala. 65, 82 So. 25; *Taylor v. Lehigh Valley R. Co.*, 87 N. J. L. 673, 94 Atl. 566; *Pusey v. Atlantic Coast Line R. Co.* (N. Car.), 106 S. E. 452; *Dobbins v. Seaboard Air Line R. Co.*, 108 S. Car. 254, 93 S. E. 932.

86. *Root v. Connecticut Co.* (Conn.), 108 Atl. 506; *Peterson v. Chicago, etc.,*

on account of a defect in the crossing, the occupant of an automobile using due care is injured, the company must respond in damages.<sup>87</sup> If a defective crossing causes the engine of the automobile to become stalled so that the machine cannot be moved before the arrival of the train the company may be liable.<sup>88</sup> Even after the appointment of a receiver for the company, the duty of maintaining the crossing in a reasonably safe condition continues in force, so that damages may be collected of the receiver.<sup>89</sup> Some difficulty may be encountered in locating the demarkation between the crossing to be maintained by the railroad and the approach thereto to be maintained by the town, county or other highway district.<sup>90</sup>

**Sec. 583. Negligence of railroad in operation of train — private crossing.**

The duty of the employees of a railroad company at a private crossing is different than at a public crossing. Many statutory provisions governing the operation of trains over crossings will be found inapplicable at private crossings.<sup>91</sup> At a private crossing in a rural district, ordinarily the railroad is not required to give any warning of the approach of its cars, nor is it required to slacken the speed thereof, but may run them at any speed consistent with its duty to its own passengers.<sup>92</sup> As to a mere licensee using the private crossing, the duty of the railroad is merely to use reasonable care

R. Co., 185 Iowa 378, 170 N. W. 452; Taylor v. Lehigh Valley R. Co., 87 N. J. L. 673, 94 Atl. 566; Felton v. Midland Continental R. R., 32 N. Dak. 223, 155 N. W. 23.

**Absolutely safe.**—Statutes do not require that the crossing shall be absolutely safe for travelers. Peterson v. Chicago, etc., R. Co., 185 Iowa 378, 170 N. W. 452.

**87.** Still v. Atlantic Coast Line R. Co. (S. Car.), 101 S. E. 836; Smith v. Illinois Cent. R. Co., 162 Wis. 120, 155 N. W. 933.

**88.** Southern Pac. Co. v. Martinez,

270 Fed. 770.

**89.** Louisville & I. R. Co. v. Spreckman, 169 Ky. 385, 183 S. W. 915. See also, Cottam v. Oregon Short Line R. Co. (Utah), 187 Pac. 827.

**90.** See Louisville & I. R. Co. v. Speckman, 169 Ky. 385, 183 S. W. 915.

**91.** Hawkins v. Interurban Ry. Co. 184 Iowa 232, 168 N. W. 234.

**92.** Central of Ga. Ry. v. McKey, 13 Ga. App. 477, 79 S. E. 378; Louisville & I. R. Co. v. Morgan, 174 Ky. 623, 192 S. W. 672; Louisville & I. R. Co. v. Cantrell, 175 Ky. 440, 194 S. W. 353.

to avoid injury after discovery of the peril of the licensee.<sup>93</sup> But it is further held that if the railroad has customarily given signals of the approach of trains to a private crossing, and these were relied on by the persons using the crossing, and one is injured on the crossing by the failure to give the signals, a recovery may be had. It is also held that, if the crossing is one where the presence of persons is to be expected, and therefore anticipated, a lookout duty rests upon the railroad company. If the crossing is a private one, in the country, and it is shown that the public generally uses the crossing with the knowledge and acquiescence of the railroad company, the presence of persons upon the crossing is to be anticipated by those operating the trains.<sup>94</sup> The use of a private crossing by many persons does not put upon the railroad a lookout duty as to them, nor require an anticipation of their presence upon the track or dangerously near to it, unless the use is with the knowledge and acquiescence of the railroad. It may, however, be said that wherever, from the nature and use of a crossing by the public, the duty is imposed upon the railroad of anticipating the presence of persons upon the crossings, the duty of the ones operating a railroad train to maintain a lookout, to give warnings of the approach, and to have the train under control, follows.<sup>95</sup>

**Sec. 584. Negligence of railroad in operation of train — permissive use of tracks of railroad company.**

Where a person driving an automobile is injured at a point where the railroad crosses a street or highway and such injury is due to the negligence of the company, it is liable therefor. And where such company simply permits another railroad company to run cars upon its tracks, it is declared to be the general rule that the former is liable for damages caused by the negligence of the company enjoying the per-

93. *Central of Ga. Ry. Co. v. McKey*, 13 Ga. App. 477, 79 S. E. 378; *Whitner v. Southern R. Co.*, 101 S. Car. 441, 85 S. E. 1064.

94. *Louisville & I. R. Co. v. Morgan*, 174 Ky. 633, 192 S. W. 672; *Louisville*

& I. R. Co. v. *Cantrell*, 175 Ky. 440, 194 S. W. 353; *Louisville, etc., R. Co. v. Clore*, 183 Ky. 261, 209 S. W. 55.

95. *Louisville & I. R. Co. v. Morgan*, 174 Ky. 633, 192 S. W. 672.

missive use. In this connection, in an action against a railroad company for an injury sustained at a grade crossing by one riding in an automobile, it was decided that the case was for the jury upon evidence that the safety gates at the crossing where the accident occurred were raised, that there was no watchman on duty, that no warning was given, that the automobile stopped at a proper place and was immediately started again when a trainman of the defendant motioned them to proceed, and that it was struck before it got across the tracks.<sup>96</sup>

96. *Sanders v. Pennsylvania R. Co.*, 225 Pa. St. 105, 73 Atl. 1010.

## CHAPTER XXII.

## COLLISIONS WITH STREET CARS.

- SECTION** 585. Relative rights of street cars and automobiles — at intersecting streets.
586. Relative rights of street cars and automobiles — between crossings.
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588. Relative rights of street cars and automobiles — burden of proof as to negligence.
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601. Driving auto along track — car from rear.
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603. Speed and control of automobile — approaching intersecting streets.
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607. Stopping auto near track.
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609. Reliance on proper care by street railway.
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614. Function of jury.
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618. Negligence of railway — stopping, if necessary.
619. Negligence of railway — warning of approach.
620. Negligence of railway — private crossings.
621. Liability of street railway company to its passenger.
622. Liability of auto driver.

### Sec. 585. Relative rights of street cars and automobiles — at intersecting streets.

At intersecting streets, the general rule is that a street car crossing in one direction and an automobile approaching at right angles have equal right to the use of the crossing.<sup>1</sup>

1. *Idaho*.—Holmes v. Sandpoint & I. R. Co., 25 Idaho 345, 137 Pac. 532.

*Illinois*.—Hedmark v. Chicago Rys. Co., 192 Ill. App. 584; Johnson Oil Refining Co. v. Galesburgh, etc., Power Co., 200 Ill. App. 392.

*Maine*.—Cobb v. Cumberland County Power & Light Co., 117 Me. 455, 104 Atl. 844.

*Maryland*.—United Rys. & Elec. Co. v. State to Use of Mantik, 127 Md. 197, 96 Atl. 261.

*Minnesota*.—Syck v. Duluth St. Ry. Co., 177 N. W. 944.

*New York*.—Harlan v. Joline, 77 Misc. (N. Y.) 184, 136 N. Y. Suppl. 72; Ebling Brewing Co. v. Linch, 80 Misc. (N. Y.) 517, 141 N. Y. Suppl. 480; James Everard's Breweries v. New York Rys. Co., 151 N. Y. Suppl. 905.

*Canada*.—Carleton v. City of Regina, 1 D. L. R. 778.

**"A street car has no paramount right of way over other vehicles and pedestrians at the intersections of streets where the car tracks cross other streets than the one they run along. The preference of right of way accorded to street cars upon city streets, especially between street crossings, and in respect to vehicles passing in the same or opposite directions to the cars, within the space embraced within their tracks, does not apply at street crossings, and their rights to the use of the streets at crossings are precisely the same as those of pedestrians and other vehicles crossing their tracks there. Neither has a superior right to the other. The car has a right to cross, and must cross the street; and a vehicle or pedestrian has the right to cross and must cross the railroad track. The right of each**

must be exercised with due regard to the right of the other, in a reasonable and careful manner, and so as not unreasonably to abridge or interfere with the rights of the other. The trolley car and the driver may each acquire a right of way to cross at street intersections, though it is suggested that a driver might be negligent though he has a right of way if he persists in crossing when he perceives or ought to perceive that the motorman is not yielding to his just claim. It is incumbent upon a street railway company in operating its cars at public crossings to use ordinary care to avoid injury, and this rule is applicable in thickly populated or much-used districts regardless of whether or not there is a statute or a municipal ordinance limiting the rate of speed. While a street railway company has a preferential right of way it has no right to proceed upon the assumption that it may take no heed of the probability of encountering vehicles at crossings. A motorman in approaching crossings must proceed with such care and caution that he can reduce to the minimum the danger to others. A street car should be kept under the reasonable control of the motorman when crossing a street, and persons with or without vehicles, passing over the track at street crossings, may assume that care will be used to reduce the speed at such crossings. The railroad company must recognize and respect the equal rights of all others, and cause its servants who operate the cars to exercise the care which the increased danger arising under the travel at street crossings demand, and others using the street must take all reasonable and proper precaution to avoid

Each must exercise reasonable care to avoid a collision,<sup>2</sup> and neither can heedlessly continue his course on the assumption that the other will give way.<sup>3</sup> But, if one reaches the inter-

accidents. If it is the rule that cars must be under control at street crossings, this control, in the absence of legislative requirements, must be a reasonable control, depending upon the circumstances, and not an absolute control so that the car may be stopped immediately under all circumstances. If the motorman sees a clear track and has no occasion to stop and no reason to anticipate danger to another, it would not be negligence to maintain the usual rate of speed, even over a crossing. But if he sees, or ought to see, persons or vehicles thereon, not able to get out of his way readily, it would certainly be negligence not to have such control of his car as to be able to stop before reaching such crossing. The general rule is that at a street crossing, or at a place used as a street crossing, the motorman in charge of a car approaching one discharging passengers is bound to keep a sharp lookout for passengers or other persons who may attempt to cross the tracks behind the standing or moving car, to have his car under such control that he can stop it upon the appearance of danger, and to give such signals as will usually protect travelers who are in the exercise of ordinary prudence." *Nellis on Street Railways* (2d Ed.), § 388.

**While street cars and other vehicles have equal rights at street intersections, a vehicle is not equally entitled to cross at the same moment the car is crossing without regard to the speed at which the car is running.** *Hedmark v. Chicago Rys. Co.*, 192 Ill. App. 584.

**A fast suburban trolley line operated over the tracks of an ordinary railroad has a paramount and superior right of way over vehicles at street crossings.** *Letzter v. Ocean Elec. Ry.*

*Co.*, 192 N. Y. App. Div. 114, 182 N. Y. Suppl. 649. But where the railway is not operated on its own right of way, their rights are more equal. *Sutton v. Virginia Ry. & P. Co.*, 125 Va. 449, 99 S. E. 670.

**2.** *Hoff v. Los Angeles-Pac. Co.*, 158 Cal. 596, 112 Pac. 53; *Garrett v. Peoples R. Co.*, 6 Penn. (Del.) 29, 64 Atl. 254; *Joyce v. Interurban R. Co.*, 172 Iowa, 727, 154 N. W. 936; *Louisville Ry. Co. v. Budwell*, 189 Ky. 424, 224 S. W. 1065; *United Rys. & Elec. Co. v. State to Use of Mantik*, 127 Md. 197, 96 Atl. 261; *Travelers Indemnity Co. v. Detroit United Ry.*, 193 Mich. 375, 159 N. W. 528; *Granader v. Detroit United Ry.*, 206 Mich. 367, 171 N. W. 362; *Kirk v. St. Paul City Ry. Co.* (Minn.), 170 N. W. 517; *Reed v. Tacoma Ry. & P. Co.* (Wash.), 188 Pac. 409. "It was just as incumbent upon the motorman to exercise due care in running the cars over the crossing, as it was upon the chauffeur to act prudently in the management of the motor truck as it drew near to that place of possible danger. A due regard for the interests of those having an equal right to the use of the crossing required that the usual signal should have been given as the cars approached the junction of the streets, and that their speed should have been reduced and under ready control, especially as the presence of trees in foliage obstructed the view of the track from the position which the drivers of motor trucks and other vehicles are accustomed to occupy." *United Rys. & Elec. Co. v. State to Use of Mantik*, 127 Md. 197, 96 Atl. 261.

And see section 591.

**3.** *Kirk v. St. Paul City Ry.*, 141 Minn. 457, 170 N. W. 517; *James Everard's Breweries v. New York Rys. Co.*, 151 N. Y. Suppl. 905.

section clearly in advance of the other, in the absence of statute or ordinance regulating the priority, the law generally permits him to continue his course.<sup>4</sup> A statute or a municipal ordinance may, however, give the street railway cars a priority which is to be respected by other travelers.<sup>5</sup> Or traffic on certain busy streets may be preferred to that upon less busy cross streets.<sup>6</sup> A traffic statute requiring the driver of a vehicle approaching the intersection of a street, to grant the right of way to any vehicle coming from the right, does not necessarily apply to the motorman of a street car,<sup>7</sup> though in some states such a regulation may be applied as between a street car and automobile.<sup>8</sup> Regulations of this

4. *Margolis v. Chicago Rys. Co.*, 205 Ill. App. 286; *Reed v. Public Service Ry. Co.*, 89 N. J. L. 431, 99 Atl. 100; *Harlan v. Joline*, 77 Misc. (N. Y.) 184, 136 N. Y. Suppl. 72. "The driver of the automobile would have the right of way if, proceeding at a rate of speed which under the circumstances of the time and locality was reasonable, he should reach the point of crossing in time to go safely upon the tracks in advance of the approaching car; the latter being sufficiently distant to be checked, and, if need be, stopped, before it should reach him." *Reed v. Public Service Ry. Co.*, 89 N. J. L. 431, 99 Atl. 100.

5. *Walker v. Rodriguez*, 139 La. 251, 71 So. 499.

6. *Johnson Oil Refining Co. v. Galesburgh, etc.*, *Power Co.*, 200 Ill. App. 392; *Louisville Ry. Co. v. Budwell*, 189 Ky. 424, 224 S. W. 1065; *Cook v. United Rys. & Elec. Co. of Baltimore*, 132 Md. 553, 104 Atl. 37; *Boston Ins. Co. v. Brooklyn Heights R. Co.*, 182 N. Y. App. Div. 1, 169 N. Y. Suppl. 251; *Ebling Brewing Co. v. Linch*, 80 Misc. (N. Y.) 517, 141 N. Y. Suppl. 480.

**Question for jury as to right of way.**—In an action for damages arising from a collision between an automobile proceeding in an easterly direction and a trolley car proceeding in a northerly direction, the court refused to charge plaintiff's request that

if the front of the automobile was from twenty to twenty-five feet from the railroad track at the time when the street car was from one-half to three-quarters of a block away, the trolley car did not have the right of way, and further refused to charge that if the automobile got within the square formed by the intersection of the streets before the trolley car, that at that point the trolley car would not have, as matter of law, the right of way. *Held*, that if such were the facts as the jury might have found, it could not be said as a matter of law that the trolley car had the right of way, but that would be a question of fact depending on the speed at which the respective vehicles were approaching, and the court instead of declining the request should have instructed the jury that whether the trolley car did then have the right of way depended on whether or not if the vehicles proceeded without changing their speed, the trolley car would have reached the path of the automobile before that vehicle would have cleared the street car track. *Boston Ins. Co. v. Brooklyn Heights R. Co.*, 182 N. Y. App. Div. 1, 169 N. Y. Suppl. 251.

7. *Reed v. Public Service Ry. Co.*, 89 N. J. L. 431, 99 Atl. 100. And see section 246.

8. *Syck v. Duluth St. Ry. Co.* (Minn.), 177 N. W. 944.



character, however, do not relieve the party entitled to priority from the duty of exercising reasonable care to avoid injury to other travelers. That is to say, he cannot blindly rely on his right of priority.<sup>9</sup> Nor are such regulations to be extended to such an extent as to place a practical prohibition upon traffic not entitled to priority.<sup>10</sup>

**Sec. 586. Relative rights of street cars and automobiles — between crossings.**

Between street crossings, the street railway cars are generally accorded a preferential right to use the space allotted for their tracks.<sup>11</sup> That is, an automobile or other traveler

9. Syck v. Duluth St. Ry. Co. (Minn.), 177 N. W. 944; El Paso Elec. Ry. Co. v. Benjamin (Tex. Civ. App.), 202 S. W. 996.

10. Cook v. United Rys. & Elec. Co. of Baltimore, 132 Md. 553, 104 Atl. 37.

11. Capital Tr. Co. v. Crump, 35 App. D. C. 169; Coggin v. Shreveport Rys. Co., 147 La. 84 So. 902.

"A street railway company has not the exclusive right to the use of its tracks, but it has a paramount right to that of others traveling on the highway and using it, including that portion occupied by the company's tracks, in common, in that portion of the highway taken up by its tracks which is between intersecting streets or street crossings. Its cars have a preference in the streets, and while they must be managed with care so as not to negligently injure persons and property in the streets, pedestrians and persons riding or driving on the highway must use reasonable caution and diligence to keep out of their way, and not unnecessarily obstruct or interfere with their passage. This rule is founded upon the fact that the car is confined to a fixed track and cannot turn out or leave the track, and that the convenience of the individual should be subordinated to the convenience and accommodation of the

public. The street railway company has no exclusive right to occupancy of that portion of the highway on which its tracks are located. Other travelers have an equal right to use this, as well as different portions of the way, not only for crossing, but for progressing, subject only to the restriction that they must not unreasonably obstruct the street cars, which by the limitations of their construction and legal rights can proceed only on their rails. Although street cars have a superior right of way to general travel on the streets, at places other than crossings, the general public have the right to use and travel upon the entire street, including that portion of it on which the car tracks are laid, and are in no sense to be treated as trespassers for so doing. No part of a public street is withdrawn from use by placing a street railway track upon it, such street is merely burdened with an additional easement in favor of the street railway company, with the preferential right of passage over it. The right and duty of pedestrians, and the right and duty of the person in charge of the motive power of a street car when crossing streets, are reciprocal, and each is bound to use equal diligence to avoid collision. It is incumbent on a street railway company to use such reasonable care in

may use the part of the street occupied by tracks, but he should give way to the prior right of a street car upon its approach.<sup>12</sup> The motorman of the street car, however, must not willfully run into the vehicle.<sup>13</sup> When meeting an automobile, the street car must be accorded the right of way along its tracks; it cannot turn out, and the automobile must give way to permit the passage.<sup>14</sup>

**Sec. 587. Relative rights of street cars and automobiles — street railway company not an insurer.**

It is, of course, a fundamental principle in the law of street railway companies that they do not insure travelers from injury from their cars.<sup>15</sup> On the contrary, it is only liable for damages resulting from a collision between one of its cars and a motor vehicle, when some negligence on its part is shown and when absence of contributory negligence on the part of the occupants of the vehicle exists.<sup>16</sup> When the accident is the result of an inevitable accident, no liability is

operating its cars, as to speed, giving signals, and slowing up and stopping the car when danger is imminent, as is demanded by the surrounding circumstances, and persons using the streets are also bound to stop, and, if need be turn out of the tracks, in the presence of danger. Street railway companies and travelers must each use the street with reasonable regard for the safety and convenience of the other." *Nellis on Street Railways* (2d Ed.), § 387.

12. *Busch v. Los Angeles Ry. Corp.* 178 Cal. 536, 174 Pac. 665, 2 A. L. R. 1607; *Pantagis v. Seattle El. Co.*, 63 Wash. 159, 114 Pac. 1044.

13. *Capital Tr. Co. v. Crump*, 35 App. D. C. 169.

14. *Savage v. Public Service Ry. Co.*, 89 N. J. L. 555, 99 Atl. 383; *Pantages v. Seattle Elec. Co.*, 55 Wash. 453, 104 Pac. 629. "A traveler on a public street may lawfully use any part of the street he pleases when the same is not in the immediate use of another, even though there is no other

requirement for him so to do than that of convenience. He must realize, of course, that in so far as street cars are concerned they can travel over only a given space, and that he must avoid this space on the approach of a car. But his right to use any part of the street when not in use by a car is not to be governed by the question of necessity." *Pantages v. Seattle El. Co.*, 63 Wash. 159, 114 Pac. 1044.

15. *Winter v. British Columbia Elec. R. W. Co.*, 13 W. L. R. (Canada) 352.

16. *Arkansas*.—*Miller v. Ft. Smith Light & Tract. Co.*, 136 Ark. 355, 206 S. W. 329.

*Connecticut*.—*Bodek v. Connecticut Co.*, 111 Atl. 590.

*Delaware*.—*Garrett v. Peoples R. Co.*, 6 Penn. 29, 64 Atl. 254.

*Massachusetts*.—*Lynch v. Boston Elevated Ry. Co.*, 224 Mass. 93, 112 N. E. 488; *Boyd v. Boston Elevated Ry. Co.*, 224 Mass. 199, 112 N. E. 607.

*Michigan*.—*King v. Grand Rapids Ry. Co.*, 176 Mich. 645, 143 N. W. 38.

imposed on the company.<sup>17</sup> The fact of the collision does not ordinarily, of itself, establish either the negligence of the railroad company or the absence from contributory negligence of the complaining party.<sup>18</sup> If neither party is guilty of negligence contributing to the collision, neither is liable for the damages sustained by the other.<sup>19</sup> If a traveler unexpectedly rushes in front of a street car which is run at a proper speed and with due precautions for the rights of other travelers, and the motorman is unable to stop the car before a collision results, the accident is chargeable to the contributory negligence of the traveler or to inevitable accident, and the street railway company is not liable.<sup>20</sup> But the fact that, after the discovery of the peril of an automobilist on a street car track, the motorman is unable to stop his car before striking the machine, does not absolve the company from liability for its prior negligence. That is to say, if the car was running at an excessive speed, the company is chargeable with negligence, though it was unable to stop after seeing a traveler dangerously near the track.<sup>21</sup>

*Nebraska*.—*Berto v. Omaha, etc.*, Co., 178 N. W. 912.

*Pennsylvania*.—*Taylor v. Philadelphia Rapid Transit Co.*, 55 Pa. Super. Ct. 607.

*Washington*.—*Pantages v. Seattle Elec. Co.*, 55 Wash. 453, 104 Pac. 629.

*Canada*.—*Winter v. British Columbia Elec. R. W. Co.*, 13 W. L. R. (Canada) 352.

17. *Mobile Light & R. Co. v. Harris Grocery Co.* (Ala. App.), 84 So. 867.

**Unavoidable accident.**—Where an automobile was on a street railway track the company was held not liable in damages for an injury due to a collision between a tram car and the automobile, it appearing that the defendant's car was not running at an excessive rate of speed: that the motorman was competent, and that from the time he received a signal that the motor car was in trouble he not only did everything that a reasonable man could be expected to do but every-

thing that he could possibly do to avoid the accident, and there being no defect in the car equipment. *Winter v. British Columbia Elec. R. W. Co.*, 13 W. L. R. (Canada) 352.

18. *Busch v. Los Angeles Ry. Corp.* 178 Cal. 536, 174 Pac. 665, 2 A. L. R. 1607; *Garrett v. Peoples R. Co.*, 6 Penn. (Del.) 29, 64 Atl. 254; *Texas Electric Ry. Co. v. Crump* (Tex. Civ. App.), 212 S. W. 827.

19. *Boyd v. Boston Elev. Ry. Co.* 224 Mass. 199, 112 N. E. 607.

20. *Dale v. Denver City Tramway Co.*, 173 Fed. 787, 97 C. C. A. 511; *West Helena Consol. Co. v. McCray*, 256 Fed. 753; *Vanek v. Chicago City Ry. Co.*, 210 Ill. App. 148; *Good Roads Co. v. Kansas City Rys. Co.* (Mo. App.), 217 S. W. 858; *Lindley v. Fries, etc., Co.*, 153 N. Car. 394, 69 S. E. 274; *Gooderham v. Toronto R. Co.* 80 W. N. (Canada), 3, 22 D. L. R. 898.

21. *Chappell v. United Rys. Co.*, 174 Mo. App. 126, 156 S. W. 819.

**Sec. 588. Relative rights of street cars and automobiles — burden of proof as to negligence.**

The common law rule, as a general proposition, required that the plaintiff in an action of negligence should establish, not only the negligence of the defendant, but also his own absence from contributory negligence.<sup>22</sup> While the common law rule remains in force in some jurisdictions,<sup>23</sup> the tendency in recent years has been to change the rule as to contributory negligence and to place the burden of that issue on the defendant.<sup>24</sup> Indeed statutory provisions may be enacted to the extent of raising in some cases a presumption of negligence on the part of a street railway company when one of its cars has struck an automobile.<sup>25</sup> Such a presumption is rebutted when it is shown that the company did everything possible to avoid the accident.<sup>26</sup>

**Sec. 589. Relative rights of street cars and automobiles — when contributory negligence not necessarily a bar.**

The general rule is that any contributory negligence on the part of the driver of an automobile contributing to the accident will be an absolute defense to an action against a street railway company for injuries received in a collision between his machine and one of its street cars.<sup>27</sup> Modern innovations

22. "The general rule is that a plaintiff, in an action for negligence, must show that his injuries were not caused by his own want of reasonable care, and whether he exercised such care, and, if not, whether his failure to do so contributed essentially to his injury, are questions for the jury to determine from a consideration of all the circumstances of the case." *Clarke v. Connecticut St. Ry. Co.*, 83 Conn. 219, 76 Atl. 523.

23. *Johnson Oil Refining Co. v. Galesburg, etc., Power Co.*, 200 Ill. App. 392; *Boyd v. Boston Elevated Ry. Co.*, 224 Mass. 199, 112 N. E. 607.

24. *Bailey v. Worcester Consol. St. Ry. Co.*, 228 Mass. 477, 117 N. E. 824; *Day v. Duluth St. R. Co.*, 121 Minn.

445, 141 N. W. 795; *Dreger v. International Ry. Co.*, 190 N. Y. App. Div. 570, 180 N. Y. Suppl. 436; *Gagon v. Worcester Consol. St. Ry. Co.*, 231 Mass. 160, 120 N. E. 381; *Hersley v. Kansas City Rys. Co.* (Mo. App.), 214 S. W. 287.

25. *Murphy v. Georgia Ry. & Power Co.*, 146 Ga. 297, 91 S. E. 108; *Krebs v. Pascagoula St. Ry. & Power Co.*, 117 Miss. 771, 78 So. 753.

26. *Krebs v. Pascagoula St. Ry. & Power Co.*, 117 Miss. 771, 78 So. 753.

27. *Calvert v. Detroit United Ry.*, 202 Mich. 311, 168 N. W. 508; *Vogt v. United Rys. Co. of St. Louis* (Mo. App.), 219 S. W. 997; *Sutton v. Virginia Ry. & P. Co.*, 125 Va. 449, 99 S. E. 670.

have in some States relaxed the strictness of the common law rule. In some States, contributory negligence is not a defense to "wanton" conduct on the part of the employees of the street railway company.<sup>28</sup> And in a few jurisdictions a doctrine of "comparative" negligence has been established, which permits the jury to compare the negligence of the automobilist and that of the street railway company and in some cases to give a verdict for the plaintiff though he might have been guilty of some negligence contributing to the accident.<sup>29</sup> The doctrine of "comparative" negligence in some States is applied in case of actions for personal injuries and not in actions for injuries to property. In such a situation, if a collision has occurred between a street car and an automobile, the contributory negligence of the driver will not necessarily bar him from recovering for his personal injuries, but will be an absolute bar to a recovery for injuries to the vehicle.<sup>30</sup>

**Sec. 590. Relative rights of street cars and automobiles — proximate cause.**

One of the fundamental rules of the law of negligence is that neglect of care on the part of the plaintiff will not bar his recovery, unless such neglect is a proximate cause of the injury. A street railway company, conceding its negligence, is liable only for such consequences as naturally follow from its neglect.<sup>31</sup> And an automobilist injured by a collision with a street car may be permitted to recover for his injuries, though he is guilty of some act of commission or omission, so long as such improper conduct is not a proximate contributing cause of the collision.<sup>32</sup> And, ordinarily, whether the in-

28. See *Mobile Light & R. Co. v. McEvoy*, 65 Ala. App. 46, 75 So. 191; *Alabama Power Co. v. Brown* (Ala.), 87 So. 608.

29. *Columbus R. Co. v. Waller*, 12 Ga. App. 674, 78 S. E. 52.

30. *Krebs v. Pascagoula St. Ry. & Power Co.*, 117 Miss. 771, 78 So. 753.

31. *Birmingham R. L. & P. Co. v. Ely*, 183 Ala. 382, 62 So. 816.

**Injury to machine at curb.**—A street railway company may be liable for in-

juries to an automobile which is struck by a truck thrown against it by a street car. *Washington, etc., Ry. Co. v. Fingles*, 135 Md. 574, 109 Atl. 431.

32. *Birmingham R. L. & P. Co. v. Ely*, 183 Ala. 382, 62 So. 816; *Mobile Light & R. Co. v. Harris Grocery Co.* (Ala. App.), 84 So. 867; *Hygienic Ice Co. v. Connecticut Co.*, 90 Conn. 21, 96 Atl. 152; *Cobb v. Cumberland County Power & Light Co.* (Me.), 104 Atl.

juries of the plaintiff are the proximate result of his failure to use proper care, is a question for the jury.<sup>33</sup> For example, the fact that the automobilist does not have his car registered and licensed according to the statutes on the subject, is not generally considered a proximate cause of the collision, and a recovery may be permitted notwithstanding the violation of the law.<sup>34</sup> In cases of collisions between motor vehicles and street cars, the question of proximate cause is frequently associated with the "last clear chance" doctrine.<sup>35</sup> The fact that the collision would not have occurred but for the negligence of the driver of the automobile does not necessarily excuse the street railway company for the results of its concurring negligence, so far as a passenger in the vehicle is concerned; and such passenger may be permitted to recover against both the railway company and the driver of the vehicle, as joint tort-feasors.<sup>36</sup>

### Sec. 591. General duty of automobilist to exercise due care.

The general rule applied in actions of negligence arising out of a collision between a street car and a motor vehicle on a public highway, is that the driver of the vehicle is under an obligation to exercise reasonable care for the safety of himself and his machine.<sup>37</sup> The reasonable care required of an

844; *Clyde v. Southern Pac. Utilities Co.* (S. Car.), 96 S. E. 116; *Dallas Ry. Co. v. Eaton* (Tex. Civ. App.), 222 S. W. 318.

33. *Clarke v. Connecticut St. Ry. Co.*, 83 Conn. 219, 76 Atl. 523; *Donlin v. Detroit United Ry.*, 198 Mich. 327, 164 N. W. 447; *Clyde v. Southern Pac. Utilities Co.*, 109 S. Car. 290, 96 S. E. 116; *Dallas Ry. Co. v. Eaton* (Tex. Civ. App.), 222 S. W. 318.

34. Sections 126, 610.

35. Section 613.

36. *Shield v. F. Johnson & Son Co.*, 132 La. 773, 61 So. 787.

37. *Alabama*.—*Ross v. Brannon*, 198 Ala. 124, 73 So. 439.

*Arkansas*.—*Pine Bluff Co. v. Crunk*, 129 Ark. 39, 195 S. W. 397.

*California*.—*Commonwealth v. Bond-*

*ing, etc., Ins. Co. v. Pacific Elec. Ry. Co.* (Cal. App.), 184 Pac. 29.

*Delaware*.—*Garret v. Peoples R. Co.*, 6 Penn. 29, 64 Atl. 254.

*Illinois*.—*McEniry v. Tri-City Ry. Co.*, 179 Ill. App. 132; *Ashland Auto Garage v. Chicago Rys. Co.*, 183 Ill. App. 207.

*Kansas*.—*Williams v. Iola Elec. R. Co.*, 102 Kans. 268, 170 Pac. 397.

*Maryland*.—*Glick v. Cumberland & W. Elec. Ry. Co.*, 124 Md. 308, 92 Atl. 778; *State to Use of Stumpf v. Baltimore & B. Elec. Rys. Co.*, 133 Md. 411, 105 Atl. 532.

*Massachusetts*.—*Gagnon v. Worcester Consol. St. Ry. Co.*, 231 Mass. 160, 120 N. E. 381.

*Michigan*.—*Colborne v. Detroit United Ry.*, 177 Mich. 139, 143 N. W.

autoist may vary according to the circumstances, for "reasonable" or "due" care implies such a degree of vigilance as is commensurate with the dangers involved.<sup>38</sup> Thus, a traveler about to cross a street railway track need not, perhaps, exercise such great vigilance as when he is crossing the track of a steam railroad,<sup>39</sup> for the railroad trains are run at greater speed and cannot be controlled or stopped as readily as electric surface cars.<sup>40</sup> When approaching a

32; *Weil v. Detroit United Ry.*, 186 Mich. 614, 152 N. W. 959; *Travelers Indemnity Co. v. Detroit United Ry.*, 193 Mich. 375, 159 N. W. 528.

*Missouri.*—*Byerly v. Metropolitan St. Ry. Co.*, 172 Mo. App. 470, 158 S. W. 413.

*New York.*—*Clark v. New York Rys. Co.*, 78 Misc. 646, 138 N. Y. Suppl. 824.

*Pennsylvania.*—*Odherst v. Webster M. & B. & F. C. S. R. Co.*, 50 Pa. Super. Ct. 525.

*Rhode Island.*—*Hermann v. Rhode Island Co.*, 36 R. I. 447, 90 Atl. 813; *Frery v. Rhode Island Co.*, 37 R. I. 96, 91 Atl. 1.

*Texas.*—*El Paso Ry. Co. v. Terrazas (Civ. App.)*, 208 S. W. 387.

*Utah.*—*Goan v. Ogden, etc., Ry. Co.*, 51 Utah 285, 169 Pac. 949.

*Washington.*—*Devitt v. Puget Sound Traction, Light & Power Co.*, 106 Wash. 449, 180 Pac. 483, *affirmed on rehearing*, 185 Pac. 583.

*Wisconsin.*—*Bertrand v. Milwaukee Electric Ry. & L. Co.*, 156 Wis. 639, 146 N. W. 915.

38. *Taylor v. Pacific Electric Ry. Co.*, 172 Cal. 638, 158 Pac. 119; *Garratt v. Peoples R. Co.*, 6 Penn. (Del.) 29, 64 Atl. 254; *North State Lumber Co. v. Charleston, etc., Co. (S. Car.)*, 105 S. E. 406.

39. See chapter XXI.

40. *Schmidt v. Mobile Light & R. Co. (Ala.)*, 87 So. 181. "While it is true that one about to cross the track of a street railway is, . . . 'not held to that high degree of care which is required in the case of an ordinary

steam railroad running through the country, on which heavy trains of cars are moved at a high rate of speed and cannot be quickly stopped or controlled,' . . . he must, of course, exercise such care as is reasonable under all the conditions, rights and circumstances, . . . and, if he fails to do so with the result that his own negligence contributes to the accident in which he is injured, he cannot recover, in the absence of the application to the other party of the doctrine of what is called in our decisions the 'last clear chance' doctrine. The care required has been declared to be 'that degree of care which people of ordinarily prudent habits—people in general—could be reasonably expected to exercise under the circumstances of a given case. . . . 'that degree of care and prudence and good sense which men who possess those qualities in an ordinary or average degree exercise' under similar conditions." *Hoff v. Los Angeles-Pac. Co.*, 158 Cal. 596, 112 Pac. 53. "Contrary to the rule applicable to ordinary railroads, we have held that it is not negligence in itself to fail to stop, look, and listen before crossing a street car track. This, of course, does not mean that a person so crossing may act blindly, without giving any heed to his own safety; it means simply that the rule is not one of uniform application to such a situation; that a person is not to be charged with negligence from the fact alone that he did not stop, look, and listen. If the conditions are such that it would be

crossing where the view is more or less obstructed, the driver of a motor vehicle is bound to avail himself of his knowledge of the locality and the presence of danger, and to exercise that degree of caution which an ordinarily careful and prudent person would exercise under the circumstances.<sup>41</sup> If he drives his machine upon the street railway track without taking any precaution to ascertain whether a car is approaching, he is guilty of negligence as a matter of law.<sup>42</sup> In particular States statutory enactment may change the rule as to the degree of care by requiring the driver to exercise a "high" or "highest" degree of care.<sup>43</sup>

### Sec. 592. Looking for approaching street cars — in general.

The driver of an automobile when approaching a street intersection along which street cars are running, cannot continue his course heedless of approaching street cars. Although street railways and other travelers may have equal rights at intersecting streets,<sup>44</sup> it is the duty of automobile travelers to exercise reasonable care for their own safety.<sup>45</sup>

the duty of an ordinarily prudent person to stop, look, and listen before crossing the track, then the person crossing must do so, else be charged with negligence for not so doing. Stated in another way, the omission of the duty is but a fact to be weighed with all other facts and circumstances surrounding the case in determining the question of negligence or contributory negligence." *Johnson v. City of Seattle* (Wash.), 194 Pac. 417.

41. *Garrett v. Peoples R. Co.*, 6 Penn. (Del.) 29, 64 Atl. 254, and see section 279.

42. *Bardshar v. Seattle Elec. Co.*, 72 Wash. 200, 130 Pac. 101; *Briscoe v. Washington-Oregon Corp.*, 84 Wash. 29, 145 Pac. 995.

43. *Threadgill v. United Rys. Co. of St. Louis*, 279 Mo. 466. 214 S. W. 161; *Davis v. United Rys. Co.* (Mo. App.), 218 S. W. 357; *Foy v. United Rys. of St. Louis* (Mo. App.), 226 S. W. 325. See also, section 281. See also, *Edmonston v. Barrock* (Mo. App.), 230 S. W. 650.

44. Section 585.

45. Duty to look and listen.— "There seems to be no universal rule as to the liability for contributory negligence, as a matter of law, in persons driving upon or across the tracks of a street railroad company, without looking or listening for approaching cars. In *Pennsylvania* and some other jurisdictions the courts apply the rule in all cases, whether at street car crossings or elsewhere, that a failure to look and listen, and, under some circumstances, to stop, is negligence *per se*, which will bar a recovery for injuries sustained by a collision with a car. In *New Jersey* and some other states, however, the principle is held to be well established that it is not negligence in law for a person driving a vehicle, in approaching a street crossing over which he intends to cross, to fail to look and listen for an approaching street car, in order to avoid danger from it. But, while it is held, as in *New York*, that a person is



Reasonable care requires, at the least, that the driver of a motor vehicle shall look for approaching street cars before crossing a railway track in the street.<sup>46</sup> Sometimes, his duty

not necessarily negligent in failing to look and listen for approaching street cars before attempting to drive across the track of a street railroad it is held there and elsewhere that the traveler, as well as those operating the car, is bound to use that degree of care which ordinarily prudent men would use under the circumstances, and that, a person of ordinary prudence would have looked and listened, failure to do so constitutes negligence as a matter of fact. It has also been quite generally held that one who drives upon a street car track in front of an approaching trolley car, without looking or listening, and is injured by an ensuing collision, is guilty of such contributory negligence as will bar a recovery, when, if he had looked and listened, he might or must have known of the dangerous proximity of the car. But a driver or one riding with him is not bound under all circumstances to take the same precautions before driving upon street railway tracks as is required of a pedestrian. If the driver of a vehicle does not know of the existence of street railway tracks upon the street which he is about to cross, and there is nothing in the physical conditions to impute to him such knowledge, no warning signal being sounded, the law does not impose an absolute duty upon him to look and listen for an approaching car before attempting to make the crossing, and for failure to do so he is not chargeable with contributory negligence as a matter of law. The driver of a vehicle upon the streets of a city has a right to rely upon the law which requires the street railway company to give timely warnings of the approach of a car." *Nellis on Street Railways* (2d Ed.), § 416.

46. *United States*.—*Dale v. Denver*

*City Tramway Co.*, 173 Fed. 787, 97 C. C. A. 511.

*Alabama*.—*Ross v. Brannon*, 198 Ala. 124, 73 So. 439.

*California*.—*Hoff v. Los Angeles Pac. Co.*, 158 Cal. 596, 112 Pac. 53; *Loftus v. Pacific Elec. Ry. Co.*, 166 Cal. 464, 137 Pac. 34.

*Connecticut*.—*Greenhill v. Connecticut Co.*, 92 Conn. 560, 103 Atl. 646.

*Illinois*.—*Swancutt v. Trout Auto Livery Co.*, 176 Ill. App. 606; *Gray v. Chicago, etc., R. Co.*, 155 Ill. App. 428; *Bastien v. Chicago City Ry. Co.*, 189 Ill. App. 369; *Hack v. Chicago Interurban Traction Co.*, 201 Ill. App. 572; *Carden v. Chicago Rys. Co.*, 210 Ill. App. 155.

*Iowa*.—*Flannery v. Interurban Ry. Co.*, 171 Iowa, 238, 153 N. W. 1027; *Bensing v. Waterloo, etc., R. Co.*, 179 N. W. 835.

*Kansas*.—*Shelton v. Union Traction Co.*, 99 Kans. 34, 160 Pac. 977.

*Louisiana*.—*Walker v. Rodriguez*, 139 La. 251, 71 So. 499.

*Maryland*.—*State to Use of Stumpf v. Baltimore & B. Elec. Rys. Co.*, 133 Md. 411, 105 Atl. 532.

*Michigan*.—*Puffer v. Muskegon, etc., Co.*, 173 Mich. 193, 139 N. W. 19; *Doulin v. Detroit United Ry.*, 198 Mich. 327, 164 N. W. 447; *Congdon v. Michigan United Traction Co.*, 199 Mich. 564, 165 N. W. 744; *Hickey v. Detroit United Ry.*, 202 Mich. 496, 168 N. W. 517; *Gillett v. Michigan United Tract. Co.*, 205 Mich. 410, 171 N. W. 536.

*Minnesota*.—*Syck v. Duluth St. Ry. Co.*, 177 N. W. 944.

*Missouri*.—*Chappell v. United Rys. Co.*, 174 Mo. App. 126, 156 S. W. 819; *Voelker Products Co. v. United Rys. Co.*, 185 Mo. App. 310, 170 S. W. 332; *England v. Southwest Missouri R. Co.* (Mo. App.), 180 S. W. 32.

*North Carolina*.—*Lindley v. Fries*,

is expressed as that of looking and listening.<sup>47</sup> Moreover, under some circumstances, as where the view of the track is obstructed, it may be that the automobilist should stop his machine before attempting the crossing.<sup>48</sup> The tracks, of themselves, are a signal of danger, and impose a corresponding degree of care on the automobilist.<sup>49</sup> Failure to look and

etc., Co., 153 N. Car. 394, 69 S. E. 274; Kime v. Southern Railway Co., 153 N. Car. 398, 69 S. E. 274.

*Pennsylvania*.—Clifford v. Philadelphia Rapid Transit Co., 112 Atl. 468; Lessig v. Reading Transit & L. Co., 113 Atl. 381; Hill v. Philadelphia Rapid Transit Co., 114 Atl. 634; Miller North Broad Storage Co. v. Philadelphia Rapid Transit Co., 62 Pa. Super. Ct. 568.

*Rhode Island*.—Brien v. Rhode Island Co., 99 Atl. 1026; Hambly v. Bay State St. Ry. Co., 100 Atl. 497; Entwistle v. Rhode Island Co., 103 Atl. 625; Levein v. Rhode Island Co., 110 Atl. 602; King v. Rhode Island Co., 110 Atl. 623.

*Utah*.—Oswald v. Utah L. & R. Co., 39 Utah 245, 117 Pac. 46.

*Washington*.—Bowden v. Walla Walla Valley Ry. Co., 79 Wash. 184, 140 Pac. 549; Briscoe v. Washington-Oregon Corp., 84 Wash. 29, 145 Pac. 995; Herrett v. Puget Sound. etc., P. Co., 103 Wash. 101, 173 Pac. 1024; Heath v. Wylie, 109 Wash. 86, 186 Pac. 313.

*West Virginia*.—Helvey v. Princeton Power Co., 99 S. E. 180.

*Canada*.—Carleton v. City of Regina, 1 D. L. R. 778.

47. *Alabama*.—Ross v. Brannon, 73 So. 439.

*California*.—Hoff v. Los Angeles-Pac. Co., 158 Cal. 596, 112 Pac. 53; Loftus v. Pacific Elec. Ry. Co., 166 Cal. 464, 137 Pac. 34.

*Delaware*.—Garrett v. People's R. Co., 6 Penn. 29, 64 Atl. 254.

*Indiana*.—Union Traction Co. v. Moneyhun (Ind. App.), 127 N. E. 443.

*Louisiana*.—Walker v. Rodriguez, 139 La. 251, 71 So. 499.

*Missouri*.—Chappell v. United Rys. Co., 174 Mo. App. 126, 156 S. W. 819; Voelker Products Co. v. United Rys. Co., 185 Mo. App. 310, 170 S. W. 332.

*North Carolina*.—Lindley v. Fries, etc., Co., 153 N. Car. 394, 69 S. E. 274; Kime v. Southern Railway Co., 153 N. Car. 398, 69 S. E. 274.

*Pennsylvania*.—Benamy v. Reading Transit & Light Co., 112 Atl. 437.

*Wisconsin*.—Dahinden v. Milwaukee Elec. Ry. & L. Co., 171 N. W. 669; Moody v. Milwaukee Elec. Ry. & L. Co., 180 N. W. 266.

*Distance*.—A driver is not required as a matter of law to look three or four blocks. Coons v. Olympic L. & P. Co. (Wash.), 191 Pac. 769.

48. *State to Use of Stumpf v. Baltimore, etc., Rys. Co.*, 133 Md. 411, 105 Atl. 532.

49. *Loftus v. Pacific Elec. Ry. Co.*, 166 Cal. 464, 137 Pac. 34; *Chappell v. United Rys. Co.*, 174 Mo. App. 126, 156 S. W. 819. "It is unnecessary to enlarge upon the well-settled rule that a railroad track is in and of itself a sign of danger, and that one approaching such track with intent to cross it is bound to exercise his faculties of sight and hearing in order to ascertain whether a train is approaching." *Herbert v. S. P. Co.*, 121 Cal. 227, 53 Pac. 651; *Zibbell v. S. P. Co.*, 160 Cal. 237, 116 Pac. 513. "While these requirements of care have usually been applied to persons seeking to cross the track of a steam railroad, they are also fairly applicable to crossings over the track of an electric railway, con-

listen for approaching trains at a steam railroad crossing is negligence *per se*,<sup>50</sup> but the rule is not so strict at street railway crossings; in the latter class of cases, a question for the jury may be presented, though the negligence of the traveler would have been declared as a matter of law had the crossing been that of a steam railroad.<sup>51</sup>

**Sec. 593. Looking for approaching street cars — proper place for looking.**

When approaching a street railway track, the duty of looking for cars implies that the required observation shall be made at a place where looking will be effective; that is, at a place from which he can stop his machine if necessary to avoid a collision.<sup>52</sup> The taking of an observation when some considerable distance from the track, with a complete failure to again look for cars before reaching the track, may be contributory negligence as a matter of law.<sup>53</sup> Thus, where one looked for cars when he was about sixty feet from the track,

structed and operated as the defendant's road was." *Loftus v. Pacific Elec. Ry. Co.*, 166 Cal. 464, 137 Pac. 34.

50. Section 557.

51. *Dahinden v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 171 N. W. 669. And see section 614.

52. *Walker v. Rodriguez*, 139 La. 251, 71 So. 499; *Daull v. New Orleans Ry. & L. Co.*, 147 La. 1012, 86 So. 477; *Foos v. United Rys. & Elec. Co.* (Md.), 110 Atl. 849; *Donlin v. Detroit United Ry.*, 198 Mich. 327, 164 N. W. 447; *Congdon v. Michigan United Traction Co.*, 199 Mich. 564, 165 N. W. 744; *Brien v. Rhode Island Co.* (R. I.), 99 Atl. 1026; *Entwistle v. Rhode Island Co.* (R. I.), 103 Atl. 625. "No one can doubt that the law enjoins the duty, not only of listening for the approach of the car, but of looking at a point where the vision is open for a considerable distance, at least when considered with reference to the known likelihood of cars to approach at a

high rate of speed." *Voelker Products Co. v. United Rys. Co.*, 185 Mo. App. 310, 170 S. W. 332.

**Probabilities not determinative.**—

In an action where the defense is that plaintiff was guilty of contributory negligence in attempting to cross a street car track with his automobile without ascertaining in sufficient season whether cars were approaching, the question of contributory negligence is to be determined by the situation when plaintiff was at such a distance before going on the track that he could control his machine and avoid the danger, rather than by probabilities. *Hack v. Chicago & Interurban Tract. Co.*, 201 Ill. App. 572.

53. *Gray v. Chicago, etc. R. Co.*, 155 Ill. App. 428; *Congdon v. Michigan United Traction Co.*, 199 Mich. 564, 165 N. W. 744; *Shere v. Dunham* (Mo. App.), 178 S. W. 900; *England v. Southwest Missouri R. Co.* (Mo. App.), 180 S. W. 32; *Brien v. Rhode Island Co.* (R. I.), 99 Atl. 1026.

but attempted to drive across the track without looking again, when the track was straight and unobstructed for six hundred feet, it was held that he was guilty of contributory negligence.<sup>54</sup> And when one looked for approaching cars when about thirty feet from the track at a place where his view was very limited, it was held that he was guilty of negligence in failing to look again before reaching the track.<sup>55</sup> But where there is no car in sight when the driver of the machine starts across the street, he is not necessarily guilty of negligence because he does not thereafter look for a car.<sup>56</sup> The operator of a motor vehicle should look for approaching cars at a point where the view is open for a distance proportionate to the probable speed of cars at that point.<sup>57</sup> If the view is obstructed as the driver approaches, the duty to use his faculties before going upon the track, continues, and he should at some reasonable point before reaching the track look for cars,<sup>58</sup> even though it is necessary for him to stop in order to get an effective view of the track.<sup>59</sup> A lookout by the traveler at a point where he cannot see more than sixty feet is not sufficient to establish his exercise of care, for the question of his care depends on his precautions when he is at such a distance from the track that he can control his machine and avoid the danger of the approaching car.<sup>60</sup> When passing behind a street car on one track, he must use his senses to discover whether there is a car approaching on the parallel track.<sup>61</sup>

54. *Puffer v. Muskegon, etc., Co.*, 173 Mich. 193, 139 N. W. 19.

55. *Brien v. Rhode Island Co. (R. I.)*, 99 Atl. 1026.

56. *Brandt v. New York Rys. Co.*, 85 Misc. (N. Y.) 40, 147 N. Y. Suppl. 17. See also *Reichle v. Detroit United Ry.*, 203 Mich. 276, 168 N. W. 972.

57. *Voelker Products Co. v. United Rys. Co.*, 185 Mo. App. 310, 170 S. W. 332.

58. *Ricker v. Rhode Island Co. (R. I.)*, 107 Atl. 72; *Levein v. Rhode Island Co. (R. I.)*, 110 Atl. 602.

59. *Williams v. Iola Elec. R. Co.*,

102 Kans. 268, 170 Pac. 397; *Donlin v. Detroit United Ry.*, 198 Mich. 327, 164 N. W. 447; *Voelker Products Co. v. United Rys. Co.*, 185 Mo. App. 310, 170 S. W. 332. And see section 604.

60. *Hedmark v. Chicago Rys. Co.*, 192 Ill. App. 584.

61. *Schrinkel v. Minneapolis St. Ry. Co.*, 144 Minn. 465, 174 N. W. 820; *McCleave v. United Rys. Co. of St. Louis (Mo. App.)*, 181 S. W. 1084; *Zeis v. United Rys. Co. (Mo. App.)*, 217 S. W. 324; *Bardshar v. Seattle Elec. Co.*, 72 Wash. 200, 130 Pac. 101.

**Sec. 594. Looking for approaching street cars — continuity of looking.**

The driver of an automobile, as he approaches a street railway line, is not ordinarily required to keep a continuous lookout for approaching street cars.<sup>62</sup> Indeed, he should not give all of his attention to one direction, for ordinarily danger may be expected in either direction.<sup>63</sup> Moreover, he might be guilty of negligence if he used his faculties entirely for street cars, for, while exceeding the requirements of the law in respect to looking for street cars, he might be grossly negligent with respect to carriages and automobiles, as well as bicyclists, pedestrians and other travelers in the highway. The law contemplates that he shall divide his lookout between all classes of travelers and vehicles. If he devotes his attention to pedestrians and does not see an approaching street car, he may be deemed guilty of negligence as a matter of law.<sup>64</sup> But, when the driver of an automobile sees a street car on a cross street, and it is reasonably apparent that both will reach the intersection at about the same time, due care on the part of the driver requires that he shall be watchful of the street car until danger therefrom is obviated.<sup>65</sup> Where the driver of an automobile coming out of a garage glanced down the street and saw an electric car approaching about 300 feet away, but, without looking again, drove on the track and came in collision with the car it was held that he was guilty of negligence, there being no evidence showing with legal certainty that the motorman was operating the car at a dangerous rate of speed, or that, by the exercise of ordi-

62. *Byerley v. Metropolitan St. R. Co.*, 172 Mo. App. 470, 158 S. W. 413; *Foy v. United Rys. Co. of St. Louis* (Mo. App.), 226 S. W. 325; *Stream v. Grays Harbor Ry. & L. Co.* (Wash.), 195 Pac. 1044; *Dahinden v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 171 N. W. 669; *Moody v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 180 N. W. 266.

63. "The fact that plaintiff looked once to the south and then to the north and then again to the south, coupled with the excessive speed of the

street car, are circumstances which take the case out of the operation of those cases which have held the injured person guilty of contributory negligence as a matter of law." *Byerly v. Metropolitan St. Ry. Co.*, 172 Mo. App. 470, 158 S. W. 413.

64. *Shelton v. Union Traction Co.*, 99 Kans. 34, 160 Pac. 977.

65. *Weston v. Grand Rapids R. Co.*, 180 Mich. 373, 147 N. W. 630; *Lane v. Kansas City Rys. Co.* (Mo. App.), 228 S. W. 870.

nary care after the discovery of the danger, he could have avoided the collision.<sup>66</sup>

**Sec. 595. Looking for approaching street cars — ignorance of street car line.**

The fact that the operator is not familiar with the surroundings and hence is not aware of the presence of a street car line on a cross street will not necessarily excuse his failure to look for approaching cars.<sup>67</sup> If the collision occurs in the day time, the poles, wires, tracks and other appliances of the railway company may be so clearly visible, that one in the exercise of due care should be aware of the railway system, and the driver may be charged with contributory negligence in failing to learn of its presence.<sup>68</sup>

**Sec. 596. Looking for approaching street cars — backing or turning in street.**

One backing an automobile from a garage to a street along which street cars are accustomed to run, cannot be said to be in the exercise of reasonable care, if he does not look for approaching cars as he backs his machine.<sup>69</sup> So, too, one about to turn his motor vehicle around in the street must look for approaching street cars before making the turn; and, if he fails in this respect, he may be charged with contributory negligence.<sup>70</sup>

**Sec. 597. Looking for approaching street cars — failure to see, though looking.**

As a general proposition, a traveler along a street or highway is chargeable with a knowledge of such conditions as he should discover in the exercise of due care.<sup>71</sup> Thus, if a

66. *Marston v. Shreveport Traction Co.*, 140 La. 18, 72 So. 794.

67. *Lindley v. Fries, etc., Co.*, 153 N. Car. 394, 69 S. E. 274.

68. *Beaver Valley Milling Co. v. Interurban Ry. Co. (Iowa)*, 166 N. W. 565.

69. *Holmes v. Sandpoint & I. R. Co.*, 25 Idaho, 345, 137 Pac. 532.

70. *Capp v. Southwestern Tract. & Power Co.*, 142 La. 529, 77 So. 141; *Birch v. Athol, etc., Ry. Co.*, 198 Mass. 257, 84 N. E. 310.

71. "The plaintiff, an adult in full possession of his senses so far as this record shows, in broad daylight, was therefore, as a matter of law, charged with knowledge of its approach, for

motor vehicle collided with a street car which was in plain view and would have been seen by the driver had he exercised reasonable care in looking for cars, it does not avail him to claim that he looked for approaching street cars but failed to see any.<sup>72</sup> His failure to see what is in plain sight is as culpable as not to look. The surrounding circumstances, however, may be such as tend to excuse the failure of the driver to see an approaching car and to present a question for the jury as to his contributory negligence.<sup>73</sup> Thus, on an interurban electric railway crossing, if the driver of an automobile at a proper place stops and looks and listens for approaching cars and does not discover the approach of a car, he may be justified in attempting to cross the track; and, in such a case, his contributory negligence may be a question for the jury.<sup>74</sup>

to look, in the eyes of the law is to see that which is before one in plain view, and the courts close their doors on one falling short in that requirement where he is not shown to be physically disabled in his eyesight." *England v. Southwest Missouri R. Co.* (Mo. App.), 180 S. W. 32.

72. *Greenhill v. Connecticut Co.*, 92 Conn. 560, 103 Atl. 646; *Birch v. Athol, etc., Ry. Co.*, 198 Mass. 257, 84 N. E. 310; *Pigeon v. Massachusetts, etc., St. Ry. Co.*, 230 Mass. 392, 119 N. E. 762; *Schrankel v. Minneapolis St. Ry. Co.*, 144 Minn. 465, 174 N. W. 820; *Oswald v. Utah L. & R. Co.*, 39 Utah, 245, 117 Pac. 46; *Herrett v. Puget Sound, etc., P. Co.*, 103 Wash. 101, 173 Pac. 1024. See also *Spence v. Milwaukee Electric Ry. & Light Co.*, 163 Wis. 120, 157 N. W. 517.

73. *Merrell v. Chicago, etc., R. Co.* (Wis.), 177 N. W. 613; *Moody v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 180 N. W. 266.

74. *Loftus v. Pacific Elec. Ry. Co.*, 166 Cal. 464, 137 Pac. 34, wherein the situation was explained as follows: "We think the present case is not one in which it can be said that the un-

contradicted evidence forces the conclusion that the plaintiff approached the track without exercising the care which an ordinarily prudent man, situated as he was, would have exercised. Before he turned his automobile to cross the track, he brought his machine to a stop, or nearly to a stop, and, as he testified, looked and listened to ascertain whether a train was approaching. At that time the train was still at such a distance and so placed as, under the evidence, to justify the inference that it could not be seen or heard by one in plaintiff's position. As he advanced, after turning to cross the tracks, the point beyond which the easterly track was hidden by the line of poles was constantly coming nearer to him, as was the train. Under all the circumstances, there is nothing unreasonable in the inference that the train could neither be heard nor seen by plaintiff from the time he first slowed down until he reached the point, on the west track, where, as he says, he became aware of the fact that a train was approaching. This being so, the jury had the right to believe, from the plaintiff's story, that he took

**Sec. 598. Looking for approaching street cars — looking to rear.**

As is stated above,<sup>75</sup> a street railway company has the paramount right to the space occupied by its tracks between street crossings, but other travelers may properly use such space subject to the rights of the company. The driver of a motor vehicle is not necessarily guilty of contributory negligence because he is operating his machine along the track of a street railway company, though, perhaps, greater caution is imposed on him than if he were running the car along a course where danger from a street car would not be anticipated. He is not, however, as a matter of law, required continually to look to the rear to see if a car is approaching.<sup>76</sup> He may to some extent rely on the motorman giving him a

advantage of every opportunity to learn of the possible approach of a train, and that, notwithstanding his precautions, he could not, and did not, know that a train was nearing the crossing until he was in a position of danger from which he was unable, by the exercise of ordinary care, to extricate himself."

75. Section 586.

76. Capital Tr. Co. v. Crump, 35 App. D. C. 169; Bruening v. Metropolitan St. Ry. Co., 180 Mo. App. 434, 168 S. W. 248; Neubauer v. Nassau Elec. R. Co., 191 App. Div. 732, 182 N. Y. Suppl. 20; Foley v. Forty-second St. R. Co., 49 Misc. (N. Y.) 649, 97 N. Y. Suppl. 958; Hirsch v. Cincinnati Tr. Co., 32 Ohio Circuit Rep. 685; Baldie v. Tacoma Ry. & Power Co., 52 Wash. 75, 100 Pac. 162.

**Looking back.**—"A driver in a city street has a right to expect that street cars will be managed with reasonable care and a proper regard for the rights of others lawfully using the street, and he may drive along the track in full view of a car approaching from the rear; and the fact that he so proceeds for any distance will not charge him with contributory negligence in case of a collision, if,

under all the circumstances, his conduct was consistent with ordinary prudence; the only limitation on his right being that he must not unnecessarily interfere with the passage of the car, which, though entitled to preference, has not an exclusive right to the track. As to the duty imposed upon a person driving along street car tracks it seems to have been well stated in a case in *Missouri* that a person having used proper care in driving upon the tracks is not bound to look back to see if a car is coming from the rear. It is the duty of persons driving on the street to look ahead so as to be able to proceed with safety, so far as other users of the street are concerned and they have the right to presume that persons in control of cars and other vehicles following them will be on the lookout for their safety and avoid running upon them from behind. So a driver of an automobile is not guilty of contributory negligence as a matter of law by reason of driving upon street car tracks, nor by reason of the fact that while upon such tracks he does not look back from time to time; because he has a paramount duty to look ahead, and may rely for his protection at night upon the red



timely signal to get off the track.<sup>77</sup> His duty to other travelers requires a careful lookout in front to avoid pedestrians and other vehicles.<sup>78</sup> A greater degree of caution is imposed on the auto driver when he has knowledge of a car approaching from the rear which is likely to overtake him.<sup>79</sup> And it has been held that, when a person drives an automobile with the curtains down at a speed of ten to fifteen miles an hour in the day time, too close to a railway track for a car to clear the machine, and the machine is struck from behind by a car which the driver of machine could have avoided if he had looked back, the driver is guilty of contributory negligence as a matter of law, and there is no case for the jury.<sup>80</sup>

### Sec. 599. Crossing in front of observed car.

There is no positive rule of law under all circumstances which forbids an auto driver, under penalty of being charged with negligence, from crossing a street along which a street car is approaching.<sup>81</sup> If such were the law, a motor traveler

light on the rear of his automobile." *Nellis on Street Railways* (2d Ed.), § 418.

77. *Clayton v. Kansas City Rys. Co.* (Mo. App.), 231 S. W. 68.

78. Section 332. "It is true that it [driving on track] puts upon the driver of the vehicle a greater degree of care, but it does not put upon him the burden of keeping a lookout to the rear to the exclusion of his duty to look ahead. The duty to look ahead is paramount. The red rear light is in itself a warning upon which the driver has a right to rely for protection from oncoming cars or vehicles which, although they have a paramount right of way, must assert it in some accepted manner, as by ringing a bell or sounding a whistle, so that the driver may clear the way for the one to whom it more properly belongs. Whether the chauffeur was guilty of contributory negligence in driving his automobile along the track under the circumstances was a question of fact. The driver owed a duty to pedestrians as

well as to the street car company, and the jury may have found that, considering the fog and darkness, it was the part of prudence for him to take the center of the street rather than the open roadway at the side." *Baldie v. Tacoma Ry. & Power Co.*, 52 Wash. 75, 100 Pac. 162.

79. *Watts v. Ry.*, 34 Pa. Co. Ct. Rep. 373.

80. *Speakman v. Philadelphia, etc., Co.*, 42 Pa. Super. Ct. 558.

81. **Crossing ahead of car.**—"It is the duty of the driver of a vehicle about to cross street car tracks, on observing the rapid approach of a street car, to take into consideration the fact that it can neither turn out, nor stop instantly; but if, on such consideration, he enters on the track when the car is so far away and approaching at such speed that, by the exercise of reasonable diligence, it can be stopped, he is not thereby guilty of negligence. A driver has a right to cross a street railway track, although he may see a car in the distance, if he may reason-

wishing to cross some of the busy thoroughfares in a large city would have his progress indefinitely stopped. The fact that one voluntarily assumes a certain degree of risk is not conclusive of negligence.<sup>81a</sup> Whether a motorist is guilty of contributory negligence in trying to cross a street ahead of an approaching street car which he sees, depends upon the respective speeds of the two conveyances and their relative distances from the intersection of the streets. Whether the automobilist should stop or proceed depends upon the sur-

ably suppose he can cross before it reaches him. When a team is driven upon a street car track with a car approaching a block or less away, the driver and the motorman assume each a reciprocal duty. The one must use ordinary prudence to avoid receiving injury; the other must use ordinary prudence to avoid inflicting injury. And, when injury is inflicted, it is ordinarily for the jury, under proper instructions, to say who has neglected the duty and who has been guilty of the negligence. And it is only when, as in the cases above cited, the situation as to negligence is so plain, clear, and unequivocal as to admit of but one answer, that the court may declare negligence as a matter of law and enter a judgment of nonsuit. And it cannot be said as a matter of law that one who drives upon or across or by reason of passing teams is compelled to stop on a street railway track, the approaching car being at some considerable distance, is guilty of such negligence as a matter of law will preclude a recovery. The driver has a right to assume that the car is under control, or will be controlled, when the motorman sees him upon the track, and that he will not run into him. It is for the jury to say whether he or the motorman was guilty of that negligence—the last efficient cause—but for which the accident would not have happened. But one who, thinking that he can drive across the street in front of an electric car, which he sees ap-

proaching, attempts to do so, with the result that there is a collision when the front wheels of the wagon are on the track, is guilty of contributory negligence. It is not negligence for a person to drive across street railway tracks whenever and wherever he may have occasion to do so, and this right of crossing the tracks is not confined to street crossings. The question of negligence in such cases depends upon the proximity or remoteness of the car, its speed, and other circumstances. It is the duty of a traveler to look out for himself, and to exercise such ordinary care as would be exercised by a reasonably prudent person under attendant circumstances. The duty imposed upon persons crossing steam railway tracks to stop, look, and listen is not rigidly applied to persons traveling a street used by a street railway. The failure of a person to look for approaching cars before crossing street railway tracks does not place him in any worse position than if he had looked and seen the car; and, therefore, if, at the time when he started to drive across the track, the car was at such a distance that an attempt to cross after having seen it would not have been contributory negligence, his failure to look for the car will not preclude his recovery. A person is not guilty of contributory negligence merely because he attempts to cross a street railway when a car is approaching. If that were so, he could never attempt to cross such a track

rounding circumstances.<sup>82</sup> The street car may be so far from the danger point at the time the automobilist attempts to pass that it can be said that he was clearly not guilty of negligence. On the contrary, the street car may be so close to the intersecting point that a driver would be rash in attempting the hazard of crossing, and the court will have no difficulty in adjudging him guilty of contributory negligence as a matter of law.<sup>83</sup> Between the two extremes are a large number of cases where the burden of deciding the question

in the crowded part of a city, where there is practically always an approaching car. In such case, negligence depends upon the proximity or remoteness of the car, its speed, and all other circumstances surrounding the occurrence. It is not negligence *per se* for one to cross a street railway track in front of an approaching car which he has seen and which is not dangerously near. One is not bound, at his peril, to know, before attempting to cross a street railway track, that a collision between his vehicle and an approaching car will not occur, but he is only required to make such observation as would convince a reasonably prudent man in a like situation that the passage could be made in safety." *Nellis on Street Railways* (2d Ed.), § 414.

81-a. *Commonwealth Bonding, etc., Ins. Co. v. Pacific Elec. Ry. Co.* (Cal. App.), 184 Pac. 29, wherein it was said: "The fact that one voluntarily assumes a certain degree of risk is not conclusive of negligence. In these days of rapid transit and congested traffic, every man who crosses a busy street, or drives an automobile, takes chances, and serious ones. The question is, are they greater than is reasonably necessary to meet the ordinary requirements of business, or even pleasure? Where the precise facts under consideration are such as to give rise to an honest difference of opinion between intelligent men, the question

is one for the jury. We think this is such a case."

82. *Goan v. Ogden, etc., Ry. Co.*, 51 Utah 285, 169 Pac. 949.

83. *Alabama*.—*Ross v. Brannon*, 198 Ala. 124, 73 So. 439.

*California*.—*Commonwealth Bonding, etc., Ins. Co. v. Pacific Elec. Ry. Co.* (Cal. App.), 184 Pac. 29; *Read v. Pacific Elec. Ry. Co.* (Cal.), 197 Pac. 791.

*Connecticut*.—*Greenhill v. Connecticut Co.*, 92 Conn. 560, 103 Atl. 646.

*Illinois*.—*Hedmark v. Chicago Rys. Co.*, 192 Ill. App. 584; *Carden v. Chicago Rys. Co.*, 210 Ill. App. 155.

*Iowa*.—*Yetter v. Cedar Rapids, etc., Ry. Co.*, 182 Iowa 1241, 166 N. W. 592.

*Kansas*.—*Moore v. Kansas City Rys. Co.*, 196 Pac. 430.

*Louisiana*.—*Marston v. Shreveport Traction Co.*, 140 La. 18, 72 So. 794.

*Maryland*.—*Upton v. United Rys. & Elec. Co.*, 110 Atl. 484.

*Maine*.—*Thompson v. Lewiston, etc., St. Ry.*, 115 Me. 560, 99 Atl. 370.

*Michigan*.—*Miller v. Detroit United Ry.*, 166 N. W. 870. See also *Stevenson v. Detroit United Ry.*, 167 Mich. 45, 132 N. W. 451.

*Minnesota*.—*Haleen v. St. Paul City Ry. Co.*, 141 Minn. 289, 170 N. W. 207; *Kirk v. St. Paul City Ry. Co.*, 141 Minn. 457, 170 N. W. 517.

*New York*.—*James Everard's Breweries v. New York Rys. Co.*, 151 N. Y. Suppl. 905.

*North Carolina*.—*Lindley v. Fries.*

of contributory negligence is placed on the jury.<sup>84</sup> Where, in the exercise of common prudence, a person may think there

etc., Co., 153 N. Car. 394, 69 S. E. 274; Kime v. Southern Railway Co., 153 N. Car. 398, 69 S. E. 274.

*Pennsylvania.*—Luterman v. Pittsburgh Rys. Co., 66 Pitts. Leg. Jour. 311.

*Rhode Island.*—Fillmore v. Rhode Island Co., 105 Atl. 564.

*Texas.*—San Antonio Public Service Co. v. Tracy (Civ. App.), 221 S. W. 637.

*Utah.*—Goan v. Ogden, etc., Ry. Co., 169 Pac. 949.

*Washington.*—Blanchard v. Puget Sound Tract., L. & P. Co., 105 Wash. 205, 177 Pac. 822; Devitt v. Puget Sound Traction, Light & Power Co., 106 Wash. 449, 180 Pac. 483, *affirmed on rehearing*, 185 Pac. 583.

*West Virginia.*—Helvey v. Princeton Power Co., 99 S. E. 180.

*Canada.*—Ontario. Hughes—Owen v. Ottawa Elec. Co., 40 O. L. R. 614.

**84.** *Delaware.*—Garrett v. People's R. Co., 6 Penn. 29, 64 Atl. 254.

*Iowa.*—Flannery v. Interurban Ry. Co., 171 Iowa, 238, 153 N. W. 1027; Guy v. Des Moines City Ry. Co., 180 N. W. 294.

*Louisiana.*—Maritzky v. Shreveport Rys. Co., 144 La. 692, 81 So. 253.

*Massachusetts.*—Bailey v. Worcester Consol. St. Ry. Co., 228 Mass. 477, 117 N. E. 824.

*Michigan.*—Prince v. Detroit United Ry. Co., 192 Mich. 194, 158 N. W. 861; Traveler's Indemnity Co. v. Detroit United Ry., 193 Mich. 375, 159 N. W. 528. "The chauffeur's negligence was clearly a question for the jury. He testified that he was looking for a chance to cross, and availed himself of a time when there was no approaching car within the block, near the center of which he crossed; that he saw the car, which hit the left hind wheel, when it was 300 or 400 feet beyond the first street north, and

thought he had plenty of time to get over ahead of it. while Kays, whose back was towards the approaching car, confirms his claim that he took note of the situation and looked both ways as the automobile was about to cross the tracks. This is not a case of failing to look and see the approaching car, but of reasonable judgment and prudence in attempting to cross after seeing it. If it was reasonable for him to believe he could cross safely, he was not negligent in attempting it. Provided the car was as far away as he testified, it would have to travel at an unusual rate of speed to catch him, and in forming a judgment he had a right to assume that a reasonable degree of care according to conditions would be observed by the motorman also. If by reason of the misty evening and fading light it was more difficult for the motorman to observe clearly plaintiff's position and readily discover whether or not he had cleared the track, it was his duty 'to have the car under such control as to admit of its being stopped after he became able to discern objects on the track, and before a collision with such objects should occur.'" Travelers Indemnity Co. v. Detroit United Ry., 193 Mich. 375, 159 N. W. 528.

*Minnesota.*—Day v. Duluth St. R. Co., 121 Minn. 445, 141 N. W. 795.

*Missouri.*—Byerley v. Metropolitan St. R. Co., 172 Mo. App. 470, 158 S. W. 413; Hanson v. Springfield Tract. Co. (Mo.), 226 S. W. 1.

*New York.*—Brandt v. New York Rys. Co., 85 Misc. 40, 147 N. Y. Suppl. 17. See also Hirsch v. Interurban St. R. Co., 94 N. Y. Suppl. 330.

*Pennsylvania.*—Clifford v. Philadelphia Rapid Transit Co., 112 Atl. 468.

*Wisconsin.*—Dahinden v. Milwaukee Elec. Ry. & L. Co., 171 N. W. 669.

is reasonable time to cross a street railway safely, he is not chargeable with negligence in attempting it.<sup>85</sup> But this rule does not assist the traveler where he has placed himself in a dangerous position by reason of his negligence in failing to look for approaching cars, and the only apparent escape from injury is to attempt the crossing before he is struck by the car.<sup>86</sup> If the automobilist reaches the crossing distinctly in advance of the street car, he has a right to assume that he will be allowed to proceed and that the street car will slacken its speed, or stop if necessary.<sup>87</sup> And he may assume that the street car will not be run at an unreasonable speed or at a rate which is a violation of a municipal regulation.<sup>88</sup> If he proceeds across a street railway track pursuant to the directions of a traffic officer, he will not be charged with contributory negligence as a matter of law.<sup>89</sup> Where ample opportunity seems to be afforded for the safe passage of the automobile at the time its driver starts across the street, but before reaching a place of safety his progress is obstructed by other vehicles, or is delayed for some other reason, and the street car fails to stop before striking him, the questions of negligence and contributory negligence are generally for the jury.<sup>90</sup> Where at an intersection of streets a passenger on a street car was injured by a collision between the car and an automobile and it appeared that the motorman saw the automobile, which had its lamps lit and brightly shining, at a distance of only eighty to a hundred feet from him when it was moving at from eighteen to twenty miles an hour and that the chauffeur, not seeing the car until within about twelve feet of it, attempted to turn suddenly to the right and avoid a collision, but in the effort to do so his machine skidded and

85. *Hickey v. Detroit United Ry.* 202 Mich. 496, 168 N. W. 517; *Virginia Ry. & P. Co. v. Slack Grocery Co.* (Va.), 101 S. E. 878.

86. *Congdon v. Michigan United Traction Co.*, 199 Mich. 564, 165 N. W. 744.

87. *Prince v. Detroit United Ry. Co.*, 192 Mich. 194, 158 N. W. 861.

88. *Byerley v. Metropolitan St. R.*

*Co.*, 172 Mo. App. 470, 158 S. W. 413. And see section 609.

89. *American Automobile Ins. Co. v. United Rys. Co. of St. Louis*, 200 Mo. App. 317, 206 S. W. 257.

90. *Anderson v. Puget Sound, etc., Co.*, 89 Wash. 83, 154 Pac. 135; *Bee-man v. Tacoma Ry. & P. Co.* (Wash.), 191 Pac. 813.

struck the car on the side, it was held that the motorman was not negligent, but that the chauffeur was guilty of gross carelessness.<sup>91</sup>

### Sec. 600. Driving auto along track — in general.

Though a street railway company, except over intersecting streets, has a paramount right to the use of that part of the highway occupied by their tracks,<sup>92</sup> a traveler is not necessarily guilty of negligence in guiding his conveyance along the tracks.<sup>93</sup> Especially is this so when the road outside of the tracks is impassable.<sup>94</sup> He is bound, however, to antici-

91. *Minneapolis St. Ry. Co. v. Odegaard*, 182 Fed. 56, 104 C. C. A. 496.

92. Section 586.

93. *Watts v. Montgomery Tr. Co.*, 175 Ala. 102, 57 So. 471; *Capital Tr. Co. v. Crump*, 35 App. D. C. 169; *Foley v. Forty-second St. R. Co.*, 49 Misc. (N. Y.) 649, 97 N. Y. Suppl. 958; *Baldie v. Tacoma Ry. & Power Co.*, 52 Wash. 75, 100 Pac. 162; *Pantagis v. Seattle El. Co.*, 63 Wash. 159, 114 Pac. 1044; *O'Brien v. Washington W. P. Co.*, 71 Wash. 688, 129 Pac. 391.

**Use of tracks.**—"The rules as to rights of way applicable to steam railroads and travelers in the highways are not applicable to street railways and wagons traveling along the streets of a city, and a driver has the right in crossing such a railway to rely upon the exercise of ordinary care by the gripman of a car to avoid a collision. One traveling with a horse and vehicle on a street upon which such cars are propelled whenever the necessary or customary use of the street requires or permits him to do so, and it is not contributory negligence *per se* for him to turn from one track into and upon the other track, in a street having a double track, to allow a car to pass, if in so doing, or in endeavoring to turn back again, he is struck by a car running upon the other track. Nor is he guilty of negligence in failing to get

off the track when a car comes along, when he tries his best to do so, and would have done so but for the reason that the rails were wet and slippery and the ice and snow thereon held his wheel, not in turning toward the other track, instead of attempting to turn out on the side away from it, where he had no reason to anticipate that he would be unable to drive off the track at any time, and get out of the way of the car. Street railway companies have no such proprietary interest in the portion of the street upon which their tracks are laid as limits the rights of the general public to use the same territory as a part of the public highway, so as to impose upon travelers the duty of keeping themselves and horses out of the way of the cars on such tracks." *Nellis on Street Railways* (2d Ed.), § 417.

**Instructions.**—There was no error in instructing the jury that it is the duty of drivers of automobiles along a street upon which there is laid a street car track to yield the right of way to the street cars, when they can reasonably do so. *Busch v. Los Angeles Ry. Corp.*, 178 Cal. 536, 174 Pac. 665, 2 A. L. R. 1607.

94. *Langford v. San Diego Elec. Ry. Co.*, 174 Cal. 729, 164 Pac. 398. See also *McNeal v. Detroit United Ry.* 198 Mich. 108, 164 N. W. 417.

pate that street railway cars will approach, and consequently more caution is required than if the driver were using some other part of the highway.<sup>95</sup> That is, he must use ordinary care to avoid a collision with a car approaching from the front or rear, as well as to avoid injury to pedestrians and travelers in other vehicles; whereas, when using another part of the highway, he avoids the necessity of precautions against street cars thus approaching. It may be that a municipality under its police power can enact an ordinance forbidding the use of the tracks by automobilists so that one violating the ordinance would be guilty of contributory negligence and barred from recovering for his injuries. But an ordinance which merely requires travelers to keep to the right of the center of the highway and does not expressly forbid the use of street railway tracks, though such tracks may be in the center of the street, is not deemed to have been enacted for the benefit of the street railway company, and it cannot base contributory negligence on its violation.<sup>96</sup> Nor is an ordinance requiring slow moving vehicles to keep to the right-hand curb of the street in order to allow faster vehicles an opportunity toward the left, deemed applicable as between a street car and another vehicle.<sup>97</sup>

#### **Sec. 601. Driving auto along track — car from rear.**

The driver of an automobile is not required continuously to look to the rear to discover the approach of cars from that direction;<sup>98</sup> in fact, his paramount duty is to keep a reasonably careful lookout in front for other travelers and conveyances. But he cannot continue his course along the track heedless of the approach of street cars from the rear and regardless of their paramount right to the use of the track.<sup>99</sup> And especially, when he learns that a street car is overtaking him, he must use greater care than is ordinarily required

95. *Claar Transfer Co. v. Omaha, etc., Ry. Co.* (Iowa). 181 N. W. 755; *Baldie v. Tacoma Ry. & Power Co.*, 52 Wash. 75, 100 Pac. 162.

96. *Watts v. Montgomery Tr. Co.*, 175 Ala. 102, 57 So. 471.

97. *Langford v. San Diego Elec. Ry.*

*Co.*, 174 Cal. 729, 164 Pac. 398; *O'Brien v. Washington W. P. Co.*, 71 Wash. 688, 129 Pac. 391.

98. Section 598.

99. *Smith v. Somerset Tract. Co.* 117 Me. 407, 104 Atl. 788.

of a traveler, and his failure may render him guilty of contributory negligence.<sup>1</sup> Where an automobile was driven with the curtains down at a speed of from ten to fifteen miles an hour in the daytime, so close to the track that a car could not clear the machine, and the driver could have avoided the collision had he looked back, it was held that he was guilty of contributory negligence as a matter of law.<sup>2</sup> Under some circumstances, the driver of a motor vehicle may be charged with negligence if he stops his car so suddenly that the motorman of a following street car is unable to avoid a collision. But, the driver is not to be charged with neglect of care when the stop is made on the order of a traffic policeman.<sup>3</sup>

### **Sec. 602. Driving auto along track — car in front.**

When an automobile is driven along the track of a street railroad company, the driver is bound to exercise reasonable care to discover the approach of cars in front of him and to turn out to permit such cars to pass.<sup>4</sup> He must realize that street cars can travel only over a certain course, and he must avoid that course upon the approach of cars, but, until a car approaches, he may use the tracks though such use is not necessary.<sup>5</sup> Until the contrary appears, the motorman of the street car has a right to assume that the driver of the automobile will turn off from the tracks and avoid a collision.<sup>6</sup> When it is dark or the weather conditions are such that the driver of the machine cannot see far in advance, if he selects the street car tracks for his course, he must proceed at a speed slow enough to enable him to turn off the track in time to avoid an oncoming car.<sup>7</sup> One driving a motor vehicle close to a street railway track is thought to be in a better

1. *Watts v. Ry.*, 34 Pa. Co. Ct. Rep. 373.

2. *Speakman v. Philadelphia, etc., Co.*, 42 Pa. Super. Ct. 558.

3. *Reines v. N. Y. Rys. Co.*, 103 Misc. (N. Y.) 669, 171 N. Y. Suppl. 53.

4. *Petrillo v. Connecticut Co.*, 92 Conn. 235, 102 Atl. 607.

5. *Pantages v. Seattle Elec. Co.*, 63 Wash. 159, 114 Pac. 1044.

6. *Coverdale v. Sioux City Service Co.*, 268 Fed. 963; *Pantages v. Seattle Elec. Co.*, 55 Wash. 453, 104 Pac. 629.

7. *Savage v. Public Service Ry. Co.*, 89 N. J. L. 555, 99 Atl. 383.

**Smoke.**—One driving along a track in a cloud of smoke, may be guilty of negligence as a matter of law. *Claar Transfer Co. v. Omaha, etc., Ry. Co.* (Iowa), 181 N. W. 755.



position than the motorman of an approaching street car to determine whether there is room for the conveyances to pass each other; and, when the driver of the machine gives no sign to the contrary, the motorman may assume that there is no danger of a collision.<sup>8</sup> And the driver of a motor vehicle may be guilty of negligence as a matter of law, where, after driving by the side of the track, he turns toward the left instead of right side of another vehicle and onto the track where he is struck by a car which he had seen approaching.<sup>9</sup> Under the general law of the road, an automobile should pass a street car approaching in front to the right of the street car; and, his failure to attempt the passage on the right side may be sufficient ground for a charge of contributory negligence against the driver.<sup>10</sup>

**Sec. 603. Speed and control of automobile — approaching intersecting streets.**

When an automobilist is approaching an intersecting street along which a street car runs, it is his duty, not only to look for approaching street cars,<sup>11</sup> but also to have his car under such control that, if necessary, he can stop his progress before reaching the street car line.<sup>12</sup> At all times, the speed must not exceed a reasonable rate.<sup>13</sup> Statutes and municipal ordinances in some cases limit the speed of an automobile at intersecting streets or when crossing street railway tracks.

8. *Sharpnack v. Des Moines City R. Co.* (Iowa), 115 N. W. 475.

9. *Brown v. Puget Sound El. R. Co.*, 76 Wash. 214, 135 Pac. 999. See also, *Speakes Lime & Cement Co. v. Duluth St. Ry. Co.* (Wis.), 179 N. W. 596.

10. *Athens Ry. & Elec. Co. v. McKinney*, 16 Ga. App. 741, 68 S. E. 83. See also *Langford v. San Diego Elec. Ry. Co.*, 174 Cal. 729, 164 Pac. 398.

11. Section 592.

12. *Ross v. Brannon*, 198 Ala. 124, 73 So. 439; *Nichols v. Pacific Elec. Ry. Co.* 178 Cal. 630, 174 Pac. 319; *Garrett v. Peoples R. Co.*, 6 Penn. (Del.) 29, 64 Atl. 254; *Fair v. Union Tract. Co.* 102 Kans. 611, 171 Pac. 649; *Wal-*

*ker v. Rodriguez*, 139 La. 251, 71 So. 499; *Weston v. Grand Rapids R. Co.*, 180 Mich. 373, 147 N. W. 630; *Donlin v. Detroit United Ry.* 198 Mich. 327, 164 N. W. 447; *Lindley v. Fries, etc., Co.*, 153 N. Car. 394, 69 S. E. 274; *Kime v. Southern Railway Co.*, 153 N. Car. 398, 69 S. E. 274; *Hill v. Philadelphia Rapid Transit Co.* (Pa.), 114 Atl. 634; *Sutton v. Virginia Ry. & P. Co.*, 125 Va. 449, 99 S. E. 670.

13. *Garrett v. Peoples R. Co.*, 6 Penn. (Del.) 29, 64 Atl. 254; *Weston v. Grand Rapids R. Co.*, 180 Mich. 373, 147 N. W. 630. See also *Savage v. Public Service Ry. Co.*, 89 N. J. L. 555, 99 Atl. 383. And see section 305.

Such regulations must be obeyed by the automobilist, and their violation may preclude a recovery for injuries sustained in a collision.<sup>14</sup>

#### Sec. 604. Speed and control of automobile — stopping.

As a general proposition, the driver of a motor vehicle is not required to stop his machine before crossing a street railway track.<sup>15</sup> Such a precaution is not usually required even in the case of a grade crossing of a steam railroad.<sup>16</sup> But the condition of travel in a street frequently requires the driver of a motor vehicle to stop his machine to avoid a collision with a street car. Moreover, the existence of obstructions in the street may change the situation so that reasonable care will require that the vehicle be brought to a stop.<sup>17</sup> As a general rule, if he runs into the street car, he is guilty of negligence, though circumstances are easily conceivable under which such conduct is not necessarily negligence.<sup>18</sup> So, too, when crossing an intersecting street along which a street car is proceeding, if the car is so close to the danger point that the auto driver is not justified in attempting the crossing,<sup>19</sup> he should accept the alternative and slacken his speed and stop his machine if necessary.<sup>20</sup> But if he reaches the crossing distinctly in advance of the street car, he can assume that the motorman of the approaching car will slacken speed if necessary to avoid the collision, and he may proceed to exercise his equal right to the use of the street.<sup>21</sup> And, if the driver of the car is unable to steer it, it is his duty to

14. *Garrett v. People's R. Co.*, 6 Penn. (Del.) 29, 64 Atl. 254; *Columbus R. Co. v. Waller*, 12 Ga. App. 674, 78 S. E. 52; *Fair v. Union Tract. Co.*, 102 Kans. 611, 171 Pac. 649; *Weston v. Grand Rapids R. Co.*, 180 Mich. 373, 147 N. W. 630; *Chero-Cola Bottling Co. v. South Carolina Light, Power & Rys. Co.*, 104 S. C. 214, 88 S. E. 534; *Southern Traction Co. v. Jones* (Tex. Civ. App.), 209 S. W. 457.

15. *Schmidt v. Mobile & R. Co.* (Ala.), 87 So. 181; *Williams v. Iola Elec. R. Co.*, 102 Kans. 268, 170 Pac. 397.

16. Section 567.

17. *Ross v. Brannon*, 198 Ala. 124, 73 So. 439; *Schmidt v. Mobile & R. Co.* (Ala.), 87 So. 181; *Williams v. Iola Elec. R. Co.* (Kans.), 170 Pac. 397; *Orth v. H. G. & B. Ry. Co.*, 43 O. L. R. (Canada) 137.

18. Section 606.

19. Section 599.

20. *Hansafus v. St. Louis, etc., Rd.*, 199 Ill. Ap. 4; *Joyce v. Interurban R. Co.*, 172 Iowa, 727, 154 N. W. 936.

21. *Harlan v. Joline*, 77 Misc. (N. Y.) 184, 136 N. Y. Suppl. 72.

stop the machine as soon as practicable.<sup>22</sup> It may be negligence as a matter of law for a driver to stop his machine on the track or to go slowly over the track when a street car is approaching close at hand.<sup>23</sup>

**Sec. 605. Speed and control of automobile — unfamiliarity with brakes.**

Under a statute requiring that every motor vehicle shall be equipped with a good and efficient brake or brakes, it is the duty of the driver of such a conveyance to be reasonably familiar with the use of such safety appliances and to use and apply them, if need be, to avoid accident. If the driver of the vehicle is unfamiliar with the use of the brakes and therefore is unable to use them, and his ignorance is one of the proximate causes of a collision with a street car, he may be precluded from recovering for his injuries.<sup>24</sup>

**Sec. 606. Speed and control of automobile — automobile running against street car.**

The fact that the automobile runs into the street car instead of the street car running into the automobile, indicates with considerable force that the driver of the machine has failed in his duty of stopping.<sup>25</sup> At a street crossing, if the street car has proceeded to such an extent that the automobile cannot cross in front thereof with reasonable safety, it is the duty of the chauffeur to slacken speed and give the street railway company the prior right to the use of the street intersection.<sup>26</sup>

**Sec. 607. Stopping auto near track.**

The law does not object to the act of the owner of a vehicle in leaving it standing unoccupied by the side of the street or

22. *Kneeshaw v. Detroit United Ry.*, 169 Mich. 697, 135 N. W. 903.

23. *Carden v. Chicago Rys. Co.*, 210 Ill. App. 155.

24. *Garrett v. People's R. Co.*, 6 Penn. (Del.) 29, 64 Atl. 254.

25. *McCreery v. United Rys. Co.*, 221 Mo. 18, 120 S. W. 24; *Harvey v. Philadelphia Rapid Transit Co.*, 255 Pa. 220, 99 Atl. 796; *Bayer v. St. Louis, etc., Rd.*, 188 Ill. App. 323.

26. Section 599.

highway for a reasonable length of time.<sup>27</sup> It is not necessarily negligence for the owner of a motor vehicle to stop the engine and leave the machine by the side of the highway for a brief period. But in so doing he must use such a reasonable degree of prudence and foresight as would be exercised by an ordinarily prudent man. It may, however, be negligence to stop or to leave an automobile on the track of a street railway company, or so close to it that it will be struck by a passing car, where there is no reason or excuse for leaving the machine at that place.<sup>28</sup> The law does not necessarily forbid one to stop a machine on the track momentarily in order that a passenger may alight.<sup>29</sup> Where an auto driver in a rural district in the day-time stopped his car to pay toll on a turnpike road so close to the track of an electric company's track that a car could not pass without striking it, although the road was sufficiently wide to permit room for passage, and it appeared that the railway car was then seen about sixty feet away where it stopped to permit passengers to get off and on and it then proceeded without warning and struck the automobile, it was held that the driver was guilty of contributory negligence.<sup>30</sup> And where one steps out of his machine on or so close to a railway track that he is struck by a street car, and there was nothing to prevent him from seeing the car or from avoiding it, it was held that he was guilty of negligence.<sup>31</sup>

### **Sec. 608. Turning or backing auto in street.**

In the absence of statute or municipal ordinance making a contrary rule, there is no objection to turning or backing an automobile in the street.<sup>32</sup> But, when one makes irregular movements in the highway, more precautions are required than would ordinarily be necessary. Clearly, the driver of

27. Section 340.

28. *Dyer v. Cumberland County P. & L. Co.* (Me.), 110 Atl. 357; *Hause v. Lehigh Valley Trans. Co.*, 38 Pa. Super. Ct. 614; *Dyer v. Cumberland County Power & L. Co.*, 117 Me. 576, 104 Atl. 848.

29. *Fitch v. Bay St. Ry.* (Mass.),

129 N. E. 423.

30. *Hause v. Lehigh Valley Trans. Co.*, 38 Pa. Super. Ct. 614.

31. *Lotharius v. Milwaukee, etc., Electric Railway & Light Co.*, 157 Wis. 184, 146 N. W. 1122.

32. Section 263.

an automobile is guilty of negligence as a matter of law if he backs his machine upon a street railway track without looking for an approaching car.<sup>33</sup> It has even been said that he should look for approaching cars after he has started in his backward course.<sup>34</sup> And if one attempts to turn his automobile around in the street, considerable care is required so that he will not collide with street cars and other vehicles.<sup>35</sup> Unless the street car is dangerously close at the time of the maneuver, his negligence may present a jury question.<sup>36</sup>

### Sec. 609. Reliance on proper care by street railway.

Every traveler on the public highway relies, to a certain extent, upon the exercise of reasonable care by other travelers. The driver of an automobile may assume, in the absence of some warning to the contrary that the motorman of an approaching street car will exercise reasonable diligence to avoid a collision.<sup>37</sup> So, too, the motorman is entitled to assume that the automobilist will use reasonable precautions to the same end.<sup>38</sup> When a traveler having an equal right to the use of the street crossing reaches the crossing in advance of the street car, he can properly assume that the motorman of the street car will slacken its speed so as to give the traveler the right of way to which he is entitled.<sup>39</sup> But, when the law gives the street car a superior right at the

33. *Holmes v. Sandpoint & I. R. Co.*, 25 Idaho, 345. 137 Pac. 532; *Birch v. Athol, etc., Ry. Co.*, 198 Mass. 257. 84 N. E. 310.

34. *Birch v. Athol, etc., Ry. Co.*, 198 Mass. 257, 84 N. E. 310.

35. *Johnson Oil Refining Co. v. Galesburg, etc., Power Co.*, 200 Ill. App. 392.

36. *Davis v. United Rys. Co. (Mo. App.)*, 218 S. W. 357.

37. *Commonwealth Bonding, etc., Ins. Co. v. Pacific Elec. Ry. Co. (Cal. App.)*, 184 Pac. 29; *Pigeon v. Massachusetts, etc., St. Ry. Co.*, 230 Mass. 392, 119 N. E. 762; *Gagnon v. Worcester Consol. St. Ry. Co.*, 231 Mass. 160. 120 N. E. 381; *Prince v. Detroit*

*United Ry. Co.*, 192 Mich. 194, 158 N. W. 861; *Reichle v. Detroit United Ry.*, 203 Mich. 276. 168 N. W. 972; *Day v. Duluth St. Ry. Co.*, 138 Minn. 312. 164 N. W. 795; *Otto v. Duluth St. Ry. Co.*, 138 Minn. 312. 164 N. W. 1020; *Halteen v. St. Paul City Ry. Co.*, 141 Minn. 289. 170 N. W. 207.

38. *Marston v. Shreveport Traction Co.*, 140 La. 18. 72 So. 794; *Otto v. Duluth St. Ry. Co.*, 138 Minn. 312. 164 N. W. 1020.

39. *Prince v. Detroit United Ry. Co.*, 192 Mich. 194. 158 N. W. 861; *Harlin v. Joline*, 77 Misc. (N. Y.) 184. 136 N. Y. Suppl. 72; *Reed v. Tacoma Ry. & P. Co. (Wash.)*, 188 Pac. 409.

crossing, the automobilist cannot rely on the stopping of the car; if it does not stop and the driver of the machine does not slacken speed to see whether the street car will proceed, he is guilty of negligence.<sup>40</sup> The automobilist may rely that the motorman of the street car will obey an ordinance requiring the street car to stop at a certain point.<sup>41</sup> So, too, until he discovers the violation by the motorman, he may assume that the street car will not exceed a reasonable speed or the limit of speed fixed by a municipal ordinance.<sup>42</sup> But, in order to claim that he relied on the observance of a municipal ordinance by a street railway company, reason requires that the automobilist have actual knowledge of the ordinance.<sup>43</sup> The driver of a vehicle cannot blindly rely on the motorman of a street car performing his duty; the driver must exercise reasonable care under the circumstances.<sup>44</sup>

#### Sec. 610. Violation of regulation by autoist.

The violation of a statute or municipal regulation prescribing the conduct of an automobilist is considered as negligence or at least as evidence of negligence;<sup>45</sup> and, where the violation is a proximate cause of a collision between a street car and the vehicle, the street railway company is not generally liable for ensuing damages. Thus, a violation of the law of the road which brings an automobile in collision with a street

40. *Long v. Philadelphia Rapid Transit Co.*, 65 Pa. Super. Ct. 281.

41. See *Todd v. Chicago City Ry. Co.*, 197 Ill. App. 544.

42. *California*.—*Hoff v. Los Angeles Pac. Co.*, 158 Cal. 596, 112 Pac. 53; *Commonwealth Bonding, etc., Co. v. Pacific Elec. Ry. Co.* (Cal. App.), 184 Pac. 29.

*Iowa*.—*Flannery v. Interurban Ry. Co.*, 171 Iowa 238, 153 N. W. 1027.

*Minnesota*.—*Day v. Duluth St. R. Co.*, 121 Minn. 445, 141 N. W. 795.

*Missouri*.—*Byerly v. Metropolitan St. R. Co.*, 172 Mo. App. 470, 158 S. W. 413.

*New York*.—*Brandt v. New York Ry. Co.*, 85 Misc. (N. Y.) 40, 147 N. Y. Suppl. 17.

*Pennsylvania*.—*Clifford v. Philadelphia Rapid Transit Co.*, 112 Atl. 468.

*Rhode Island*.—*King v. Rhode Island Co.*, 110 Atl. 623.

*Virginia*.—*Virginia Ry. & Power Co. v. Smith*, 105 S. E. 532.

*Washington*.—*Coons v. Olymphia L. & P. Co.*, 191 Pac. 769; *Bieman v. Tacoma Ry. & P. Co.*, 191 Pac. 813; *Goldsby v. City of Seattle*, 197 Pac. 787.

43. *Voelker Products Co. v. United Rys. Co.*, 185 Mo. App. 310, 170 S. W. 332.

44. *Haleen v. St. Paul City Ry. Co.*, 141 Minn. 289, 170 N. W. 207; *Blanchard v. Puget Sound Tract., L. & P. Co.*, 105 Wash. 205, 177 Pac. 822.

45. Section 297.

car, will be ground for excusing the street railway company from liability, if the violation is a proximate cause of the collision.<sup>46</sup> But, where the regulation is one which was not enacted for the benefit of street railway companies, it cannot rely thereon to defeat the recovery of the automobilist.<sup>47</sup> One may be guilty of negligence *per se* if he violates a municipal ordinance requiring the attachment of a mirror for the discovery of vehicles in the rear.<sup>48</sup> The fact that the automobile is not licensed according to the State law on that subject, is generally considered not a proximate cause of the collision, and hence does not affect the liability of the parties.<sup>49</sup> A contrary doctrine, however, obtains in some States.<sup>50</sup> It has been held that the fact that the chauffeur had been for several years licensed to operate an automobile, but at the time of the accident his license had expired and had not been renewed, is some evidence of his negligence in operating the machine, but is not conclusive.<sup>51</sup>

### Sec. 611. Auto stalled on tracks.

Ordinarily negligence is not to be charged against the driver of a motor vehicle as a matter of law, because his machine becomes stalled on a street railway track where it is struck by a street car. The contributory negligence of the driver is a question for the jury.<sup>52</sup> So, too, the question

46. See *Johnson Oil Refining Co. v. Galesburg, etc., Power Co.*, 200 Ill. App. 392; *Day v. Duluth St. Ry. Co.*, 121 Minn. 445, 141 N. W. 795; *Boulton v. City of Seattle (Wash.)* 195 Pac. 11; *Tait v. B. C. Electric R. Co.*, 27 D. L. R. (Canada) 538, 34 W. L. R. 684, 22 B. C. R. 571. And see section 298.

47. *Watts v. Montgomery Tr. Co.*, 175 Ala. 102, 57 So. 471.

48. *El Paso Ry. Co. v. Terrazas (Tex. Civ. App.)*, 208 S. W. 387.

49. *Crossen v. Chicago, etc., Co.*, 158 Ill. App. 42. And see section 126.

50. *Knight v. Savannah Elec. Co.*, 20 Ga. App. 719, 93 S. E. 17; *Downey v. Bay State St. Ry. Co.*, 225 Mass. 281, 114 N. E. 207; *Wentzell v. Boston*

*Elev. Ry. Co.*, 230 Mass. 275, 119 N. E. 652. And see section 125.

51. *Pigeon v. Massachusetts, etc., St. Ry. Co.*, 230 Mass. 392, 119 N. E. 762.

52. *Burr v. United Railroads of San Francisco*, 173 Cal. 211, 159 Pac. 584; *Joyner v. Interurban R. Co.*, 172 Iowa 727, 154 N. W. 936; *Lawrence v. Fitchburg, etc., R. Co.*, 201 Mass. 489, 87 N. E. 898; *Luttenton v. Detroit, etc., Ry. Co. (Mich.)*, 176 N. W. 558; *Peterson v. United Ry. Co.*, 183 Mo. App. 715, 168 S. W. 254; *Mead v. Central Pa. Traction Co.*, 63 Pa. Super. Ct. 76.

**Railway employees assisting removal of machine.**—Where an automobile is overturned on the track and the employees of the company are as-

whether the motorman of the street car was negligent in not discovering the condition of the vehicle or not stopping the car in time to avoid a collision, is a question for the jury.<sup>53</sup> In such a case, the failure of the motorman of the street car to sound the gong on the car is not a proximate cause of the collision, and negligence must be founded, if at all, on some other ground.<sup>54</sup> The motorist should, of course, take reasonable precautions to avoid injury from the approaching car. Thus, if there is a reasonable opportunity he should give some signal or warning to the motorman of the approaching car to indicate the danger of the situation.<sup>55</sup> But whether the efforts to notify the motorman of the danger of the situation are sufficient, is generally a question for the jury.<sup>56</sup> A passenger in the automobile may be guilty of contributory negligence if he elects to remain in the machine and trusts to the motorman of the approaching car to stop, instead of getting out of the dangerous position when he has ample opportunity to do so.<sup>57</sup> If the motorman of a street car sees an automobile in close and dangerous proximity to the track, manifestly helpless, and has time to stop the car, but does not slow down so as to enable him to stop before a collision, and takes the obvious chance of hitting it in running by, the motorman is negligent as a matter of law.<sup>58</sup>

sisting to remove it with the consent of the owner's agent, only the exercise of reasonable care is required. *Augerson v. Seattle Elec. Co.*, 73 Wash. 529, 132 Pac. 222.

53. *Turner v. Los Angeles Ry. Corp.* (Cal. App.), 188 Pac. 56; *Joyner v. Interurban R. Co.*, 172 Iowa 727, 154 N. W. 936; *Stock v. St. Paul City Ry. Co.*, 142 Minn. 315, 172 N. W. 122; *Mead v. Central Pa. Traction Co.*, 63 Pa. Super. Ct. 76.

54. *Peterson v. United States Rys. Co. of St. Louis*, 270 Mo. 67, 192 S. W. 938.

55. *Lounbury v. McCormick*

(Mass.), 129 N. E. 598; *Mead v. Central Penn. Tract. Co.*, 54 Pa. Super. Ct. 400.

56. *Fischer v. Michigan Ry. Co.*, 203 Mich. 668, 169 N. W. 819.

57. *Lawrence v. Fitchburg, etc., R. Co.*, 201 Mass. 489, 87 N. E. 898; *Coleman v. Pittsburgh, etc., St. Ry. Co.*, 251 Pa. 498, 96 Atl. 1051. See also *Hensley v. Kansas City Rys. Co.* (Mo. App.), 214 S. W. 287.

58. *Mertz v. Connecticut Co.*, 217 N. Y. 475, 112 N. E. 166, reversing judgment 161 N. Y. App. Div. 941, 145 N. Y. Suppl. 1133.



**Sec. 612. Acts in emergencies.**

When the occupant of an automobile is suddenly confronted with an oncoming street car, which is negligently operated, he is not expected to use as high a degree of caution as he would under ordinary circumstances.<sup>59</sup> His failure to employ the best course to avoid the impending peril is not contributory negligence as a matter of law.<sup>60</sup> For example, if a motorist about to cross a street is without contributory negligence suddenly placed in a position where a collision with a street car is imminent, it may not be negligence as a matter of law for him to attempt to stop before reaching the track or for him to hasten his speed and try to clear the track before the car reaches the intersection point, although as a matter of subsequent mathematical calculation it can be shown that the other alternative is the course which would have taken him out of danger.<sup>61</sup> The doctrine under consideration is applicable only when the plaintiff is suddenly placed in a dangerous position, if he has ample time to think and act, there is no emergency which gives an opportunity for the application of the general rule.<sup>62</sup> Leniency is also extended to the motorman when his actions in the face of an imminent collision are under consideration.<sup>63</sup>

**Sec. 613. Last clear chance doctrine.**

Under the "last clear chance" or "discovered peril" doctrine, an automobilist who has negligently placed himself in a position of danger on a street railway track may, nevertheless, recover for injuries sustained in a collision with a street car, where the motorman, after discovering the danger of the traveler, could, by the exercise of reasonable care, have avoided the collision.<sup>64</sup> Moreover, in some jurisdictions, the

59. *Hoff v. Los Angeles Pac. Co.*, 158 Cal. 596, 112 Pac. 53; *Byerley v. Metropolitan St. R. Co.*, 172 Mo. App. 470, 158 S. W. 413; *Letzter v. Ocean Elec. Ry. Co.*, 192 N. Y. App. Div. 114, 182 N. Y. Suppl. 649.

60. *Taylor v. Pacific Electric Ry. Co.*, 172 Cal. 638, 158 Pac. 119.

61. *Hoff v. Los Angeles Pac. Co.*, 158 Cal. 596, 112 Pac. 53; *Byerley v. Met-*

*ropolitan St. R. Co.*, 172 Mo. App. 470, 158 S. W. 413.

62. *Kneeshaw v. Detroit United Ry.*, 169 Mich. 697, 135 N. W. 903.

63. *Moore v. B. C. El. Ry. Co.*, 35 D. L. R. (Canada) 771.

64. *Alabama*.—*Ross v. Brannon*, 198 Ala. 124, 73 So. 439. See also *Harden v. Bradley*, 88 So. 432.

*California*.—*Taylor v. Pacific Elec-*

doctrine is extended so as to permit a recovery where the street railway employees by the exercise of reasonable care

tric Ry. Co., 172 Cal. 638, 158 Pac. 119; Commonwealth Bonding, etc., Ins. Co. v. Pacific Elec. Ry. Co. (Cal. App.), 184 Pac. 29; Read v. Pacific Elec. Ry. Co. (Cal.), 197 Pac. 791.

*Connecticut*.—Hygienic Ice Co. v. Connecticut Co., 90 Conn. 21, 96 Atl. 152.

*Delaware*.—Garrett v. People's R. Co., 6 Penn. 29, 64 Atl. 254.

*Illinois*.—Bozinch v. Chicago Rys. Co., 187 Ill. App. 8; Sorensen v. Chicago Rys. Co., 217 Ill. App. 174.

*Indiana*.—Terre Haute, etc., Tract. Co. v. Overpeck (Ind. App.), 131 N. E. 543.

*Iowa*.—Hutchinson Purity Ice Cream Co. v. Des Moines City Ry. Co., 172 Iowa 527, 154 N. W. 890; Bensing v. Waterloo, etc., R. Co., 179 N. W. 835; Livingston v. Chambers, 183 N. W. 429.

*Louisiana*.—See Marston v. Shreveport Traction Co., 140 La. 18, 72 So. 794.

*Maine*.—Dyer v. Cumberland County P. & L. Co., 110 Atl. 357.

*Minnesota*.—Hedlund v. Minneapolis St. R. Co., 120 Minn. 319, 139 N. W. 603.

*North Carolina*.—Buffalo v. Carolina Power & L. Co., 104 S. E. 161.

*Rhode Island*.—Strongoli v. Receivers, 113 Atl. 655.

*South Dakota*.—DeNorma v. Sioux Falls Traction System, 39 S. Dak. 10, 162 N. W. 746.

*Texas*.—El Paso Elec. R. Co. v. Davidson (Civ. App.), 162 S. W. 937; Southwestern Gas & Elec. Co. v. Grant (Civ. App.), 223 S. W. 544.

**"Humanitarian" doctrine.** — In *Missouri*, a doctrine has been adopted which is called the "humanitarian" doctrine, and which was distinguished from the "last clear chance" rule in *Smith v. Heibel*, 157 Mo. App. 177, 137 S. W. 70, in the following language:

"The argument of the learned counsel for appellant assumes throughout, that the humanitarian and last chance doctrines are one and the same. This is an erroneous view. The humanitarian doctrine proceeds in accord with the precepts of humanity which require every person to protect every other person seen to be in, or about to become in, a position of peril, if he may do so, by exercising ordinary care to that end, while exercising as well ordinary care for himself and those in the conveyance of which he has charge. This is true, whether the plaintiff became in peril through his own negligence or otherwise. But the last chance doctrine is not so broad. It proceeds on the theory of prior negligence on the part of plaintiff. Such was the case in *Davies v. Mann*, 10 Mees. & W. 545. The humanitarian doctrine includes and comprehends that of the last chance. But the last clear chance doctrine does not include the humanitarian rule in its entirety. As its name implies, the last clear chance doctrine concedes the negligence of the plaintiff in the first instance but makes for a recovery, notwithstanding such prior negligence of plaintiff, on the distinct ground that the defendant was the one who had the last clear chance to avert the injury and that he omitted to do so. Under such circumstances, the prior negligence of the plaintiff is said to be remote in the chain of causation while that of the defendant, who omitted to exercise ordinary care to save him, is held to be the proximate cause of the hurt." See also *Powell v. Kansas City Rys. Co. (Mo.)*, 226 S. W. 916; *England v. Southwest Missouri R. Co. (Mo. App.)*, 180 S. W. 32; *Newton v. Harvey (Mo. App.)*, 202 S. W. 249; *King v. Kansas City Rys. Co. (Mo. App.)*, 204 S. W. 1129; *Sethman v. Union*

*should* have discovered the danger of the traveler.<sup>65</sup> In other jurisdictions, the courts deny such a broad application to the rule.<sup>66</sup> The issues under the "last clear doctrine" are generally within the province of the jury;<sup>67</sup> but the burden of proof is upon the plaintiff to show that the case comes within the principle involved.<sup>68</sup> It is essential for the application of the doctrine that the railway employees could have avoided the accident after the discovery of the plaintiff's peril or after they should have discovered it.<sup>69</sup> If the driver of an automobile is in no apparent peril until the very moment of the collision with the street car, when the accident is unavoidable, there is no basis for a submission of issues to the jury

Depot, etc., Co. (Mo. App.), 218 S. W. 879; Lane v. Kansas City Rys. Co. (Mo. App.), 228 S. W. 870; Swinehart v. Kansas City Rys. Co. (Mo. App.), 233 S. W. 59.

65. Birmingham R. L. & P. Co. v. Broyles, 194 Ala. 64, 69 So. 562; Atherton v. Topeka Ry. Co., 107 Kan. 6, 190 Pac. 430; Calvert v. Detroit United Ry., 202 Mich. 311, 168 N. W. 508; Rush v. Metropolitan St. R. Co., 157 Mo. App. 504, 137 S. W. 1029; Flack v. Metropolitan St. Ry. Co., 162 Mo. App. 650, 145 S. W. 110; Borders v. Metropolitan St. Car Co., 168 Mo. App. 172, 153 S. W. 72; Aqua Contracting Co. v. United Rys. of St. Louis (Mo. App.), 203 S. W. 483; Daso v. Jefferson City Bridge & Terminal Co. (Mo. App.), 189 S. W. 400; Montague v. Missouri & K. I. Ry. Co. (Mo. App.), 193 S. W. 935; Virginia Ry. & Power Co. v. Smith (Va.), 105 S. E. 532. See also Birmingham Ry., Light & Power Co., 196 Ala. 148, 72 So. 96.

66. Terre Haute, etc., Tract. Co. v. Overpeck (Ind. App.), 131 N. E. 543; Maris v. Lawrence Ry. & Light Co., 98 Kans. 205, 158 Pac. 6; Nicholson v. Houston Elec. Co. (Tex. Civ. App.), 220 S. W. 632.

67. Birmingham R. L. & P. Co. v. Broyles, 194 Ala. 64, 69 So. 562; Ross

v. Brannon, 198 Ala. 124, 73 So. 439; Mondt v. Iowa L. & R. Co., 178 Iowa, 166, 155 N. W. 245; Huff v. Michigan Union Traction Co., 186 Mich. 88, 152 N. W. 936; Hedlund v. Minneapolis St. Ry. Co., 120 Minn. 319, 139 N. W. 603; King v. Kansas City Rys. Co. (Mo. App.), 204 S. W. 1129.

68. Jacobe v. Houston Electric Co. (Tex. Civ. App.), 187 S. W. 247.

69. *United States*.—Coverdale v. Sioux City Service Co., 268 Fed. 963. *Iowa*.—Claar Transfer Co. v. Omaha etc., Ry. Co., 181 N. W. 755.

*Maine*.—Thompson v. Lewiston, etc., St. Ry., 115 Me. 560, 99 Atl. 370.

*Michigan*.—Kneeshaw v. Detroit United Ry., 167 Mich. 697, 135 N. W. 903.

*Missouri*.—England v. Southwest Missouri R. Co. (Mo. App.), 180 S. W. 32; Sethman v. Union Depot, etc., Co. (Mo. App.), 218 S. W. 879.

*North Carolina*.—Buffalo v. Carolina Power & L. Co. (N. Car.), 104 S. E. 161.

*Rhode Island*.—Hambly v. Bay State St. Ry. Co., 100 Atl. 497; Ricker v. Rhode Island Co., 107 Atl. 72.

*Texas*.—See El Paso Elec. R. Co. v. Davidson (Tex. Civ. App.), 162 S. W. 937.

*Washington*.—Johnson v. City of Seattle, 194 Pac. 417.

on the theory of the last clear chance rule.<sup>70</sup> The duty to take additional precautions to avert a collision is not thrust upon the motorman by the mere fact that he sees the automobile, but it is essential also that he should see that it was in a position of danger. He has a right to assume that it will stop before reaching the crossing, and a realization of danger arises only when it appears that the automobile is driven in ignorance or disregard of the possibility of meeting an approaching car, or that it has got so near the track that it cannot be stopped in time.<sup>71</sup> The "last clear chance" rule is not applicable where the negligence of the auto driver continues up to the time of the accident.<sup>72</sup> Nor can it be invoked by one joint tort-feasor as against the other.<sup>73</sup> The doctrine is frequently applied in cases where the plaintiff's vehicle has become stalled on the track, but the railway company does not stop one of its cars until injury is caused to the vehicle.<sup>74</sup>

*Canada.*—Gooderham v. Toronto R. Co., 22 D. L. R. (Canada) 898, 8 O. W. N. 3.

70. Read v. Pacific Elec. Ry. Co. (Cal.), 197 Pac. 791; Underwood v. Oskaloosa Tr. & Light Co., 157 Iowa. 352, 137 N. W. 933; Daso v. Jefferson City Bridge & Terminal Co. (Mo. App.), 189 S. W. 400; Montague v. Missouri & K. I. Ry. Co. (Mo. App.), 193 S. W. 935; Heath v. Wylie (Wash.), 186 Pac. 313.

71. Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 158 Pac. 119; Garrett v. People's R. Co., 6 Penn. (Del.) 29, 64 Atl. 254; Fillmore v. Rhode Island Co. (R. I.), 105 Atl. 564; Levein v. Rhode Island Co. (R. I.), 110 Atl. 602; King v. Rhode Island Co. (R. I.), 110 Atl. 623. See also Lobbett & Dean v. Oakland, Etc., Ry. (Cal. App.), 172 Pac. 1123. "A motorman may, within the limits of reasonable prudence and fair judgment, presume that an adult either will not enter the range of danger created by an approaching street car or that he will remove himself or his vehicle therefrom before an

impact occurs." Ross v. Brannon, 198 Ala. 124, 73 So. 439. "Merely seeing an automobile approaching the crossing, and seeing that its approach, if continued would bring it dangerously near the crossing, would not of itself up to a certain point charge the motorman with knowledge that the driver of the automobile would not act as an ordinarily prudent man would act under the same or similar circumstances. He had a right to presume that the driver would or had used his eyes, and was therefore aware of the danger." England v. Southwest Missouri R. Co. (Mo. App.), 180 S. W. 32.

72. Shield v. F. Johnson & Son Co., 132 La. 773, 61 So. 787; Smith v. Somerset Tract. Co., 117 Me. 407, 104 Atl. 788; Sutton v. Virginia Ry. & P. Co., 125 Va. 449, 99 S. E. 670; Hubenthal v. Spokane, etc., R. Co., 97 Wash. 581, 166 Pac. 797.

73. Shield v. F. Johnson & Son Co., 132 La. 773, 61 So. 787.

74. Section 611.

**Sec. 614. Function of jury.**

The general rule in negligence cases is that the negligence of the defendant and the contributory negligence of the plaintiff are questions for the jury. In actions for injuries sustained in a collision between a street car and a motor vehicle, except in cases where the plaintiff has clearly failed to exercise due diligence in avoiding the car, the question of his negligence is within the province of the jury.<sup>75</sup> The evidence of the plaintiff tending to show an exercise of reasonable care

**75. United States.**—*Jackson Light & Traction Co. v. Lee*, 256 Fed. 97.

**California.**—*Levings v. Pacific Elec. Ry. Co.*, 178 Cal. 231, 173 Pac. 87; *Busch v. Los Angeles Ry. Corp.*, 178 Cal. 536, 174 Pac. 665, 2 A. L. R. 1607; *Carlton v. Pac. Elec. Ry. Co.*, 39 Cal. App. 321, 178 Pac. 869.

**Connecticut.**—*Strosnick v. Connecticut Co.*, 92 Conn. 594, 103 Atl. 755.

**Massachusetts.**—*Richardson v. Haverhill, etc., Ry. Co.*, 218 Mass. 52, 105 N. E. 221; *Keeney v. Springfield St. Ry. Co.*, 210 Mass. 44, 96 N. E. 73; *Lynch v. Boston Elevated Ry. Co.*, 224 Mass. 93, 112 N. E. 488; *Boyd v. Boston Elev. Ry. Co.*, 224 Mass. 199, 112 N. E. 607; *Morrissey v. Connecticut Valley St. Ry. Co.*, 233 Mass. 554, 124 N. E. 435; *Davis v. Worcester Consol. St. Ry. Co.*, 125 N. E. 554; *Clayton v. Holyoke St. Ry. Co.*, 128 N. E. 460.

**Michigan.**—*McNeal v. Detroit United Rys.*, 198 Mich. 108, 164 N. W. 417; *Granader v. Detroit United Ry.*, 206 Mich. 367, 171 N. W. 362; *Powell v. Detroit United Ry.*, 206 Mich. 698, 173 N. W. 349; *Beaubian v. Detroit United Ry.*, 179 N. W. 478; *Niman v. Detroit United Ry.*, 183 N. W. 48.

**Minnesota.**—*Otto v. Duluth St. Ry. Co.*, 138 Minn. 312, 164 N. W. 1020.

**Missouri.**—*Bruening v. Metropolitan St. Ry. Co.*, 181 Mo. App. 264, 168 S. E. 247; *Davis v. United Rys. Co. (Mo. App.)*, 218 S. W. 357; *Jackels v. Kansas City Rys. Co. (Mo. App.)*, 231 S. W. 1023.

**New York.**—*Dreger v. International Ry. Co.*, 190 App. Div. 570, 180 N. Y. Suppl. 436; *Letzter v. Ocean Elec. Ry. Co.*, 192 App. Div. 114, 182 N. Y. Suppl. 649; *Harlan v. Joline*, 77 Misc. 184, 136 N. Y. Suppl. 72; *Brandt v. New York Rys. Co.*, 85 Misc. 40, 147 N. Y. Suppl. 17.

**Pennsylvania.**—*Rothrock v. Lehigh Valley Transit Co.*, 103 Atl. 918; *Smoker v. Baldwin Locomotive Works*, 261 Pa. 341, 104 Atl. 597.

**Utah.**—*Oswald v. Utah L. & R. Co.*, 39 Utah 245, 117 Pac. 46.

**Virginia.**—*Virginia Ry. & P. Co. (Va.)*, 101 S. E. 878.

**Washington.**—*Bardsher v. Seattle Elec. Co.*, 72 Wash. 200, 130 Pac. 101; *Herrett v. Puget Sound, etc., P. Co.*, 103 Wash. 101, 173 Pac. 1024; *Coons v. Olympia L. & P. Co.*, 191 Pac. 769; *Koch v. City of Seattle*, 194 Pac. 572; *Johnson v. City of Seattle*, 194 Pac. 417; *Stream v. Grays Harbor Ry. & L. Co.*, 195 Pac. 1044; *Goldsby v. City of Seattle*, 197 Pac. 787.

**Wisconsin.**—*Dahinden v. Milwaukee Elec. Ry. & L. Co.*, 171 N. W. 669; *Merrill v. Chicago, etc., R. Co.*, 177 N. W. 613.

"As a general rule, the facts disclosed in collisions of vehicles at intersecting streets, make the issue of the plaintiff's care one for the determination of the jury." *Lynch v. Boston Elevated Ry. Co.*, 224 Mass. 93, 112 N. E. 488.

by him is to be considered by the jury, unless it is inherently incredible.<sup>76</sup> There are some cases, as where the traveler fails to look for street cars before trying to cross an intersecting street, when the courts, as a matter of law, say that he is negligent.<sup>77</sup>

### Sec. 615. Negligence of railway — in general.

A street railway company is required to exercise reasonable care to avoid collisions with other vehicles having a lawful right to the use of the street.<sup>78</sup> Except possibly at points between crossings, the street railway company has no superior rights to the use of the streets, even as to the space occupied by its tracks.<sup>79</sup> The violation of some statute or ordinance prescribing a rule for the operation of street cars may be negligence *per se* in some States,<sup>80</sup> but, ordinarily, the

76. *Rieck v. Chicago & Milwaukee Elec. Ry. Co.*, 160 Wis. 232, 151 N. W. 243.

77. *Underwood v. Oskaloosa Tr. & Light Co.*, 157 Iowa, 352, 137 N. W. 933; *Gillett v. Michigan United Tract. Co.*, 205 Mich. 140, 171 N. W. 536; *Zeis v. United Rys. Co.* (Mo. App.), 217 S. W. 324. And see section 592.

78. *Delaware*.—*Garrett v. People's R. Co.*, 6 Penn. (Del.) 29, 64 Atl. 254. *Florida*.—*Stevens v. Tampa Elec. Co.* (Fla.), 88 So. 303.

*Iowa*.—*Borg v. Des Moines City Ry. Co.*, 181 N. W. 10.

*Kentucky*.—See *Woody v. Louisville Ry. Co.*, 153 Ky. 14, 154 S. W. 384.

*Michigan*.—*Traveler's Indemnity Co. v. Detroit United Ry.*, 193 Mich. 375, 159 N. W. 528.

*Minnesota*.—*Coleman v. Minneapolis St. R. Co.*, 113 Minn. 364, 129 N. W. 762.

*Missouri*.—*Johnson v. Springfield Tr. Co.*, 176 Mo. App. 174, 163 S. W. 896; *Bruening v. Metropolitan St. Ry. Co.*, 181 Mo. App. 264, 168 S. W. 247.

"High" degree of care.—It is error to charge the jury that the employees of the railway company are bound to

exercise a high degree of care. *Clark v. Public Service R. Co.*, 83 N. J. Law, 319, 85 Atl. 189.

**Dazzling headlight**, causing two motor vehicles to collide. See *Tupper v. Union St. Ry. Co.* (Mass.), 129 N. E. 881.

**Electric street cars** are governed by the same rules which apply to the management of other vehicles, and being of greater size and weight than they commonly are and capable of being moved at a very high speed; the car must at all times be kept so well in hand as not to expose others to unreasonable hazard. *Currie v. Consolidated Ry. Co.*, 81 Conn. 383, 71 Atl. 356; *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533.

**A custom**, as to the conduct of drivers vehicles at street intersections, is received in some states as bearing on the conduct of the motorman. *Jordan v. Boston & M. R. Co.* (N. H.), 113 Atl. 390.

79. Section 585.

80. *Lininger v. San Francisco, etc., R. Co.*, 18 Cal. App. 411, 123 Pac. 235; *Dorrance v. Omaha, etc., Ry. Co.*

negligence of the railway company in case of a collision with an automobile, is a question within the province of the jury.<sup>81</sup> Although street cars usually travel on the right-hand track in the direction in which they are going, in the absence of the statute or ordinance requiring the company to operate its cars in this manner, it is lawful to run them in either direction.<sup>82</sup>

### Sec. 616. Negligence of railway — lookout.

The employees of a street railway company must exercise a reasonable degree of vigilance in looking out for other travelers so that the car may be slacked or stopped in order to avoid a collision.<sup>83</sup> The duty to keep a reasonable lookout applies notwithstanding that in a particular case the street car has the right of way at a street intersection.<sup>84</sup> Greater precaution with reference to the lookout of the motorman is required where his view of approaching travelers is more or less obstructed.<sup>85</sup> Whether, considering the conditions of the weather and obstructions, the motorman of a street car should have seen an automobile on the track sooner than he did, is ordinarily a question for the jury.<sup>86</sup>

(Neb.), 180 N. W. 90; *Oswald v. Utah L. & R. Co.*, 39 Utah, 245, 117 Pac. 46.

**Pleading ordinance.**—In the federal courts, a municipal ordinance, to be admissible in evidence, must in some manner be referred to in the pleadings. *Dale v. Denver City Tramway Co.*, 173 Fed. 787, 97 C. C. A. 511.

**81.** *Prince v. Detroit United Ry. Co.*, 192 Mich. 194, 158 N. W. 861; *Travelers Indemnity Co. v. Detroit United Ry.*, 193 Mich. 375, 159 N. W. 528; *Lehman v. New York City Railway Company*, 107 N. Y. Suppl. 561; *Deslandes v. Rhode Island Co. (R. I.)*, 100 Atl. 393.

**82.** *Busch v. Los Angeles Ry. Corp.*, 178 Cal. 536, 174 Pac. 665, 2 A. L. R. 160; See also, *Gardner v. Wilmington, etc., Tract. Co.*, 7 Boyce's (30 Del.), 521, 108 Atl. 740.

**83.** *Stoker v. Tri-City Ry. Co.*, 182 Iowa 1090, 165 N. W. 20; *Daull v. New Orleans Ry. & L. Co.*, 147 La. 1012, 86 So. 477; *Cobb v. Cumberland County Power & Light Co. (Me.)*, 104 Atl. 844; *Gagnon v. Worcester Consol. St. Ry. Co.*, 231 Mass. 160, 120 N. E. 381; *Good Roads Co. v. Kansas City Rys. Co. (Mo. App.)*, 217 S. W. 858; *Dorrance v. Omaha, etc., Ry. Co. (Neb.)*, 180 N. W. 90; *Alshulir v. Milwaukee Electric Ry. & Light Co.*, 169 Wis. 477, 173 N. W. 304; *Gulesarian v. Madison Rys. Co. (Wis.)*, 179 N. W. 573.

**84.** *El Paso Elec. Ry. Co. v. Benjamin (Tex. Civ. App.)*, 202 S. W. 996.

**85.** *Ohio Valley Mills v. Louisville Ry. Co.*, 168 Ky. 758, 182 S. W. 955.

**86.** *Baldie v. Tacoma Ry. & Power Co.*, 52 Wash. 75, 100 Pac. 162.

**Sec. 617. Negligence of railway — speed.**

Due diligence on the part of an electric railway company running through the streets of a city or village, requires that it shall have its cars under reasonable control and shall run them at a speed not faster than a reasonable rate under the circumstances.<sup>87</sup> The rate of speed permissible necessarily depends on the surrounding circumstances, such as the density

**87. Alabama.**—*Mobile Light & R. Co. v. Harris Grocery Co.* (Ala. App.), 84 So. 867; *Alabama Power Co. v. Brown*, 87 So. 608.

**California.**—*Leninger v. San Francisco, etc., R. Co.*, 18 Cal. App. 411, 123 Pac. 235.

**Delaware.**—*Garrett v. Peoples R. Co.*, 6 Penn. (Del.) 29, 64 Atl. 254.

**Indiana.**—See *Union Traction Co. v. Howard*, 173 Ind. 335, 90 N. E. 764. "But it is obvious that there may be distinctions between the operation of trains, or cars, at a speed of thirty miles an hour across country highways and across thoroughfares in cities, depending upon location and conditions surrounding the crossing. Whether the rate of speed is dangerous depends largely upon the circumstances. The general duty may be said to be the use of reasonable care to so regulate the speed as not to jeopardize those who are passengers, or those who have rights in the streets." *Indiana Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005.

**Louisiana.**—*Coggin v. Shreveport Rys. Co.*, 147 La. —, 84 So. 902.

**Maryland.**—*United Rys. & Elec. Co. v. Montek*, 127 Md. 197, 96 Atl. 261.

**Massachusetts.**—*Davis v. Worcester Consol. St. Ry. Co.*, 234 Mass. 297, 125 N. E. 554.

**Michigan.**—*Prince v. Detroit United Ry. Co.*, 192 Mich. 194, 158 N. W. 861; *Donlin v. Detroit United Ry.* 198 Mich. 327, 164 N. W. 447; *Fischer v. Michigan Ry. Co.* 203 Mich. 668, 169 N. W. 819.

**Minnesota.**—*Erickson v. St. Paul*

*City Ry. Co.*, 141 Minn. 166, 169 N. W. 532.

**Missouri.**—*Turney v. United Rys. of St. Louis*, 155 Mo. App. 513, 135 S. W. 93; *Chappell v. United Rys. Co.*, 174 Mo. App. 126, 156 S. W. 819.

**Pennsylvania.**—*Rockroth v. Lehigh Valley Transit Co.*, 103 Atl. 918; *Keinath v. Bullock (Pa. St.)*, 110 Atl. 755.

**Texas.**—*Texas Electric Ry. Co. v. Crump (Tex. Civ. App.)*, 212 S. W. 827.

**Utah.**—*Cowan v. Salt Lake, etc., R. Co.*, 189 Pac. 599.

**Wisconsin.**—*Speaks Lime & Cement Co. v. Duluth St. Ry. Co.*, 179 N. W. 596.

**Canada.**—*Gallagher v. Toronto Ry. Co.*, 41 O. L. R. (Canada) 143.

**Rate of speed.**—"The statutes, in most of the States authorize the authorities in the various municipalities to regulate by ordinance the rate of speed at which street cars shall be operated in the streets of the municipality. Usually, therefore, each municipality has an ordinance fixing the maximum rate of speed, and the limit has been fixed in various cities at rates varying from four to fifteen miles an hour. The violation of such an ordinance is generally held to be some proof of negligence. Where there is no law or ordinance regulating the rate of speed on a city street, the mere fact of a street car running at a high rate of speed does not constitute negligence, but it is for the jury to say, in view of the surrounding conditions at the time, whether such a rate of speed was excessive, and, there-



of traffic, obstructions, etc.<sup>88</sup> Whether a given speed is unreasonable under the circumstances is generally a question for the jury.<sup>89</sup> In the absence of some regulation prescribing the speed, it is not negligence *per se* to run an interurban electric car over a country highway crossing at a speed of thirty miles an hour.<sup>90</sup> Municipal ordinances may legally be en-

fore, dangerous in the circumstances. A rate of speed may be dangerous under special circumstances, though it would not be great, unusual, or excessive under ordinary conditions. The reasonableness of the speed at which a car is run is to be measured by the relation of that speed to the particular circumstances under which it is maintained. A speed of twenty miles an hour might not be unreasonable in the open country, where the view is unobstructed, and there are no travelers in sight. A speed of three or four miles an hour might be unreasonable in a crowded street, when other vehicles or pedestrians were on the tracks in front, or obviously on the point of crossing them. Street railway companies in operating their cars along public streets have a common right in the highway with other travelers, and in the absence of any law or municipal ordinance regulating the speed of their cars, they must be run at such speed, and must be kept in such control as not to interfere unreasonably with the rights of others upon the highway. Ordinarily the test of negligence in the rate of speed is whether or not the car was running at the speed at which an ordinarily prudent man would have run the car under similar circumstances. It is the duty of an electric motorman to keep his car so far under control as to avoid injuries to pedestrians or persons in other vehicles who are in the exercise of due care to avoid injury, and it is a question for the jury as to whether a question for the jury as to whether the motorman of a street car lost con-

trol thereof because the car was running at a dangerous speed. Where a city ordinance permits a certain rate of speed, and the car does not exceed that speed, negligence cannot be imputed to the defendant on account of the speed alone; but, although the rate of speed in a particular case may not have been in excess of that allowed by a statute or ordinance, it may be negligent in view of the surrounding circumstances. The violation of an ordinance regulating the rate of speed is not sufficient negligence upon which to maintain an action, unless such violations were the proximate cause of the injury. The fact that the car was moving at a rate of speed prohibited by an ordinance of the city will not of itself entitle the plaintiff to recover. The mere fact that a street car is running at a higher rate of speed than any municipal ordinance allows, does not give one injured by his own carelessness by impact with such a car a right of action." *Nellis on Street Railways* (2d Ed.), § 393.

88. *Garfield v. Hartford, etc., Ry.*, 80 Conn. 260, 67 Atl. 890.

89. *Alabama Power Co. v. Brown* (Ala.), 87 So. 608; *Indiana Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005.

90. *Indiana Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005.

**Fifty miles.**—In the absence of positive regulation or special circumstances, a speed of fifty miles at a crossing in the country is not necessarily negligence. *Jordan v. Osborne*, 147 Wis. 623, 133 N. W. 32.

acted which limit the speed of street cars; and the violation of such ordinances in some jurisdictions is considered as negligence *per se*, and in others as evidence of negligence.<sup>91</sup> But, even in the case of a violation of a positive speed regulation, a question of proximate cause may remain.<sup>92</sup> A street railway company is bound by an ordinance limiting the speed of its cars, though its franchise has expired, where it is operating its cars by virtue of an extension.<sup>93</sup>

### Sec. 618. Negligence of railway — stopping, if necessary.

An exercise of reasonable care on the part of the motorman of a street car frequently requires that he stop the car to avoid a collision with other travelers.<sup>94</sup> Even where the company has a preferential right of way for its cars, it must not willfully run a car into an automobile.<sup>95</sup> Thus, if the plaintiff's automobile is "stalled" on the track, the motorman must make diligent efforts to stop the car.<sup>96</sup> And, under the last chance doctrine, the railway company may be liable for injuries sustained by a traveler, though the traveler negli-

91. *Ward v. Ft. Smith Light & Traction Co.*, 123 Ark. 548, 185 S. W. 1085; *Lininger v. San Francisco, etc.*, R. Co., 18 Cal. App. 411, 123 Pac. 235; *Williams v. Iola Elec. R. Co.*, 102 Kans. 268, 170 Pac. 397; *Prince v. Detroit United Ry. Co.*, 192 Mich. 194, 158 N. W. 861; *Ziegler v. United Rys. Co. of St. Louis (Mo. App.)*, 220 S. W. 1016. See also *Brown v. Detroit United Ry.*, 179 Mich. 404, 146 N. W. 278. "There is an irreconcilable conflict in the decisions as to the effect of the violation by a street railway company, in the operation of its cars, of regulatory ordinances designed to promote the public safety. Our court has already taken a position on this question. According to our decisions, the mere fact that the street car was driven at a rate of speed forbidden by the city ordinance would not be considered proof of negligence as a matter of law. It is but an evidential fact tending to prove negligence, and

the question of negligence or not is one of fact for the jury." *Ward v. Ft. Smith Light & Traction Co.*, 123 Ark. 548, 185 S. W. 1085.

**Pleading.**—In some states, a municipal ordinance is not available, unless it is pleaded. *Yeoman v. Muskegon Tract. & L. Co. (Mich.)*, 181 N. W. 1021.

92. *Williams v. Iola Elec. R. Co.* 102 Kans. 268, 170 Pac. 397; *Ziegler v. United Rys. Co. of St. Louis (Mo. App.)*, 220 S. W. 1016; *Winkler v. United Rys. Co. of St. Louis (Mo. App.)*, 229 S. W. 229.

93. *Flannery v. Interurban Ry. Co.*, 171 Iowa, 238, 153 N. W. 1027.

94. *Peterson v. New Orleans Ry. & Light Co.*, 142 La. 835, 77 So. 647; *Reines v. N. Y. Rys. Co.*, 103 Misc. (N. Y.) 669, 171 N. Y. Suppl. 53.

95. *Capital Tr. Co. v. Crump*, 35 App. D. C. 169.

96. Section 611.

gently placed himself in a position of danger, where the motorman after discovery of the danger failed to use ordinary care in stopping the car and averting the collision.<sup>97</sup> The motorman is not necessarily required to stop or slacken the speed of his car every time a person is seen to approach a crossing with intent to pass over it. He may properly assume that the traveler, if far enough away to cross safely, will continue his movements and cross in front of the car; or, if not far enough and if warned of the approach of the car, that he will stop and let the car pass first.<sup>98</sup>

### Sec. 619. Negligence of railway — warning of approach.

A street railway company may be chargeable with negligence if the motorman fails to give warning of the approach of the car at street crossings and other places where travelers may lawfully come into proximity to the car tracks.<sup>99</sup> Par-

<sup>97</sup> Section 613.

<sup>98</sup> *Garrett v. Peoples R. Co.*, 6 Penn. (Del.) 29, 64 Atl. 254. And see section 613.

<sup>99</sup> *California*.—*Thompson v. Los Angeles, etc., R. Co.*, 165 Cal. 748, 134 Pac. 709.

*Delaware*.—*Garrett v. People's R. Co.*, 6 Penn. 29, 64 Atl. 254.

*Indiana*.—*Indiana Union Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005.

*Maryland*.—*United Rys. & Elec. Co. v. Mantik*, 127 Md. 197, 96 Atl. 261.

*Massachusetts*.—*Davis v. Worcester Consol. St. Ry. Co.*, 234 Mass. 297, 125 N. E. 554; *Wright v. Concord, etc., Ry. Co.*, 126 N. E. 666.

*Missouri*.—*Turney v. United Rys. of St. Louis*, 155 Mo. App. 513, 135 S. W. 93. See also *McCreery v. United Rys. Co.*, 221 Mo. 18, 120 S. W. 24.

*Texas*.—*Texas Electric Ry. v. Williams* (Civ. App.), 213 S. W. 730; *Northern Texas Tract. Co. v. Smith* (Civ. App.), 223 S. W. 1013.

*Wisconsin*.—*Jordan v. Osborne*, 147 Wis. 623, 133 N. W. 32; *Gulesarian*

*v. Madison Rys. Co.* (Wis.), 179 N. W. 573.

**Negative testimony.**—"It must be held that there was enough in the evidence to justify the jury in finding that the motorman was negligent in not giving proper warning, by bell or whistle, of his approach. It is true that the only evidence that he did not give such warning was negative, consisting of the statements of the people in the automobile that they heard no signal. But, if they were so situated, as they undoubtedly were, as to have been able to hear a bell or whistle sounded from the motor car, their failure to hear is some evidence that no such signal was given. . . . That there was positive testimony to the contrary does not conclusively establish that a warning was given. It creates merely a conflict of testimony, which is finally resolved, so far as this court is concerned, by the verdict of the jury." *Thompson v. Los Angeles, etc., R. Co.*, 165 Cal. 748, 134 Pac. 709. See also to the same effect, *Pigeon v. Massachusetts, etc., St. Ry. Co.* (Mass.), 119 N. E. 762.

ticularly is this so, when the obligation to sound a gong or give some other proper form of warning, is a duty which is imposed by statute or municipal ordinance. But the failure to sound the gong cannot be deemed the proximate cause of the injuries sustained by one riding on a motor vehicle, where the driver of the vehicle received actual knowledge of the approach of the street car as soon as if the signal had been given.<sup>1</sup> But the motorman cannot neglect the warning on the assumption that the automobilist is aware of the approach of the street car.<sup>2</sup>

### **Sec. 620. Negligence of railway — private crossings.**

The situation with reference to private crossings over street car lines is somewhat different from that in reference to public highways across the tracks. As a general proposition a railway company may run its cars at such speed as suits its convenience over private crossings; and it need not give any warning of the approach of the cars to such crossings, unless it has been customary for signals to be given.<sup>3</sup> But, if it has been customary for the company to give signals of the approach of its cars, and these are relied upon by a traveler on the crossing who is struck by reason of the failure of the railway employees to give the customary signals, a recovery may be had.<sup>4</sup>

### **Sec. 621. Liability of street railway company to its passenger.**

When, by reason of a collision between a motor vehicle and a street railway car, a passenger on the street car is injured, upon proof of the negligence of the company proximately resulting in the injuries, and proof of absence of contributory negligence on the part of the passenger, the company may be

1. *Stoker v. Tri-City Ry. Co.*, 182 Iowa 1090, 165 N. W. 30; *Louisville Ry. Co. v. Budwell*, 189 Ky. 424, 224 S. W. 1065; *Winkler v. United Ry. Co. of St. Louis* (Mo. App.), 229 S. W. 229; *Blanchard v. Puget Sound Tract., L. & P. Co.* 105 Wash. 205, 177 Pac. 822.

2. *Good Roads Co. v. Kansas City*

*Rys. Co.* (Mo. App.), 217 S. W. 858.

3. *Louisville & Interurban Rd. Co. v. Cantrell*, 175 Ky. 440, 194 S. W. 353; *Turney v. United Rys. of St. Louis*, 155 Mo. App. 513, 135 S. W. 93.

4. *Louisville & Interurban Rd. Co. v. Cantrell*, 175 Ky. 440, 194 S. W. 353.

liable to respond in damages.<sup>5</sup> Negligence on the part of the street railway company must be shown,<sup>6</sup> for the doctrine *res ipsa loquitur* does not apply.<sup>7</sup> As to its passengers more than "ordinary" care may be required of a common carrier, such as a street railway company.<sup>8</sup> If the employees of the railway company have been guilty of negligence, the concurring negligence of the operator of the automobile will not relieve it from liability.<sup>9</sup>

### Sec. 622. Liability of auto driver.

In case of a collision between a street car and an automobile, the driver of the automobile may be liable for injuries sustained by an employee or a passenger in the car,<sup>10</sup> or one of the employees operating it.<sup>11</sup> The action is unusual in practice, but there is no reason why the liability should not exist when the automobilist has been guilty of negligence which is a cause of the passenger's injuries, and the passenger has been free from contributory negligence. The fact that it might be considered negligence as between the street railway company and the passenger for the passenger to ride on the bumper of the car, does not necessarily determine that it is contributory negligence as between the passenger and an approaching automobilist who runs into the car.<sup>12</sup> The liability of the operator of a motor vehicle to passengers riding in his machine, is discussed in another place in this book.<sup>13</sup>

5. Pittsburgh Rys. Co. v. Givens, 211 Fed. 885, 128 C. C. A. 263; Birmingham Ry., L. & P. Co. v. Beal, 200 Ala. 409, 76 So. 1; Omaha & C. B. St. Ry. Co. v. McKeeman, 250 Fed. 386. See also, Richardson v. Nassau Elec. R. Co., 190 N. Y. App. Div. 529, 180 N. Y. Suppl. 529; Virginia Ry. & Power Co. (Va.), 105 S. E. 657.

6. McNiff v. Boston Elev. Ry. Co., 234 Mass. 252, 125 N. E. 391.

7. Plumb v. Richmond L. & R. Co., 195 App. Div. 254.

8. Omaha & C. R. St. Ry. Co. v. McKeeman, 250 Fed. 386.

9. Pittsburgh Rys. Co. v. Givens, 211 Fed. 885, 128 C. C. A. 263; Jerome v. New York Rys. Co., 190 N. Y. App. Div. 311, 179 N. Y. Suppl. 777.

10. Wigginton's Adm'r v. Rickert, 186 Ky. 650, 217 S. W. 933; Regan v. John L. Kelley Contracting Co., 226 Mass. 58, 114 N. E. 726; Healy v. Warwick, 174 N. Y. Suppl. 632.

11. Lounsbury v. McCormick (Mass.), 129 N. E. 598.

12. Smith v. Heibel, 157 Mo. App. 177, 137 S. W. 70.

13. Chapter XXIV.

## CHAPTER XXIII.

## LIABILITY FOR ACT OF DRIVER; MASTER AND SERVANT.

- SECTION 623. Liability does not arise from mere ownership—in general.
624. Liability does not arise from mere ownership—automobile not an inherently dangerous machine.
625. Liability does not arise from mere ownership—defective automobile.
626. Liability does not arise from mere ownership—statutory change in common law rule.
627. Liability for conduct of chauffeur—employment alone insufficient to charge owner.
628. Liability for conduct of chauffeur—driver must be acting within scope of duty.
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637. Liability for conduct of chauffeur—chauffeur taking car for meals.
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### Sec. 623. Liability does not arise from mere ownership — in general.

It may be stated as a general rule in the law of automobile operation that, conceding the negligence of the operator of an automobile, the owner thereof when not riding in the car, is not liable for injuries arising from such negligence, merely because he is the owner of the vehicle.<sup>1</sup> Moreover, as a gen-

1. *California*.—Martinelli v. Bond  
(Cal. App.), 183 Pac. 461.

*Indiana*.—Premier Motor Mfg. Co. v.  
Tilford, 61 Ind. App. 164, 111 N. E.

eral proposition, the circumstance that the driver is an employee of the owner does not fasten liability on the owner, for the owner is liable for the acts of his servant only when the latter is acting within the scope of his employment.<sup>2</sup> And the fact that the driver is a child or near relative of the owner of the machine does not necessarily make the owner liable for the conduct of such driver.<sup>3</sup>

645; *Decker v. Hall* (Ind. App.), 125 N. E. 786.

*Kansas*.—*Halverson v. Blosser*, 101 Kans. 683, 168 Pac. 863.

*Kentucky*.—*Tyler v. Stephan's Adm'r*, 163 Ky. 770, 174 S. W. 790.

*Louisiana*.—*Marullo v. St. Pasteur*, 144 La. 926, 81 So. 403.

*Maine*.—*Pease v. Montgomery*, 111 Me. 582, 88 Atl. 973.

*Maryland*.—*Dearholt Motor Sales Co. v. Merritt*, 133 Md. 323, 105 Atl. 316.

*Massachusetts*.—*Melchionda v. American Locomotive Co.*, 229 Mass. 202, 118 N. E. 265; *Gardner v. Farnum*, 230 Mass. 193, 119 N. E. 666; *Canavan v. Giblein*, 232 Mass. 297, 122 N. E. 171.

*Minnesota*.—*Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133.

*Missouri*.—*Calhoun v. Mining Co.*, 202 Mo. App. 564, 209 S. W. 318.

*New Hampshire*.—*Danforth v. Fisher*, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670.

*New York*.—*Reilly v. Connable*, 214 N. Y. 586, 108 N. E. 853; *Potts v. Pardee*, 220 N. Y. 431, 116 N. E. 78, 8 A. L. R. 785; *Clark v. Buckmobile Co.*, 107 App. Div. 120, 94 N. Y. Suppl. 771; *Freibaum v. Brady*, 143 App. Div. 220, 128 N. Y. Suppl. 121; *Breener v. Goldstein*, 184 App. Div. 268; *Parsons v. Wisner*, 113 N. Y. Suppl. 922. *Compare* *Ingraham v. Storkamore*, 63 Misc. (N. Y.) 114, 118 N. Y. Suppl. 399.

*North Carolina*.—*Linville v. Nissen*, 162 N. Car. 95, 77 S. E. 1096; *Reich v. Cone*, 104 S. E. 530.

*Ohio*.—*White Oak Coal Co. v. Rivoux*,

88 Ohio 18, 102 N. E. 302, 46 L. R. A. (N. S.) 1091.

*Pennsylvania*.—*Sarver v. Mitchell*, 35 Pa. Super. Ct. 69.

*Tennessee*.—*Davis v. Newsum Auto Tire & Vulcanizing Co.*, 141 Tenn. 527, 213 S. W. 914.

*Texas*.—*Gordon v. Texas & Pacific Mercantile & Mfg. Co.* (Civ. App.), 190 S. W. 748.

*Utah*.—*Ferguson v. Reynolds*, 176 Pac. 267.

*Wisconsin*.—*Steffen v. McNaughton*, 142 Wis. 49, 124 N. W. 1016, 19 Ann. Cas. 1227, 26 L. R. A. (N. S.) 382; *Oulette v. Superior Motor & M. Works*, 157 Wis. 531, 147 N. W. 1014.

## 2. Section 627.

3. *Denison v. McNorton*, 228 Fed. 401, 142 C. C. A. 631; *Lewis v. Steel*, 52 Mont. 300, 157 Pac. 575; *Maher v. Benedict*, 123 N. Y. App. Div. 579, 103 N. Y. Suppl. 228; *McFarlane v. Winters*, 47 Utah, 598, 155 Pac. 437. "All the evidence the plaintiff produced to establish the doctor's responsibility for the acts of his son, Glen, was that the former owned the automobile, and that the same was at the time being used with his permission or consent by the son. That is not sufficient. Every time an owner lends any article or instrumentality to another, whether for hire or gratuitously, the owner consents to its use by the borrower or bailee. To hold that evidence of that fact is sufficient to fasten liability upon the owner of the instrumentality in case some injury is inflicted upon another by the negligent use of such instrumen-



**Sec. 624. Liability does not arise from mere ownership — automobile not an inherently dangerous machine.**

The owner of certain dangerous instrumentalities, such as railroad locomotives, ferocious beasts, high explosives, etc., is bound to keep the same under his control so that injury will not be caused to another. As to these forces, a duty rests upon their owner to keep them properly within his control; and, when he does not do so, he may be liable for injuries resulting from their improper use by a servant, though such servant was not at the time acting in the performance of his duty.<sup>4</sup> But a motor vehicle is not placed in the category of these *per se* dangerous agencies.<sup>5</sup> Hence the liability of the owner cannot be based solely on the danger of the machine.<sup>6</sup>

tality while it is in the possession and under the control of a third person is to revolutionize the law which holds the principal or master liable for the acts of his agent or servant. We are of the opinion, therefore, that the plaintiff produced no evidence which supports the findings of the jury or the judgment of the court as against the defendant W. P. Winters." *McFarlane v. Winters*, 47 Utah, 598, 155 Pac. 437. And see section 656.

4. *Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618.

5. Section 37.

6. *Alabama*.—*Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87.

*Georgia*.—*Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618; *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338. "It is insisted in the argument that automobiles are to be classed with ferocious animals, and that the law relating to the duty of the owners of such animals is to be applied. It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless." *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338.

*Illinois*.—*Arkin v. Pago*, 287 Ill. 420, 123 N. E. 30.

*Indiana*.—*Premier Motor Mfg. Co. v. Tilford*, 61 Ind. App. 164, 111 N. E. 645; *Martin v. Lilly*, 188 Ind. 139, 121 N. E. 443.

*Kentucky*.—*Tyler v. Stephan's Adm'r*, 163 Ky. 770, 174 S. W. 790.

*Maryland*.—*Symington v. Sipes*, 121 Md. 313, 88 Atl. 134.

*Michigan*.—*Brinkman v. Zuckerman*, 192 Mich. 624, 159 N. W. 316.

*Minnesota*.—*Slater v. Advance Thresher Co.*, 97 Minn. 302, 107 N. W. 133; *Provo v. Conrad*, 130 Minn. 412, 153 N. W. 753; *Mogle v. A. W. Scott Co.*, 144 Minn. 173, 174 N. W. 832.

"The rule of law applicable to the care and protection of dangerous instrumentalities does not apply. The rule requires the master to exercise a proper degree of care to guard, control, and proper use of such an instrumentality owned or operated by him, and, an injury occurring by reason of the improper use of such an instrumentality by a servant, though occasioned while not in the performance of his duty, the master is liable. But the principle on which liability is founded in such cases is the failure of the master to properly keep within his control such dangerous agencies." *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133.

And the fact that the owner keeps the machine in a public garage where it might be more accessible to the wrongful use of his chauffeur than if he kept it at his residence, does not change the rule in this respect.<sup>7</sup> Yet, if he intrusts the machine to an incompetent driver, it may be converted into a dangerous instrumentality.<sup>8</sup>

**Sec. 625. Liability does not arise from mere ownership—defective automobile.**

The additional fact that an automobile was in want of repair and dangerous for driving, does not necessarily charge the owner with liability for the act of his servant in using the same, where such use was not in pursuance of the master's business;<sup>9</sup> and especially is this true when the use of the car, not its defective condition, is said to be the proximate cause of the injury.<sup>10</sup> And, when one loans his automobile to another, the fact that the machine had a broken muffler and was noisy in operation does not impose liability on the owner.<sup>11</sup>

*Missouri.*—Michael v. Pulliam (Mo. App.), 215 S. W. 763.

*Montana.*—Lewis v. Steel, 52 Mont. 300, 157 Pac. 575.

*New Hampshire.*—Danforth v. Fisher, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Ann. St. Rep. 670.

*New York.*—Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Suppl. 1057. *Compare* Ingraham v. Storkamore, 63 Misc. (N. Y.) 114, 118 N. Y. Suppl. 399.

*North Carolina.*—Linville v. Nissen, 162 N. Car. 95, 77 S. E. 1096.

*Ohio.*—Elms v. Flick, 126 N. E. 66.

*Rhode Island.*—Colwell v. Aetna Bottle & Stopper Co., 33 R. I. 531, 82 Atl. 388.

*Tennessee.*—King v. Smythe, 104 Tenn. 217, 204 S. W. 296, L. R. A. 1918F 293; Core v. Resha (Tenn.), 204 S. W. 1149.

*Texas.*—Allen v. Bland (Civ. App.), 168 S. W. 35.

*Utah.*—McFarlane v. Winters, 47

Utah, 598, 155 Pac. 437.

*Virginia.*—Blair v. Broadwater, 121 Va. 301, 93 S. E. 632, L. R. A. 1918A 1011.

*Washington.*—Jones v. Hoge, 47 Wash. 663, 92 Pac. 433, 125 Am. St. Rep. 915, 14 L. R. A. (N. S.) 216.

*Wisconsin.*—Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016, 19 Ann. Cas. 1227, 26 L. R. A. (N. S.) 382.

*Compare.*—Southern Cotton Oil Co. v. Anderson (Fla.), 86 So. 629.

7. Lewis v. Amorous, 3 Ga. App. 50, 59 S. E. 338; Jones v. Hoge, 47 Wash. 663, 92 Pac. 433, 125 Am. St. Rep. 915, 14 L. R. A. (N. S.) 216.

8. Gardiner v. Solomon, 200 Ala. 115, 75 So. 621. And see section 662.

9. Gordon v. Texas & Pacific Mercantile & Mfg. Co. (Tex. Civ. App.), 190 S. W. 748.

10. Beatty v. Firestone Tire & Rubber Co., 263 Pa. St. 271, 106 Atl. 303.

11. Halverson v. Blosser, 101 Kans. 683, 168 Pac. 862.

**Sec. 626. Liability does not arise from mere ownership — statutory change in common law rule.**

In a few jurisdictions, the law-making bodies have attempted to impose on the owner of a motor vehicle a liability in excess of that imposed by the common law. Thus, in *Michigan* the Legislature attempted to charge the owner with liability for all injuries occasioned by the negligence of the driver of the machine, except in case it was stolen.<sup>12</sup> But, it was held that the statute was unconstitutional so far as it attempted to impose liability where a trespasser obtained possession thereof without the consent of the owner and without his fault.<sup>13</sup> A subsequent statute cured the defect in the former law by providing that the owner would not be liable when the machine was driven without the consent or knowledge of the owner.<sup>14</sup> The later statute is constitutional, although it imposes a liability on the owner greater than that allowed by the common law rules, as for example rendering him responsible for negligence in the operation of the machine when it is loaned to another.<sup>15</sup> The statute also imposes lia-

**12. Under Mich. Pub. Acts, 1909.** No. 318, prescribing regulations for automobiles on public highways, one injured by a violation thereof was not required to first obtain judgment against the driver, before suing the owner. *Johnson v. Sergeant*, 168 Mich. 444, 134 N. W. 468.

**13. Daugherty v. Thomas**, 174 Mich. 371, 140 N. W. 615, 45 L. R. A. (N. S.) 699, Ann. Cas. 1915A 1163; *Löchr v. Abell*, 174 Mich. 590, 140 N. W. 926; *Mitchell v. Van Keuler & W. Lbr. Co.*, 175 Mich. 75, 140 N. W. 973; *Barry v. Metzger Motor Car Co.*, 175 Mich. 466, 141 N. W. 529; *Levyn v. Koppin*, 183 Mich. 232, 149 N. W. 993. "It may be laid down as a general proposition that absolute liability, without fault on his part, cannot ordinarily be imposed upon a citizen. It has been held in numerous cases that a statute making a railroad company liable for stock killed, whether the com-

pany was negligent or not, and fixing the damages according to a schedule, was to deprive the company of property without due process of law." *Daugherty v. Thomas*, 174 Mich. 371, 140 N. W. 615, 45 L. R. A. (N. S.) 699, Ann. Cas. 1915A 1163.

**14. Hatter v. Dodge Bros.**, 202 Mich. 97, 167 N. W. 935; *Hawkins v. Erma-tinger (Mich.)*, 179 N. W. 249.

**Joint owner.**—In case of joint owners of a motor vehicle, the statute does not render one of such persons liable when the machine is operated by the other in his personal affairs. *Mittlestadt v. Kelly*, 202 Mich. 524, 168 N. W. 501.

**15. Stapleton v. Independent Brewing Co.**, 198 Mich. 170, 164 N. W. 520, L. R. A. 1918A 916. "The present statute, while safe-guarding the rights of persons having occasion to use the streets, does not unreasonably infringe upon the rights of those able to own

bility when the machine is driven by a member of the owner's family, although against his directions, and in this respect the statute has been sustained by a divided court.<sup>16</sup> The law makers in *Canada* have not been so hindered with constitutional limitations, and have been more successful in imposing liability on the owner of the machine for the negligence of the driver.<sup>17</sup> And under the British Motor Car Act of 1903,

automobiles. The owner of an automobile is supposed to know, and should know, about the qualifications of the persons he allows to use his car, to drive his automobile, and if he has doubts of the competency or carefulness of the driver he should refuse to give his consent to the use by him of the machine. The statute is within the police power of the State." *Stapleton v. Independent Brewing Co.* (Mich.), 164 N. W. 520.

16. *Hawkins v. Ermatinger* (Mich.), 179 N. W. 249.

17. **Canadian statute.**—Where the owner of an automobile placed it in a garage for a purpose other than demonstrating, and a servant of the garage-keeper, thinking the machine was in the garage for use in demonstrating, took it and operated it with the result that injuries were caused to another, it was held that under section 19 of the Motor Vehicle Act, 2 Geo. V, ch. 48, which was the statute in force at the time of the accident, the owner was liable therefor. *Downs v. Fisher*, 23 D. L. R. (Canada) 726, 33 O. L. R. 504, 8 O. W. N. 257.

**Statute of 6 Edw. VII, ch. 46.**—In *Mattei v. Gillies*, 16 Ont. L. R. 558, the court also said: "Besides this I am inclined to hold that, having regard to the provisions of the act, as to registration of the owner, the carrying of a number on the machine for the purpose of identification, and the permit granted on those conditions, as between the owner and the public, the chauffeur or driver is to be regarded

as the *alter ego* of the proprietor, and that the owner is liable for the driver's negligence in all cases where the use of the vehicle is with the sanction or permission of the proprietor. In driving the motor he is within the ostensible scope of his employment, and the liability will remain by virtue of the statute, and this even though the driver may be out on an errand of his own."

**Abrogation of common law rule.**—

In a case in Ontario it was held that the provisions of special legislation (6 Edw. VII, ch. 46, and its amendments) show an intention on the part of the legislature to abrogate to some extent to the common-law rule that the master of a vehicle is exempt from responsibility if his servant does an injury with the master's vehicle when, outside of the duties of his master's employment, he is out at large on an errand or frolic of his own. In this case the servant of the defendant took the latter's automobile out of his salesrooms without his knowledge or consent, and while so using it caused the injury complained of. The court held that the defendant was liable in a dual aspect, and that he was responsible to answer the damages brought about by the use of his vehicle in contravention of the statutory rate of speed and because the vehicle was allowed to be handled recklessly by his servant on the highway. *Verrall v. Dominion Automobile Co.*, 20 Ont. W. R. 178, 3 Ont. W. N. 108. See also the following Canadian cases as to the

the person causing or permitting a motor car to be used contrary to regulations was held responsible as well as the driver in certain instances.<sup>18</sup> And a statute in *New Jersey* relative to pedestrians attempting to cross a street between the regular crossings, was construed so as to bar an action against the owner of the machine if he was not driving at the time of the collision with such pedestrian, but not so as to bar a remedy against the driver at the time, whether such driver was the owner or an employee.<sup>19</sup> And in *California*, a statute has been passed providing that no minor shall operate an automobile without a license and requiring as a prerequisite to the obtaining of such license that his parent or guardian shall join in the application; and further providing that in case of the negligence of such minor the person so signing shall be liable for his negligence. The statute seems to apply whether or not the parent is owner of the machine.<sup>20</sup> And, in *Connecticut*, statutory provisions under the bailor liable for injuries occasioned through the use of the car by a bailee.<sup>21</sup> And in a few States, statutes have been enacted to the effect that when a motor vehicle is operated in violation of the law, or negligently, or carelessly, so that one receives injuries thereby, the damages shall be a lien on the vehicle.<sup>22</sup> The

liability of the owner: *B. & R. Co. v. McLeod*, 18 Dom. L. R. 245, 7 A. L. R. 349, 28 W. L. R. 778, 6 W. W. R. 1299; *Wiltsoe v. Arnold*, 15 Dom. L. R. 915, 27 W. L. R. 259, 6 W. W. R. 4; *Bernstein v. Lynch*, 13 Dom. L. R. 134, 28 O. L. R. 435, 4 O. W. N. 1005, 49 C. L. J. 619; *Hughes v. Exchange Taxicab & Auto Livery*, 11 Dom. L. R. 314, 24 W. L. R. 174; *Wynne v. Dalby*, 29 O. L. R. 62, 30 O. L. R. 67; *Cote v. Pennoek*, 51 Qué. S. C. 537; *Smith v. Brenner*, 12 O. W. R. 9; *Lowry v. Thompson*, 29 O. L. R. 478; *Cillis v. Oakley*, 31 O. L. R. 603; *Hirschman v. Beal*, 38 O. L. R. 40; *McCabe v. Allan*, 39 Qué. S. C. 29; *McIlroy v. Kobald*, 35 D. L. R. 587; *Walker v. Martin*, 45 O. L. R. 504, 46 O. L. R. 144; *Gray v. Peterborough Ry. Co.*, 18 O. W. N. 260.

18. *Pettitt, Law of Motor Cars*, 62; *Pettitt, Law of Heavy Motor Cars*, 58. See also *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338.

19. *Schreiner v. Grinnell*, 89 N. J. L. 37, 97 Atl. 781.

20. *Crittenden v. Murphy*, 36 Cal. App. 803, 173 Pac. 595. But see *Spence v. Fisher* (Cal.), 193 Pac. 255. See also, as to lights on machine. *Luckie v. Diamond Coal Co.* (Cal. App.), 183 Pac. 178.

21. *Wolf v. Sulik*, 93 Conn. 431, 106 Atl. 443, 4 A. L. R. 356.

22. *Merchants & Planters Bank v. Brigman*, 106 S. Car. 362, 91 S. E. 332; *Matter of McFadden*, 112 S. Car. 258, 99 S. E. 838; *Core v. Resha* (Tenn.), 204 S. W. 1149; *Lynde v. Browning*, 2 Tenn. C. C. A. 262.

constitutionality of the enactment has been sustained.<sup>23</sup> Under such a statute the owner will not necessarily be liable for injuries caused in the operation of his machine beyond the value of his interest in the machine; but the person injured may secure a lien on the machine, and such lien is given priority to a chattel mortgage or other lien except one for taxes.<sup>24</sup> The lien may be allowed although the driver thereof at the time of the accident in question was not acting within the scope of the owner's business and although a personal judgment could not be rendered against the owner for the injuries.<sup>25</sup>

### **Sec. 627. Liability for conduct of chauffeur — employment alone insufficient to charge owner.**

The general rule is, that in an action against the owner of a motor vehicle for injuries occasioned by the negligence of the driver thereof, the owner is not liable merely because the driver is in the general employ of the owner.<sup>26</sup> To charge the

**23.** *Merchants & Planters' Bank v. Brigman*, 106 S. Car. 362, 91 S. E. 332; *Denny v. Doe* (S. Car.), 108 S. E. 95.

**24.** *Merchants & Planters' Bank v. Brigman*, 106 S. Car. 362, 91 S. E. 332.

**25.** *Denny v. Doe* (S. Car.), 108 S. E. 95; *Core v. Resha* (Tenn.), 204 S. W. 1149.

**26.** *California*.—*Martinelli v. Bond* (Cal. App.), 183 Pac. 461.

*Georgia*.—*Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618; *McIntire v. Hartfelder-Garbutt Co.*, 9 Ga. App. 327, 71 S. E. 492.

*Indiana*.—*Premier Motor Mfg. Co. v. Tilford*, 61 Ind. App. 164, 111 N. E. 645.

*Kentucky*.—*Taylor v. Stephan's Adm'r*, 163 Ky. 770, 174 S. W. 790.

*Massachusetts*.—*O'Rourke v. A-G Co., Inc.*, 232 Mass. 129, 122 N. E. 193.

*Minnesota*.—*Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133; *Provo v. Conrad*, 130 Minn.

412, 153 N. W. 753. "The relation between the owner of an automobile and the person employed by him to operate it is that of master and servant, and liability for injuries to third persons, caused by the negligence of the servant operating the same, differs in no essential respect from the rules and principles of law applicable to that relation. Efforts have been made to extend such rules of liability, by statute and judicial decisions, on the theory that the automobile is a dangerous instrumentality requiring for the protection of the public a high degree of care in safeguarding its use. These efforts have not met with success, and the courts are practically uniform in applying in such cases the law of master and servant." *Provo v. Conrad*, 130 Minn. 412, 153 N. W. 753.

*Missouri*.—*Shamp v. Lambert*, 142 Mo. App. 567, 121 S. W. 770; *Calhoun v. Mining Co.*, 202 Mo. App. 564, 209 S. W. 318.

owner, it must also appear that the driver at the time of the accident in question was acting within the scope of his master's business.<sup>27</sup> When the owner of an automobile is sued for damages on account of an injury caused by the machine while driven by his chauffeur, the rules of law touching master and servant and the liability of the former for the acts of the latter, are to be applied.<sup>28</sup> A *prima facie* case which will hold the owner, unless counter evidence is produced, may sometimes be created on proof of the ownership of the machine and general employment of the chauffeur, but such *prima facie* case will be dispelled on proof that the servant at the time was not acting within his employment.<sup>29</sup> In deciding whether a chauffeur is the servant of the defendant or of some other person, the manner, method and means of the pay-

*New Jersey*.—Cronecker v. Hall, 450 N. J. L. 450, 105 Atl. 213.

*New York*.—Reilly v. Connable, 214 N. Y. 586, 108 N. E. 853; Freibaum v. Brady, 143 App. Div. 220, 128 N. Y. Suppl. 121; Cullen v. Thomas, 150 App. Div. 475, 135 N. Y. Suppl. 22.

*Pennsylvania*.—Curran v. Loreh, 243 Pa. 247, 90 Atl. 62.

*Texas*.—Christensen v. Christiansen (Civ. App.), 155 S. W. 995; Gordon v. Texas & Pacific, etc., Co. (Civ. App.), 190 S. W. 748.

*Utah*.—Ferguson v. Reynolds, 176 Pac. 267.

*Compare* Southern Cotton Oil Co. v. Anderson (Fla.), 86 So. 629.

**Defendant not owner.**—An employer is not liable for personal injuries caused by an employee who, while driving a borrowed automobile, ran into a pedestrian on the street where it appears that he was never employed to drive a motor car, was not a licensed chauffeur and the car was not owned or furnished by the defendant, who had no knowledge that it was being used by the employee, there being nothing which made it necessary for him to drive the car. O'Loughlin v. Mackey, 182 N. Y. App. Div. 637, 169

N. Y. Suppl. 835.

27. Section 628.

28. Fielder v. Davison, 139 Ga. 509, 77 S. E. 618.

**When liable for acts of servant.**—

“It appears that there are three sets of conditions under which an employer may be liable for the tort of his agent, to wit: (1) When the tortious act is done in obedience to the express orders or directions of the master; (2) when it is done in the execution of the master's business within the scope of his employment; and (3) when it is warranted by the express or implied authority conferred upon the servant, considering the nature of the services required, instructions given, and the circumstances under which the act was done.” Turner v. Am. Dist. Tel. & M. Co., 94 Conn. 712, 110 Atl. 543, quoted in Stuart v. Doyle (Conn.), 112 Atl. 653.

**Salesman** of a truck company, using car under employment for salary and commissions, may be servant of company so as to render it liable for his negligence. Buckley v. Harkens (Wash.), 195 Pac. 250.

29. Section 673.

ment for his services may be material in determining whether he was under the direction and control of the defendant.<sup>30</sup>

**Sec. 628. Liability for conduct of chauffeur — driver must be acting within scope of duty.**

The general rule in the law of master and servant is that the owner of a motor vehicle is liable for the acts of his chauffeur when the latter is acting within the scope of his master's business.<sup>31</sup> The reverse is also true, that the owner is not liable for the conduct of the servant when the latter is

**30.** *Minor v. Stevens*, 65 Wash. 423, 118 Pac. 313.

**31.** *Alabama*.—*Southern Garage Co. v. Brown*, 187 Ala. 484, 65 So. 400; *Barfield v. Evans*, 187 Ala. 579, 65 So. 928; *Jones v. Strickland*, 201 Ala. 138, 77 So. 562.

*Arkansas*.—*Healey v. Cockrill*, 133 Ark. 327, 202 S. W. 229; *Hughey v. Lennox*, 219 S. W. 323; *Terry Dairy Co. v. Parker*, 223 S. W. 6.

*California*.—*Adams v. Weisendanger*, 27 Cal. App. 590, 150 Pac. 1016; *Martinelli v. Bond* (Cal. App.), 183 Pac. 461; *Nussbaum v. Traung Label, etc., Co.* (Cal. App.), 189 Pac. 728.

*Delaware*.—*Grier v. Samuel*, 27 Del. 106, 86 Atl. 209; *Wollaston v. Stiltz*, 114 Atl. 198.

*Georgia*.—*Felder v. Davison*, 139 Ga. 509, 77 S. E. 618; *Rape v. Barker* (Ga. App.), 103 S. E. 171.

*Illinois*.—*Heelan v. Guggenheim*, 210 Ill. App. 1.

*Kansas*.—*Thompson v. Aultman & Taylor Machinery Co.*, 96 Kans. 259, 150 Pac. 587.

*Kentucky*.—*Tyler v. Stephan's Adm'r*, 163 Ky. 770, 174 S. W. 790; *Denker Transfer Co. v. Pugh*, 162 Ky. 818, 173 S. W. 139.

*Maine*.—*Karahleas v. Dillingham*, 109 Atl. 815.

*Massachusetts*.—*Fleischner v. Durgin*, 207 Mass. 435, 93 N. E. 801; *Reynolds v. Denholm*, 213 Mass. 576, 100

N. E. 1006; *Donnelly v. Harris*, 219 Mass. 466, 107 N. E. 435; *Winslow v. New England Co-op. Soc.*, 225 Mass. 576, 114 N. E. 748; *Regan v. John L. Kelley Contracting Co.*, 226 Mass. 58, 114 N. E. 726; *Higgins v. Bickford*, 227 Mass. 52, 116 N. E. 245; *Buckley v. Sutton*, 231 Mass. 504, 121 N. E. 527.

*Michigan*.—*Riley v. Roack*, 168 Mich. 294, 134 N. W. 14; *Houseman v. Karicoffe*, 201 Mich. 420, 167 N. W. 964; *Foster v. Rinz*, 202 Mich. 601, 168 N. W. 420.

*Minnesota*.—*Thomas v. Armitage*, 111 Minn. 288, 126 N. W. 735; *Provo v. Conrad*, 130 Minn. 412, 153 N. W. 753.

*Missouri*.—*Shamp v. Lambert*, 142 Mo. App. 567, 121 S. W. 770; *Winfrey v. Lazarus*, 148 Mo. App. 388, 128 S. W. 276; *Nicholas v. Kelley*, 159 Mo. App. 20, 139 S. W. 248; *Whimster v. Holmes*, 177 Mo. App. 130, 164 S. W. 236; *Wiedeman v. St. Louis Taxicab Co.*, 182 Mo. App. 523, 165 S. W. 1105; *Whimster v. Holmes* (Mo. App.), 190 S. W. 62; *Vaughn v. Davis* (Mo. App.), 221 S. W. 782.

*New Hampshire*.—*Danforth v. Fisher*, 75 N. H. 111, 71 Atl. 535. 21 L. R. A. (N. S.) 93, 139 Am.-St. Rep. 670.

*New Jersey*.—*Doran v. Thomsen*, 74 N. J. L. 445, 66 Atl. 897; *Bennett v. Busch*, 75 N. J. L. 240, 67 Atl. 188:



not acting within the scope of his employment.<sup>32</sup> It is, of course, true that the master rarely commands the servant to

*John M. Hughes Sons Co. v. Bergen & Westside Auto Co.*, 75 N. J. L. 355, 67 Atl. 1018.

*New York*.—*O'Brien v. Stern Bros.*, 223 N. Y. 290, 119 N. E. 550; *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Suppl. 1057; *Douglas v. Hewson*, 142 App. Div. 166, 127 N. Y. Suppl. 220; *Pangburn v. Buick Motor Co.*, 151 App. Div. 756, 137 N. Y. Suppl. 37; *Fitzsimons v. Isman*, 166 App. Div. 262, 151 N. Y. Suppl. 552; *Lowell v. Williams*, 183 App. Div. 701, 170 N. Y. Suppl. 596; *Parsons v. Wisner*, 113 N. Y. Suppl. 922; *Dillon v. Mundet*, 145 N. Y. Suppl. 975.

*Oregon*.—*Kahn v. Home Telep. & Teleg. Co.*, 78 Oreg. 308, 152 Pac. 240.

*Pennsylvania*.—*Kurtz v. Tourison*, 241 Pa. St. 425, 88 Atl. 656.

*Rhode Island*.—*Elliott v. O'Rourke*, 40 R. I. 187, 100 Atl. 314.

*Texas*.—*Lefkowitz v. Sherwood* (Civ. App.), 136 S. W. 850; *Reid Auto Co. v. Gorsczya* (Civ. App.), 144 S. W. 688; *Christensen v. Christiansen* (Civ. App.), 155 S. W. 995; *Buick Automobile Co. v. Weaver* (Civ. App.), 163 S. W. 594; *Anto Sales Co. v. Bland*, 194 S. W. 1021; *Flores v. Garcia* (Civ. App.), 226 S. W. 743.

*Utah*.—*Ferguson v. Reynolds*, 178 Pac. 267.

*Washington*.—*Hammons v. Setzer*, 72 Wash. 550, 130 Pac. 1141; *Prusch v. Greenough Bros. Co.*, 79 Wash. 109, 139 Pac. 870; *George v. Carstens Packing Co.*, 91 Wash. 637, 158 Pac. 529.

*Wisconsin*.—*Steffen v. McNaughton*, 142 Wis. 49, 124 N. W. 1016, 19 Ann. Cas. 1227, 26 L. R. A. (N. S.) 382; *Haswell v. Reuter*, 177 N. W. 8.

**32.** *Alabama*.—*Calley v. Lewis*, 7 Ala. App. 593, 61 So. 37.

*California*.—*Adams v. Weisendanger*, 27 Cal. App. 590, 150 Pac. 1016;

*Martinelli v. Bond* (Cal. App.), 183 Pac. 461; *Hirst v. Morris Co.* (Cal. App.), 187 Pac. 770.

*Georgia*.—*Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618; *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338; *Rape v. Barker* (Ga. App.), 103 S. E. 171.

*Illinois*.—*Szszatkowski v. People's Gas Light & Coke Co.*, 209 Ill. App. 460.

*Indiana*.—*Premier Motor Mfg. Co. v. Tilford*, 61 Ind. App. 164, 111 N. E. 645; *Martin v. Lilly*, 188 Ind. 139, 121 N. E. 443.

*Kansas*.—*Halverson v. Blosser*, 101 Kans. 653, 168 Pac. 863.

*Kentucky*.—*Tyler v. Stephan's Adm'r*, 163 Ky. 770, 174 S. W. 790.

*Louisiana*.—*Jung v. New Orleans, etc., Co.*, 145 La. 727, 82 So. 870.

*Maine*.—*Pease v. Montgomery*, 111 Me. 582, 88 Atl. 973.

*Maryland*.—*Symington v. Sipes*, 121 Md. 313, 88 Atl. 134; *State to Use of DeCelus v. C. J. Benson & Co.*, 100 Atl. 505.

*Massachusetts*.—*Fleischner v. Durgin*, 207 Mass. 435, 93 N. E. 801; *Hartnett v. Gryzmish*, 218 Mass. 258, 105 N. E. 988; *Sautoro v. Bickford*, 229 Mass. 357, 118 N. E. 665; *Müller v. Flash Chemical Co.*, 230 Mass. 419, 119 N. E. 702; *O'Rourke v. A-G Co., Inc.*, 232 Mass. 129, 122 N. E. 193; *McGrath v. Wehrle*, 233 Mass. 456, 124 N. E. 253.

*Michigan*.—*Riley v. Roack*, 168 Mich. 294, 134 N. W. 14; *Hill v. Haynes*, 204 Mich. 536, 170 N. W. 685.

*Minnesota*.—*Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133; *Provo v. Conrad*, 130 Minn. 412, 153 N. W. 753. "It is elementary that the master is not liable for injuries occasioned to a third person by the negligence of his servant, while the

be negligent, or employs him with the expectation that he will commit a negligent or wilful tort, but if the acts under consideration are done in the prosecution of the master's busi-

ness, the latter is engaged in some act beyond the scope of his employment, for his own or the purposes of another, although he may be using the instrumentalities furnished him by the master with which to perform the ordinary duties of his employment, or, as expressed in *Shear. & R., Neg.* (3d Ed.), § 63, that if the act complained of be committed by the servant while at liberty from the service of the master and while pursuing his own interests exclusively, there can be no question of the master's freedom from liability, even though the injury would not have been committed without the facilities afforded the servant by his relation to the master." *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133.

*Missouri.*—*Long v. Nute*, 123 Mo. App. 204, 100 S. W. 511; *Warrington v. Bird*, 168 Mo. App. 385, 151 S. W. 754; *Glassman v. Harry*, 182 Mo. App. 304, 170 S. W. 403; *Calhoun v. Mining Co.*, 202 Mo. App. 564, 209 S. W. 318; *Michael v. Pulliam* (Mo. App.), 215 S. W. 763.

*New Hampshire.*—*Danforth v. Fisher*, 75 N. H. 111, 71, Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670; *Howe v. Leighton*, 75 N. H. 601, 75 Atl. 102; *Dearborn v. Fuller*, 107 Atl. 607.

*New Jersey.*—*Doran v. Thomsen*, 74 N. J. L. 445, 66 Atl. 897.

*New York.*—*Reilly v. Connable*, 214 N. Y. 586, 108 N. E. 853; *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Suppl. 161; *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Suppl. 1057; *Douglas v. Hewson*, 142 App. Div. 166, 127 N. Y. Suppl. 220; *Freibaum v. Brady*, 143 App. Div. 220, 128 N. Y. Suppl. 121; *Colwell v. Saperston*, 149

App. Div. 373, 134 N. Y. Suppl. 284; *Cullen v. Thomas*, 150 App. Div. 475, 135 N. Y. Suppl. 22; *Bogorad v. Dix*, 176 App. Div. 774, 162 N. Y. Suppl. 992; *Stenzler v. Standard Gas Light Co.*, 179 App. Div. 774, 167 N. Y. Suppl. 282.

*North Carolina.*—*Linville v. Nissen*, 162 N. Car. 95, 77 S. E. 1096.

*Ohio.*—*White Oak Coal Co. v. Rivoux*, 88 Ohio, 18, 102 N. E. 302, 46 L. R. A. (N. S.) 1091.

*Pennsylvania.*—*Durham v. Strauss*, 38 Pa. Super. Ct. 620; *Toy v. McClements*, 68 Pitts. Leg. Journ. (Pa.) 680.

*Rhode Island.*—*Northrup v. Robinson*, 33 R. I. 496, 82 Atl. 392; *Colwell v. Aetna Bottle & Stopper Co.*, 33 R. I. 531, 82 Atl. 388.

*South Carolina.*—*Knight v. Laurens Motor Car Co.*, 108 S. Car. 179, 93 S. E. 869.

*Tennessee.*—*Goodman v. Wilson*, 129 Tenn. 464, 166 S. W. 752, 51 L. R. A. (N. S.) 1116; *Core v. Resha*, 204 S. W. 1149.

*Texas.*—*Christensen v. Christiansen* (Civ. App.), 155 S. W. 995; *Gordon v. Texas & Pacific, etc., Co.* (Civ. App.), 190 S. W. 748; *Main Street Garage v. Eganhouse* (Civ. App.), 223 S. W. 316.

*Utah.*—*Fowkes v. J. I. Case Threshing Mach. Co.*, 46 Utah, 502, 151 Pac. 53; *Wright v. Intermountain Motorcar Co.*, 53 Utah, 176, 177 Pac. 237.

*Washington.*—*Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 125 Am. St. Rep. 915, 14 L. R. A. (N. S.) 216; *Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040; *Ludberg v. Barghoorn*, 73 Wash. 476, 131 Pac. 1165.

*Wisconsin.*—*Gewauske v. Ellsworth*, 166 Wis. 250, 164 N. W. 996; *Youn-*

ness, liability will ordinarily attach to the master.<sup>33</sup> But, if the tort of the servant is entirely disconnected from the service or business of the master, the latter is not responsible, although it may occur during the general term of the ser-

guist v. L. J. Droese Co., 167 Wis. 458, 167 N. W. 736.

*Canada.*—Halparin v. Bulling, 50 Can. S. C. 471, 20 Dom. L. R. 598; Collis v. Oakley, 20 Dom. L. R. 550, 31 Ont. L. R. 603, 6 O. W. N. 575.

**Rule unaffected by statute.**—It has been held that Gen. Laws of 1909, chap. 86, relating to motor vehicles, has not changed the common law rule affecting the liability of a master for acts of a servant outside of the scope of his employment. Colwell v. Aetna Bottle and Stopper Co., 33 R. I. 531, 82 Atl. 388.

**"In the course of his employment."**—"Stress is laid by counsel for plaintiff upon the construction of the phrase 'in the course of his employment,' and it is contended that the acts of the agent on the occasion in question bring the case within the proper understanding and definition of that expression. This phrase or expression is found in many of the books; but it has no particular magic, and does not enlarge the rule of liability in such cases. In contemplation of law it means simply while engaged in the service of the master, and nothing more. It is not used as synonymous with, 'during the period covered by the employment,' but rather as expressive of 'within the scope of his employment,' or during the time when the servant is engaged in the performance of the master's work." Slater v. Advance Thresher Co., 97 Minn. 305, 107 N. W. 133.

**"The universal test of the master's liability for the acts of his servant is:** Was there authority, express or implied, for doing the act? That is: Was it one done in the course and

within the scope of the servant's employment. If so, the master will be liable for the act, whether negligent fraudulent, deceitful, or an act of positive malfeasance. However, the master is not liable for every wrong which the servant may commit during the continuance of the employment. The liability can only arise when the act done is within the real or apparent scope of the master's business. Hence, when a servant steps outside of his employment to do an act for himself not connected with his master's business, no liability attaches. The reason for the rule is that beyond the scope of his employment a servant is as much a stranger to his master as a third person. In every such case the proper inquiry is: Was the servant engaged in serving his master? If the act be done while the servant is at liberty from the service and pursuing his own ends exclusively, the master is not responsible." Tyler v. Stephan's Adm'r, 163 Ky. 770, 174 S. W. 790.

**33.** Adams v. Weisendanger, 27 Cal. App. 590, 150 Pac. 1016; Fielder v. Davison, 139 Ga. 509, 77 S. E. 618; Albert v. Munch, 141 La. 686, 75 So. 613; Clawson v. Pierce-Arrow Motor Car Co., 231 N. Y. 273; Reid Auto Co. v. Gorseys (Tex. Civ. App.), 144 S. W. 688. "However it may be in other jurisdictions, in this State the test to determine whether a master is liable to a stranger for the consequences of his servant's misconduct is to inquire whether the latter was doing what he was employed to do at the time he caused the injury complained of. If he was, the fact that he was not doing it in the way expected is immaterial. Rowell v. Railroad, 68 N. H. 368. But,

vant's employment.<sup>34</sup> But, so long as the servant is acting within the scope of his employment, the owner is liable, though the negligent act was not necessary to the performance of his duties, or though it was not expressly authorized or known to the employer, or is contrary to his instructions.<sup>35</sup> But, where the chauffeur was given positive instructions that the machine should not be used except for the purposes of its owner and family and when not so used it was to be kept in a certain garage, and it appeared that the chauffeur took the family to the theatre and was directed to take the car to the garage and return at the close of the performance, but he took the car before that time and went to visit a friend in a distant part of the city, it was held that he was not engaged in the employment of the master at the time.<sup>36</sup>

#### **Sec. 629. Liability for conduct of chauffeur — owner riding in machine.**

The serious problems of the liability of the owner of an automobile for the negligence of his servant are those which arise from the operation of the machine by the servant in the absence of the master, and generally without his knowledge or consent. When the owner is riding in the machine at the time of the commission of the negligent act in question, the

if at the time he did the act which caused the injury he was not acting within the scope of his employment, the master is not liable." *Danfort. v. Fisher*, 75 N. H. 111. 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670. "It is axiomatic law that to render the master liable for the torts of his servant the tort must have been committed while the servant was acting in accordance with his employment, or, as it is generally expressed, within the scope of it. This does not mean that the act must have been done by an express direction of the master, either under a special or a general power, but that the servant was at the time engaged directly or indirectly upon the work or business for

which he was employed." *State, Use of Debelius v. C. J. Bensont Co. (Md.)*, 100 Atl. 505.

34. *Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618; *Reilly v. Connable*, 214 N. Y. 586, 108 N. E. 853.

35. *Healey v. Cockrill*, 133 Ark. 327, 202 S. W. 229; *Rosenstein v. Bernhard & Turner Automobile Co. (Iowa)*, 180 N. W. 282; *Shamp v. Lambert*, 142 Mo. App. 567, 121 S. W. 770; *Winfrey v. Lazarus*, 148 Mo. App. 388, 128 S. W. 276; *Defoe v. Stratton (N. H.)*, 114 Atl. 29; *Cooper v. Knight (Tex. Civ. App.)*, 147 S. W. 349; *Smith v. Yellow Cab Co. (Wis.)*, 180 N. W. 125.

36. *Halparin v. Bulling*, 50 Can. Sup. 471.

courts ordinarily have no difficulty in holding as a matter of law that the driver or chauffeur was acting within the scope of his master's business.<sup>37</sup> There is a strong presumption that an owner riding in his own car has the control of its operation.<sup>38</sup> Moreover, the contributory negligence of the chauffeur may be imputed to the master when the latter is riding in the machine, so as to preclude a recovery by the master of injury to himself or the machine.<sup>39</sup> And, where the master, who had been driving, reached his place of business and stepped out of the car, whereupon his employee attempted to turn the car around and negligently caused injury to another traveler, it was held that the employee was serving the employer within the scope of his employment.<sup>40</sup> The owner of an automobile may, however, escape liability for the negligence of the driver of his automobile, though he is riding therein, when he has loaned the machine to others and is exercising no control over the operation thereof but is merely riding as the guest of the persons to whom it is loaned.<sup>41</sup> The courts, in at least one jurisdiction, have permitted the owner to escape liability when his son was driving the machine and he was riding therein from church on the invitation of the son.<sup>42</sup> And where the wife is the owner, but the machine is driven by a chauffeur in the pay of and under the control of the husband, the wife may not be liable for the negligence of the chauffeur, though both she and her husband are riding in the machine at the time.<sup>43</sup> And, where the car is in the control of an independent contractor making repairs thereto, the owner may not be liable for the negligence of such contractor.

37. *Baker v. Maseeh*, 20 Ariz. 201, 179 Pac. 53; *Watkins v. Brown*, 14 Ga. App. 99, 80 S. E. 212; *Carpenter v. Campbell Automobile Co.*, 159 Iowa, 52, 140 N. W. 225; *Daggv v. Miller* (Iowa), 162 N. W. 854; *Risser v. Parr* (Iowa), 168 N. W. 865; *Albert v. Munch*, 141 La. 686, 75 So. 513; *Painter v. Davis*, 113 Minn. 217, 129 N. W. 368.

38. *Laudenberger v. Easton Transit Co.*, 261 Pa. 288, 104 Atl. 588.

39. *Lytle v. Hancock County*, 19 Ga.

App. 193, 91 S. E. 219; *Bastien v. Chicago City Ry. Co.*, 189 Ill. App. 369.

40. *Thomas v. Armitage*, 111 Minn. 288, 126 N. W. 735.

41. *Pease v. Montgomery*, 111 Me. 582, 88 Atl. 973; *Hartley v. Miller*, 165 Mich. 115. See also *Reiter v. Groher* (Wis.), 181 N. W. 739. And see sections 642-643.

42. *Zeeb v. Bahnmaier*, 103 Kans. 599, 176 Pac. 396, 2 A. L. R. 883.

43. *Potts v. Pardee*, 220 N. Y. 431, 116 N. E. 78, 8 A. L. R. 785.

though he is riding in the machine at the time the contractor is testing it.<sup>44</sup> But it has been thought that, if the owner is riding in the machine, it is his duty to prevent, if possible, the driver from operating it in a dangerous manner or in violation of law.<sup>45</sup>

### Sec. 630. Liability for conduct of chauffeur—use of car without consent of owner.

It may be stated as a general rule, that, when the chauffeur or employee of the owner of a motor vehicle, or a third person not in his employ, uses the same without the consent of such owner, the owner is not liable for the negligent conduct of the driver.<sup>46</sup> Particularly is this so when the use of the car

44. *Lafitte v. Schunamaun*, 19 Ga. App. 799, 92 S. E. 295.

45. *Randolph v. Hunt* (Cal. App.), 183 Pac. 358.

46. *Alabama*.—*Calley v. Lewis*, 7 Ala. App. 593, 61 So. 37; *Jones v. Strickland*, 201 Ala. 138, 77 So. 562; *Archer v. Sibley*, 201 Ala. 495, 78 So. 849; *Dowdell v. Beasley* (Ala.), 87 So. 18.

*Georgia*.—*Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618; *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338; *McIntire v. Hartfelder-Garbutt Co.*, 9 Ga. App. 327, 71 S. E. 492; *Wooley v. Doby*, 19 Ga. App. 797, 92 S. E. 295.

*Kentucky*.—*Taylor v. Stephan's Adm'r*, 163 Ky. 770, 174 S. W. 790.

*Maryland*.—*Symington v. Sipes*, 121 Md. 313, 88 Atl. 134; *State to Use of Decelius v. C. J. Benson & Co.*, 100 Atl. 505; *Dearholt Motor Sales Co. v. Merritt*, 133 Md. 323, 105 Atl. 316.

*Massachusetts*.—*Hartnett v. Gryzmish*, 218 Mass. 253, 105 N. E. 988.

*Michigan*.—*Riley v. Roack*, 168 Mich. 294, 134 N. W. 14; *Brinkman v. Zuckerman*, 192 Mich. 624, 159 N. W. 316; *Hill v. Haynes*, 204 Mich. 536, 170 N. W. 685.

*Missouri*.—*Whimster v. Holmes*, 177 Mo. App. 164, 164 S. W. 236.

*New Hampshire*.—*Howe v. Leighton*, 75 N. H. 601, 73 Atl. 102.

*New York*.—*O'Brien v. Stern Bros.*, 223 N. Y. 290, 119 N. E. 550; *Rose v. Balfe*, 223 N. Y. 481, 119 N. E. 842; *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Suppl. 1057; *Bogorad v. Dix*, 176 App. Div. 774, 162 N. Y. 992; *Quirk v. Worden*, 190 App. Div. 773, 180 N. Y. Suppl. 647; *Donnelly v. Yuille*, 197 App. Div. 59.

*Pennsylvania*.—*Lotz v. Hanlon*, 217 Pa. St. 339, 66 Atl. 525, 10 Ann. Cas. 731, 10 L. R. A. (N. S.) 202; *Curran v. Lorch*, 243 Pa. 247, 90 Atl. 62; *Soloman v. Commonwealth Trust Co. of Pittsburg*, 256 Pa. 55, 100 Atl. 534; *Kennedy v. Knott*, 264 Pa. St. 26, 107 Atl. 390.

*Rhode Island*.—*Northrup v. Robinson*, 33 R. I. 496, 82 Atl. 392.

*South Carolina*.—*Knight v. Laurens Motor Car Co.*, 108 S. Car. 179, 93 S. E. 869.

*Texas*.—*Christensen v. Christiansen* (Civ. App.), 155 S. W. 995; *Nicholson v. Houston Elec. Co.* (Civ. App.), 220 S. W. 632; *Henphill v. Romano* (Civ. App.) 233 S. W. 125.

is contrary to the express instructions of the owner, and for the pleasure or business of the chauffeur.<sup>47</sup> And, in such a case, it is not of controlling importance that the driver was in the general employ of the owner and had the authority to use the car at certain times or for certain purposes.<sup>48</sup> Of course, certain small details in the management and repair of the automobile may justify the chauffeur, acting within the scope of his authority, in using the car without the knowledge of the owner. To illustrate, if the machine needs repairs, the servant may be acting within the scope of his employment in driving it to a repair shop, though his employer has no knowledge of the trip.<sup>49</sup> And when the owner of the automobile is in a foreign country, he may be liable for the negligence of his chauffeur running the car within this country, when the chauffeur is acting within the scope of his employment.<sup>50</sup> Where the owner of an automobile having his headquarters at a hotel, but keeping the machine at a garage sev-

*Virginia*.—Kidd v. Dewitt, 105 S. E. 124.

*Washington*.—Jones v. Hoge, 47 Wash. 663, 92 Pac. 433, 125 Am. St. Rep. 915, 14 L. R. A. (N. S.) 216; Prusch v. Greenough Bros. Co., 79 Wash. 109, 139 Pac. 870.

*Compare*, Southern Oil Co. v. Anderson (Fla.), 86 So. 629.

**47.** *Georgia*.—McIntire v. Hartfelder-Garbutt Co., 9 Ga. App. 327, 71 S. E. 492.

*Kansas*.—Toadvine v. Sinnet, 178 Pac. 401.

*Kentucky*.—Taylor v. Stephan's Adm'r, 163 Ky. 770, 174 S. W. 790.

*Maryland*.—Symington v. Sipes, 121 Md. 313, 88 Atl. 134.

*Michigan*.—Riley v. Roack, 168 Mich. 294, 134 N. W. 14.

*Minnesota*.—Provo v. Conrad, 130 Minn. 412, 153 N. W. 753.

*Missouri*.—Glassman v. Harry, 182 Mo. App. 304, 170 S. W. 403.

*New Jersey*.—Reimers v. Proctor Pub. Co., 85 N. J. L. 441, 89 Atl. 931; Cronecker v. Hall, 450 N. J. L. 450,

105 Atl. 213; Eldridge v. Calhoun, 112 Atl. 340.

*New York*.—Rose v. Balfe, 223 N. Y. 481, 119 N. E. 842; Stewart v. Baruch, 103 App. Div. 577, 93 N. Y. Suppl. 161.

*Pennsylvania*.—Sarver v. Mitchell, 35 Pa. Super. Ct. 69; Durham v. Strauss, 38 Pa. Super. Ct. 620.

*Canada*.—Halparin v. Bulling, 50 Can. Sup. 471.

#### **Workmen's Compensation Act.**

Where an employee takes his employer's automobile contrary to his instructions, his personal representative cannot recover for his death under the Workmen's Compensation Act. Reimers v. Proctor Pub. Co., 85 N. J. L. 441, 89 Atl. 931.

**48.** McIntire v. Hartfelder-Garbutt Co., 9 Ga. App. 327, 71 S. E. 492.

**49.** See Cunningham v. Castle, 127 N. Y. App. Div. 580, 111 N. Y. Suppl. 1057. And see section 640.

**50.** Winfrey v. Lazarus, 148 Mo. App. 388, 128 S. W. 276.

eral blocks away, directed the chauffeur to go downstairs in the hotel and get some oil, but the servant instead of obeying the order literally, drove to the garage for oil, it was held to be a question for the jury whether the chauffeur was acting within the general scope of his duty in thus going after oil.<sup>51</sup> But, where the chauffeur takes the machine against the instructions of the owner for a pleasure trip for himself or his friends, the owner is not liable for his negligence.<sup>52</sup> And the owner may not be liable for the conduct of the chauffeur, where he ordered him to bring the machine from a garage in the rear of the house to the front, but instead went to a nearby drug store for some cigarettes for himself.<sup>53</sup>

**Sec. 631. Liability for conduct of chauffeur — private use by chauffeur with consent of owner.**

Though the opinion has been expressed that the owner of a motor vehicle who permits his chauffeur to use the machine upon the personal business of the latter may be liable for the negligence of such chauffeur,<sup>54</sup> the overwhelming weight of authority supports the view that the owner is not liable under such circumstances.<sup>55</sup> The fact that it is the duty of the driver

51. *Bennett v. Busch*, 75 N. J. L. 240, 67 Atl. 188.

52. *Symington v. Sipes*, 121 Md. 313, 88 Atl. 134; *Lotz v. Hanlon*, 217 Pa. St. 339, 66 Atl. 525, 10 Ann. Cas. 731, 10 L. R. A. (N. S.) 202; *Sarver v. Mitchell*, 35 Pa. Super. Ct. 69; *Knight v. Laurens Motor Car Co.*, 108 S. Car. 179, 93 S. E. 869.

53. *Healey v. Cockrill*, 33 Ark. 327, 202 S. W. 289.

54. *Anderson v. Southern Cotton Oil Co.*, 73 Fla. 432, 74 So. 975; *Southern Cotton Oil Co. v. Anderson (Fla.)*, 86 So. 629; *Ingraham v. Storkamore*, 63 Misc. (N. Y.) 114, 118 N. Y. Suppl. 399. See also *Studebaker Bros. Co. v. Kitts (Tex.)*, 152 S. W. 464.

55. *California*.—*Brimberry v. Dudfield Lbr. Co. (Cal. App.)*, 186 Pac. 205, affirmed 191 Pac. 894; *Nussbaum v. Traung Label, etc. Co. (Cal. App.)*,

189 Pac. 728.

*Connecticut*.—*Adomaites v. Hopkins*, 111 Atl. 178.

*Georgia*.—*Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618.

*Illinois*.—*Kitz v. Scudder Syrup Co.*, 199 Ill. App. 605; *Reinick v. Smetana*, 205 Ill. App. 321.

*Indiana*.—*Premier Motor Mfg. Co. v. Tilford*, 61 Ind. App. 164, 111 N. E. 645.

*Maryland*.—See *State to Use of Deceluis v. C. J. Benson & Co.*, 100 Atl. 505.

*Massachusetts*.—*O'Rourke v. A-G Co., Inc.*, 232 Mass. 129, 122 N. E. 193.

*Minnesota*.—*Mogle v. A. W. Scott Co.*, 144 Minn. 173, 174 N. W. 832; *Menton v. L. Patterson Co.*, 145 Minn. 310, 176 N. W. 991.

*Missouri*.—*Calhoun v. Mining Co.*, 202 Mo. App. 564, 209 S. W. 318; *Val-*



to return the machine to its owner after its permissive use, does not change the situation, although the injury in question

*lery v. Hesse Bldg. Material Co.* (Mo. App.), 211 S. W. 95; *Miller v. Rice Slix Dry Goods Co.* (Mo. App.), 223 S. W. 437.

*New York.*—*Reilly v. Connable*, 214 N. Y. 586, 108 N. E. 853; *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Suppl. 1057; *Douglass v. Hewson*, 152 App. Div. 166, 127 N. Y. Suppl. 220; *Ostrander v. Armour & Co.*, 176 App. Div. 152, 161 N. Y. Suppl. 961; *Perlmutter v. Byrne*, 193 App. Div. 769, 184 N. Y. Suppl. 580; *Lansing v. Hayes*, 196 App. Div. 671; *Davis v. Anglo-American, etc. Co.*, 145 N. Y. Suppl. 341. "The law, however, contains no prohibition against the owner of an automobile loaning it to his chauffeur or to anyone else for any lawful purpose, and he is not liable for damages caused thereby when in use by his consent on the business or pleasure of others." *Bogorad v. Dix*, 176 App. Div. 774, 162 N. Y. Suppl. 992. "I do not think the question of the ignorance or consent of the master has any bearing whatever upon his liability. The fact that the servant has used the horses or the automobile without his consent has probative force upon the proposition as to whether or not the servant was engaged in the master's business, and was acting within the scope of his employment. The question is whether he was or not. If without the knowledge of his master, he took the car from the garage to a machine shop to have it fixed and an accident occurred, the fact of the want of knowledge on the master's part would not affect the liability, because the act would be within the scope of the servant's employment and in the prosecution of the master's business. If the chauffeur were granted a two week's vacation and the master said to him: 'I am going off on a trip and will not need

the machine; you may take it and use it for your own pleasure while I am gone,' I cannot think that he would be responsible for any negligence of the chauffeur during that period." *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Suppl. 1057.

*North Carolina.*—*Reich v. Cone*, 104 S. E. 530.

*Pennsylvania.*—*Scheel v. Shaw*, 255 Pa. 451, 97 Atl. 685, affirming 60 Pa. Super. Ct. 73 *Beatty v. Firestone Tire & Rubber Co.*, 263 Pa. St. 271, 106 Atl. 303.

*Texas.*—*Gordon v. Texas & Pacific, etc. Co.* (Civ. App.), 190 S. W. 748.

*Utah.*—*Wright v. Intermountain Motorcar Co.*, 53 Utah, 176, 177 Pac. 237.

*Washington.*—*Ludberg v. Barghoorn*, 73 Wash. 476, 131 Pac. 1165.

*Wisconsin.*—*Gewanske v. Ellsworth*, 166 Wis. 250, 164 N. W. 996.

"In order to create a liability for the use of the automobile of the master by the servant two things must appear: First, the use must be with the knowledge and consent of the master; and, second, it must be used within the scope of the employment and to facilitate the master's business. While it is true that fair and generous treatment on the part of the master is likely to produce a corresponding sense of loyalty on the part of the servant, it cannot be said that such treatment of a servant by a master in any way promotes or facilitates the master's business in a legal sense. It is to the benefit of both master and servant that their relationship should be pleasant and harmonious, but the effort of the master to accommodate and assist the servant does not bring within the scope of the master's employment acts of the servant otherwise without such scope." *Gewanski v. Ellsworth*, 166 Wis. 250, 164 N. W. 996.

arises while he is so returning the machine.<sup>56</sup> The general rule, however, may be changed by statutory enactment.<sup>57</sup> The reason for the rule is that, when the chauffeur is using the machine in his private business, he is not under the control of the master and is not acting within the scope of his master's business.<sup>58</sup> The legal situation is the same as though the machine had been loaned to a friend for personal use, and it is well settled that the owner is not liable for negligence in the operation of the machine when it is loaned to another and is used for the personal business of the borrower.<sup>59</sup> Liability is not imposed on the owner merely because he permitted his servant to use the machine for his servant's personal pleasure or business.<sup>60</sup> Thus, where the chauffeur took the owner in the machine to the owner's home, and then obtained permission to take his family home from where they were visiting in another part of the city, it was held that on such trip he was not acting within the scope of his master's business, and that the owner was not liable for his negligence on the trip.<sup>61</sup> But, it is held that, where the owner permits the driver to take the car for a visit to a relative, but instructs him to return to a hotel to take the owner home later in the evening, after the visit and on his return to the hotel, he is deemed to be in the business of the owner.<sup>62</sup> And, where the owner asked a young man to drive the machine for a particular trip and loaned him the machine while he went to secure his father's permission, it was held that on his return he might be deemed a servant of the owner so as to charge the latter

56. *Brimberry v. Dudfield Lbr. Co.* (Cal. App.), 186 Pac. 205, affirmed 191 Pac. 894; *Van Cleave v. Walker* (Tex. Civ. App.), 210 S. W. 767.

57. Section 626.

58. *Scheel v. Shaw*, 255 Pa. 451, 97 Atl. 685, affirming 60 Pa. Super. Ct. 73; *Kewanski v. Ellsworth*, 166 Wis. 250, 164 N. W. 996.

**Use to enable driver to reach work earlier.**—Where the employer permits the driver to use the machine to and from his home in order that the driver may reach his work earlier, it has been

held that the relation of master and servant continues during such trips. *Depue v. George D. Salmon Co.*, 92 N. J. Law. 550, 106 Atl. 379.

59. Section 642.

60. *Scheel v. Shaw*, 255 Pa. 451, 97 Atl. 685, affirming 60 Pa. Super. Ct. 73; *Ludberg v. Barghoorn*, 73 Wash. 476, 131 Pac. 1165; *Gewanski v. Ellsworth*, 166 Wis. 250, 164 N. W. 996.

61. *Scheel v. Shaw*, 255 Pa. 451, 97 Atl. 685, affirming 60 Pa. Super. Ct. 73.

62. *Graham v. Henderson*, 254 Pa. 137, 98 Atl. 870.

with his negligence.<sup>63</sup> The fact that the machine was defective and dangerous for driving at night when the owner permitted his servant to use it, does not make an exception to the general rule.<sup>64</sup>

### **Sec. 632. Liability for conduct of chauffeur — variance from direct course.**

When the owner of an automobile directs his driver to take the car to a certain place, but the driver instead of following the route which it was his duty to take, diverts therefrom for his private purposes, and, while away from the course, is guilty of negligence, a difficult question is sometimes presented as to the liability of the owner. The solution of the question frequently depends upon the degree of the variance from the proper course.<sup>65</sup> The intention of the driver in making the deviation is also important.<sup>66</sup> A mere disregard of instructions and slight deviation from the line of the chauffeur's

63. *Elliott v. O'Rourke*, 40 R. I. 187, 100 Atl. 314.

64. *Gordon v. Texas & Pacific, etc. Co.* (Tex. Civ. App.), 190 S. W. 748, wherein it was said: "Appellant's contention, in substance, is that the mere fact that the automobile was defective and dangerous for driving at night, and known to be so by the defendant, and that at the time it was being driven by one of defendant's servants, having been given power to take it from the garage, creates a liability on defendant's part for the consequences. We cannot approve so broad a ground of liability on the part of automobile owners. The authorities seem uniform to the effect that the owner of a car who was not present at the infliction of the injury cannot be held liable, except it be shown that the person in charge, not only was the agent or servant of the owner, but also was engaged at the time in the business of his master."

65. "The fact that the servant acts also for himself, while performing ser-

vice for his employer, and in doing so diverts from the usual route or method of performing the service, will not exonerate the employer from responsibility for misconduct of the servant. Sometimes the extent of the deviation may be so slight, relatively, that as a matter of law it can be said that it does not constitute a complete departure from the master's service, while under other circumstances the deviation may be so marked that it can be said as a matter of law that it does constitute an abandonment of the master's service, while under still other circumstances the deviation may be so uncertain in extent or degree that it leaves a question of inference to be drawn by a trial jury as to whether or not there has been such an abandonment as to relieve the master from responsibility for the servant's act." *Healey v. Cockrill*, 133 Ark. 327, 202 S. W. 229.

66. *Mathewson v. Edison Elec. Illum. Co.*, 232 Mass. 576, 122 N. E. 743.

duty, does not necessarily relieve the master from responsibility for his negligence.<sup>67</sup> The fact that the servant would not have been at the place of the accident but for the deviation, is not controlling.<sup>68</sup> On the other hand, if the servant departs so far from the line of his duty that for the time being his acts constitute an abandonment of his service, the master is not liable.<sup>69</sup> Between extreme cases showing a slight deviation from instructions and those showing clearly an abandonment of the master's service, there are many border

**67. Kentucky.**—Eakin v. Anderson, 169 Ky. 1, 183 S. W. 217.

**Massachusetts.**—Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801; McKeever v. Ratcliffe, 218 Mass. 17, 105 N. E. 552; Mathewson v. Edison Elec. Illum. Co., 232 Mass. 576, 122 N. E. 743. "The employer has been held responsible for wrongs done to third persons by his driver during incidental departures from the scope of the authority conferred by the employment and upon comparatively insignificant deviation from direct routes of travel, but within the general penumbra of the duty for which he is engaged." Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801.

**Missouri.**—Guthrie v. Holmes, 272 Mo. 215, 198 S. W. 854; Long v. Nute, 123 Mo. App. 204, 100 S. W. 511; Whimster v. Holmes, 177 Mo. App. 130, 164 S. W. 236.

**New York.**—Fisk v. Lorber, 95 Misc. 574, 159 N. Y. Suppl. 722.

**Pennsylvania.**—Witte v. Mitchell-Lewis Motor Co., 244 Pa. 172, 90 Atl. 528; Baloy v. Rosenbaum Co., 260 Pa. 466, 103 Atl. 882; Blaker v. Philadelphia Elec. Co., 60 Pa. Super. Ct. 56.

**Washington.**—George v. Carstens Packing Co., 91 Wash. 637, 158 Pac. 529.

**Wisconsin.**—Thomas v. Lockwood Oil Co., 182 N. W. 841.

**Operator of jitney.**—Where the operator of a jitney is instructed by the owner not to diverge from certain

streets, and he carries a passenger to his home on another street where the jitney is licensed to operate, the owner is not liable for injuries sustained by the passenger while outside of the authorized route. Youngquist v. L. J. Droese Co., 167 Wis. 458, 167 N. W. 730.

**68. Dale v. Armstrong,** 107 Kans. 101, 190 Pac. 598.

**69. Alabama.**—Dowdell v. Beasley, 87 So. 18.

**Arkansas.**—Healey v. Cockrill, 133 Ark. 327, 202 S. W. 229.

**California.**—Employer's Liability, etc. Corp. v. Industrial Acc. Com., 187 Pac. 42.

**Kentucky.**—Eaken v. Anderson, 169 Ky. 1, 183 S. W. 217.

**Massachusetts.**—Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801; Mathewson v. Edison Elec. Illum. Co., 232 Mass. 576, 122 N. E. 743.

**Michigan.**—Drobnecke v. Packard Motor Car Co., 180 N. W. 459.

**New Jersey.**—Cronecker v. Hall, 92 N. J. Law, 450, 105 Atl. 213.

**New York.**—O'Brien v. Stern Bros., 223 N. Y. 290, 119 N. E. 550; Riley v. Standard Oil Co., 191 N. Y. App. Div. 490, 181 N. Y. Suppl. 573; Coyne v. Kennedy, 229 N. Y. 550, 129 N. E. 911.

**Pennsylvania.**—Soloman v. Commonwealth Trust Co. of Pittsburgh, 256 Pa. 55, 100 Atl. 534.

**Virginia.**—Kidd v. Dewitt, 105 S. E. 124.

**Errand for friend.**—A plaintiff cannot recover for the death of his intes-

cases where the question is submitted to the jury.<sup>70</sup> The fact that the driver loiters on the way so as to avoid being sent on another errand, does not constitute such a departure from service as to relieve the master.<sup>71</sup> The proportion between the length of the trip as directed by the master and the distance of the deviation, is sometimes examined and considered on the question whether the chauffeur is acting within the scope of his employment.<sup>72</sup> "A side trip of several blocks from a main trip of sixteen blocks may correctly be called a slight deviation, whereas a side trip of several blocks from a main trip of less than one block might reasonably be regarded as an entirely different proposition."<sup>73</sup> Though the distance of the diversion is not great, if it is considerable in comparison to the course directed to be taken, it may be deemed an abandonment of the master's service rather than a deviation. Thus, where a chauffeur was directed to bring the car from the garage at the rear of the house to the front, and he went to a nearby drug store to make a purchase for himself, the deviation is not slight and cannot be disregarded.<sup>74</sup> Where

tate where it appears without contradiction that, at the time such intestate was run over by defendant's automobile, the chauffeur was not upon the defendant's business or acting within the scope of his employment but was going away from his work and in an opposite direction for a purpose of his own and on an errand for a friend. *O'Brien v. Stern Bros.*, 223 N. Y. 290 119 N. E. 550.

**70. Kansas.**—*Dale v. Armstrong*, 190 Pac. 598.

*Massachusetts.*—*McKeever v. Ratcliff*, 218 Mass. 17, 105 N. E. 552; *Donohue v. Voemberg*, 227 Mass. 1, 116 N. E. 246; *Mathewson v. Edison Elec. Illum. Co.*, 232 Mass. 576, 122 N. E. 743; *Lewandowski v. Cohen*, 129 N. E. 378.

*Pennsylvania.*—*Maloy v. Rosenbaum Co.*, 260 Pa. 466, 103 Atl. 882; *Blaker v. Philadelphia Elec. Co.*, 60 Pa. Super. Ct. 56.

*Washington.*—*George Carstens Pack-*

*ing Co.*, 91 Wash. 637, 158 Pac. 529.

**71. Thomas v. Lockwood Oil Co.** (Wis.), 182 N. W. 841.

**72. Fleischner v. Durgin**, 207 Mass. 435, 93 N. E. 801; *Fisick v. Lobber*, 95 Misc. (N. Y.) 574, 159 N. Y. Suppl. 722; *Witte v. Mitchell-Lewis Motor Co.*, 244 Pa. 172, 90 Atl. 528.

**73. Eakin v. Anderson**, 160 Ky. 1, 183 S. W. 217.

**74. Healy v. Cackrill**, 133 Ark. 327, 202 S. W. 229, wherein it was said: "We do not think that the facts of the present case bring it within the rule of slight deviation from the employer's service, or a mere incidental departure from the service to mingle with it purposes of the servant's own, but that it is a case of complete abandonment or departure from the employer's business and a stepping aside wholly for the servant's own purpose. The distance traveled by the servant in going upon his own errand was not very great, but it was considerably out

the trip on the servant's business was eight times the distance of the trip he was directed to take for his employer, and at the time of the accident he was still more than three times the distance he was directed to go away from and beyond the place he was directed to go, it was held that the servant was not acting in his master's business.<sup>75</sup> And, where the owner employs one not in his general employ to drive a machine from a garage in Brookline to a shop less than a mile away, but without the consent or knowledge of the owner, he takes the machine to a square not on the direct course and has lunch and then with a friend drives the car to a shop in Boston six miles farther out of his way for the purpose of getting a chain for his own use, and then just after he has turned to go back negligently runs over a traveler in Boston, it was held that the owner was not liable for his negligence.<sup>76</sup> Similarly, when it was the duty of the servant to drive to the post office for the mail, then to the express office and then back to the master's house, and after leaving the post office he undertook to oblige a third person by carrying a note to that person's house, which was not on his direct road to the express office, it was held that while so engaged the servant was on an independent journey and the master was not liable.<sup>77</sup> On the

of proportion with the distance necessary to travel in obeying the instructions of his employer. In other words, the relative distance was too great to be called a slight deviation, and the departure from the line of duty was so complete that the connection with the employer's service was completely broken. In order to perform the employer's service it was unnecessary for the servant to leave the immediate proximity of the employer's premises. He did not even have to cross any of the streets, but his journey from the back of the premises to the front was merely to follow the same side of the street halfway around the block. Instead of following that course, the servant left the premises entirely and went off on an errand of his own to purchase an article for his private use,

and, in order to make that trip in observance of the traffic rules, it was necessary for him to travel the distance of 6½ blocks in getting back to the front of his employer's residence. The servant, in leaving the premises in order to make the trip to the store, was not mingling his own business with that of his employer, but he was stepping aside entirely from the employer's business to go on an errand of his own, and this is true even though he intended to dispose of the car, on his return, in accordance with the employer's direction."

75. *Eakin v. Anderson*, 169 Ky. 1, 183 S. W. 217.

76. *Fleischner v. Durgin*, 207 Mass. 435, 93 N. E. 801.

77. *Northrup v. Robinson*, 33 R. I. 496, 82 Atl. 392.

other hand, the case is for the jury where it appears that the chauffeur was in the continuous employment of the defendant, that prior to the accident in question he had started to return to the defendant's garage, that on the way he was compelled to stop to change his tire in the rain, that his clothes were wet and instead of returning to the garage immediately, he drove the machine to his home in another part of the city and had his supper and changed his clothes, and that on his return to the garage he went out of his way several blocks to get some cigars when the accident in question occurred.<sup>78</sup> In this class of cases it is a very material inquiry whether the servant started to serve his own purposes, or whether the trip was commenced and ended in the master's service but a variance from the expected course was made.<sup>79</sup> If the journey upon which the servant starts be wholly for his own purposes, and without the knowledge or consent of the master, the latter will not be liable.<sup>80</sup>

**Sec. 633. Liability for conduct of chauffeur — returning to employment after unlawful divergence.**

When a chauffeur has used the automobile of his employer for his own personal business, the question is sometimes raised that when he is returning the car for the use of his employer he may be operating it in his master's business, and hence the master may be liable for his negligence on such return trip. It is true that when the servant has temporarily diverged from the course which he should have taken, he may properly be said to have resumed the master's business when he is returning to the proper course.<sup>81</sup> Thus, where a servant was engaged to drive an automobile truck for a bakery over

78. *Blaker v. Philadelphia Elec. Co.*, 60 Pa. Super. Ct. 56.

79. *Eakin v. Anderson*, 169 Ky. 1, 183 S. W. 217.

80. *Eakin v. Anderson*, 169 Ky. 1, 183 S. W. 217. And see section 630.

81. *Heelan v. Guggenheim*, 210 Ill. App. 1; *Rudd v. Fox*, 112 Minn. 477; 128 N. W. 675; *Whimster v. Holmes*, 177 Mo. App. 130, 164 S. W. 236;

*Slothower v. Clark*, 191 Mo. App. 105, 179 S. W. 55; *Riley v. Standard Oil Co.*, 231 N. Y. 301; *George v. Carstens Packing Co.*, 91 Wash. 637, 158 Pac. 629. See also *Donahue v. Vorenberg*, 227 Mass. 1, 116 N. E. 246; *Goff v. Clarksburg Dairy Co. (W. Va.)*, 103 S. E. 58. Compare *Gousse v. Lowe (Cal. App.)*, 183 Pac. 295; *Crady v. Greer*, 183 Ky. 675, 210 S. W. 167.

a certain route, and contrary to the instructions of his employer, he made a trip off his route to take a party home, and after having done so was returning to the bakery when he ran over a boy in the street, it was held that at the time of the accident the servant was driving the truck in the regular line of his employment.<sup>82</sup> But, when the use of the car by the driver is *entirely* unauthorized, the entire use thereof, both in going and in returning, is not in the furtherance of the master's business, and the owner should not, according to the better authority, be liable for the negligent acts of the chauffeur when on the return trip.<sup>83</sup> Thus, where a chauffeur was directed to take the car from the garage at a stated time and call at a certain house, but, starting an hour earlier, he went on an errand of his own a distance further than that between the garage and the house to which he had been directed to go, and then started from the place of his personal errand towards the house where his master had told him to go, and by a different route than that by which he had come, when the accident happened, it was held that the master was not liable.<sup>84</sup> And, where a servant was ordered to take the automobile from one garage of the defendant to another, and there to wash it and put it up for the night, but after driving the car to the garage as directed, he took the machine to carry another employee to his home, and after driving to a restaurant for his supper was returning to the garage when the accident in question happened, it was held that the servant was not acting within the scope of his employment at the time.<sup>85</sup> But, when the owner directs the chauffeur to be at a certain place at a certain time, but in the meantime permits him to use the machine for his personal ends, when the chauffeur is returning to the designated place, he may be said to

82. Devine v. Ward Baking Co., 188 Ill. App. 588.

83. Gousse v. Lowe (Cal. App.), 183 Pac. 295; Tyler v. Stephen's Adm'r, 163 Ky. 770, 174 S. W. 790; Eakin v. Atchison, 169 Ky. 1, 183 S. W. 217; Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801; 33 L. R. A. (N. S.) 79,

20 Ann. Cas. 1291; Brinkman v. Zuckerman, 192 Mich. 624, 159 N. W. 316; Hill v. Staats (Tex.), 189 S. W. 85.

84. Eakin v. Anderson, 169 Ky. 1, 183 S. W. 217.

85. Colwell v. Aetna Bottle & Stopper Co., 33 R. I. 531, 388.



be acting within the master's employment.<sup>86</sup> The situation is different where the servant is not permitted to use the machine for his benefit during the interval before he is required to act for his owner. Thus, where the chauffeur was directed to get his supper and be at a certain hotel at a certain time, but, after eating his supper, instead of taking the machine to the hotel, he drove to a place a mile or so distant to call upon a friend, it was held that the master was not liable for his negligence on returning from his call to the hotel.<sup>87</sup> The decisions are by no means harmonious on the liability of the master under varying circumstances. Thus, in one case, it was held that the master was liable where his chauffeur took him to church and was then directed to go to another building for the owner's son and then to return to the church, but the chauffeur instead of following the directions went in the opposite direction to collect a debt due to him and injured another traveler on his return, it was held that a judgment against the owner could be sustained.<sup>88</sup>

86. *McKiernan v. Lebaier*, 85 Conn. 111, 81 Atl. 969; *Graham v. Henderson*, 254 Pa. 137, 98 Atl. 870. "If the chauffeur in using the car to make a visit to his brother was doing so, not only without the consent of the owner, but in disregard of the orders he had received, then it would follow that during the time he employed the car, down to the time he returned it to its proper place, the relation of master and servant between him and the defendant was wholly suspended, and the latter would not be liable for any negligence of his resulting in injury to a third party. If on the other hand, permission had been given, while it might be argued that this also would result in an interruption of the relation of master and servant, a further question would require answer, namely, when was the relation resumed? for, when ever resumed, from that time forward

the chauffeur in driving the car could be engaged about his master's business and not his own. Was the relation resumed at once upon his accomplishing his visit to his brother, and was the chauffeur thereafter in making his return drive acting as servant, performing a duty he owed the master because of the relation? or was he still a licensee of the car? We are of opinion that the license, if given, expired when the visit to the brother was accomplished and that on the return drive, when the accident happened, the chauffeur was acting not on his own, but on his master's business." *Graham v. Henderson*, 254 Pa. St. 137, 98 Atl. 870.

87. *Danforth v. Fisher*, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670.

88. *Slothower v. Clark*, 191 Mo. App. 105, 179 S. W. 55.

**Sec. 634. Liability for conduct of chauffeur — chauffeur acting under direction of owner's family.**

A chauffeur in the general employ of the owner of an automobile may be acting within the scope of his employment and within his master's business, when he is operating the machine at the request of a member of the owner's family.<sup>89</sup> It may be said that the owner has made it a part of his business to furnish pleasure and transportation to the members of his family, so that one driving the car for the carriage of such persons is acting within the owner's business.<sup>90</sup> Especially is this true when the chauffeur has general directions to use the car as required by the members of the owner's family.<sup>91</sup> The right of the members of the family to give instructions to the owner's servant cannot be based merely upon the relationship, but there must exist an authority in the one giving the direction or the owner must subsequently ratify the direction.<sup>92</sup> The authority may be given expressly or may be found by implication, as when similar directions have been given in the presence of the owner or have continued so as to constitute a source of conduct.<sup>93</sup> Moreover, the circumstances may be such as to charge the owner of an automobile with the negligence of the chauffeur when running the machine pursuant to the directions of his guests.<sup>94</sup>

**Sec. 635. Liability for conduct of chauffeur—testing machine.**

A chauffeur employed to run and repair an automobile may be authorized to test the running of the engine after repairs

<sup>89.</sup> *Connecticut*.—*Carrier v. Donovan*, 88 Conn. 37, 89 Atl. 894.

*Missouri*.—*Winfrey v. Lazarus*, 148 Mo. App. 388, 128 S. W. 276.

*New York*.—*McHarg v. Adt*, 163 App. Div. 782, 149 N. Y. Suppl. 244; *Cohen v. Bargenecht*, 83 Misc. 28, 144 N. Y. Suppl. 399.

*Pennsylvania*.—*Moon v. Matthews*, 227 Pa. St. 488, 76 Atl. 219, 29 L. R. A. (N. S.) 856; *Hazzard v. Carstairs*, 244 Pa. St. 122, 90 Atl. 556; *Crouse v. Lubin*, 260 Pa. 329, 103 Atl. 725.

<sup>90.</sup> *Houseman v. Karicoffe*, 201

*Mich.* 420, 167 N. W. 964; *Crouse v. Lubin*, 260 Pa. 329, 103 Atl. 725; *Flores v. Garcia* (Tex. Civ. App.), 226 S. W. 743. And see sections 657, 660.

<sup>91.</sup> *Freeman v. Green* (Mo. App.), 186 S. W. 1166; *Cohen v. Bargenecht*, 83 Misc. (N. Y.) 28, 144 N. Y. Suppl. 399.

<sup>92.</sup> *Carrier v. Donovan*, 88 Conn. 37, 89 Atl. 894.

<sup>93.</sup> *Carrier v. Donovan*, 88 Conn. 37, 89 Atl. 894.

<sup>94.</sup> *Campbell v. Arnold*, 219 Mass 160, 106 N. E. 599.

thereto have been made; and, while such tests are being made, the master will be liable for the driver's negligence though he had no knowledge that the machine was being operated.<sup>95</sup> Where the machine is operated by a person who had repaired the brakes, the fact that such person on various occasions had driven the car in company with the owner, does not show a special agency for driving the car for the purpose of testing the brakes.<sup>96</sup>

**Sec. 636. Liability for conduct of chauffeur — chauffeur after personal laundry.**

Where in an action to recover for injuries to a pedestrian caused by an automobile, it appears that at the time of the accident it was being used by the defendant's chauffeur for the purpose of carrying his own laundry to another town, although he had been directed by the defendant not to use the machine without express orders, except that he might use it when going to and from his meals, the chauffeur was not acting in his employer's business or within the scope of his employment.<sup>97</sup> But the circumstances may be such as to present a question for the jury whether the procurement of his laundry by a chauffeur is a mere incident in his employment, as where the chauffeur slept at the house of his employer and had no fixed hours of employment, and the employer paid for his laundry as a part of his wages and permitted him to use the car to get it.<sup>98</sup>

**Sec. 637. Liability for conduct of chauffeur — chauffeur taking car for meals.**

Ordinarily when the chauffeur is using his employer's automobile for the purpose of procuring his meals, he is not engaged in his master's business, and the master is not liable for his negligent acts on such a trip.<sup>99</sup> But a different ques-

<sup>95</sup>. *Calley v. Lewis*, 7 Ala. App. 593, 61 So. 37; *Edwards v. Yarbrough* (Mo. App.), 201 S. W. 972; *Curran v. Lorch*, 243 Pa. St. 247, 90 Atl. 62.

<sup>96</sup>. *Bricker v. Dahmus*, 211 Ill. App. 103.

<sup>97</sup>. *Douglass v. Hewson*, 142 N. Y. App. Div. 166, 127 N. Y. Suppl. 220

<sup>98</sup>. *Reynolds v. Denholm*, 213 Mass. 576, 100 N. E. 1006.

<sup>99</sup>. *Nussbaum v. Traung Label, etc. Co.* (Cal. App.), 189 Pac. 728; *Hartnett*

tion is presented when a special trip is not made to get the meal, but the driver merely diverges from the course directed by the owner and stops to procure the meal.<sup>1</sup> Thus, the fact that the chauffeur by the permission of his employer stops at his own home for supper on the way to the garage with the car does not remove him even temporarily from his employment.<sup>2</sup> And, in an action for injuries received by an employee in the street struck by a taxicab used by the driver thereof to go to his supper, where there was evidence that there was no regulation prohibiting the use of the cars by drivers for that purpose, and that they were sometimes used for such purpose without objection, it was held that a judgment against the taxicab company could be sustained.<sup>3</sup> And, if the servant is directed to use the machine in order that he may return to his work sooner, a finding that he is acting in the owner's business in so doing may be justified.<sup>4</sup>

### **Sec. 638. Liability for conduct of chauffeur — chauffeur taking passenger.**

The driver of a motor vehicle sent on a particular mission by the owner of the machine is, as a general proposition, acting beyond the scope of his authority when without the knowledge of his employer he invites another person to ride with him.<sup>5</sup> If such a passenger is injured through the mere negligence of the driver of the machine, the owner thereof will not generally be liable.<sup>6</sup> The passenger is in the position of a

v. Gryzmish, 218 Mass. 258, 105 N. E. 988; Hill v. Haynes, 204 Mich. 536, 170 N. W. 685; Calhoun v. Mining Co., 202 Mo. App. 564, 209 S. W. 318; Reilly v. Connable, 214 N. Y. 586, 108 N. E. 853; Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016, 19 Ann. Cas. 1227, 26 L. R. A. (N. S.) 382.

1. Section 632.

2. Ferris v. McAidle, 92 N. J. L. 580, 106 Atl. 460; Fisick v. Lorber, 95 Misc. (N. Y.) 574, 159 N. Y. Suppl. 722. See also Moore v. Reddie, 103 Wash. 386, 174 Pac. 648.

3. Burger v. Taxicab Motor Co., 66

Wash. 676, 120 Pac. 519.

4. Snyder v. Eriksen (Kans.), 198 Pac. 1080.

5. Waller v. Southern Ice & Coal Co., 144 Ga. 695, 87 S. E. 888; Walker v. Fuller, 223 Mass. 566, 112 N. E. 230; Dearborn v. Fuller (N. H.), 107 Atl. 607; Roefe v. Hewitt, 227 N. Y. 486, 125 N. E. 804; Christensen v. Christensen (Tex. Civ. App.), 155 S. W. 995; McQueen v. People's Store Co., 97 Wash. 387, 166 Pac. 626.

6. Barker v. Dairymen's Milk Products Co. (Ala.), 88 So. 588; Waller v. Southern Ice & Coal Co., 144 Ga.

trespasser or mere licensee as to whom there is ordinarily no duty except to refrain from wilful or intentional wrong.<sup>7</sup> Especially is the rule applicable, when the car is taken from the garage without the knowledge or consent of the owner.<sup>8</sup> When the person injured is a traveler other than the unauthorized guest, there may be a question for the jury whether the driver at the time he is carrying the guest is acting for his employer or for his private purposes.<sup>9</sup> If the machine in question is a taxicab, it is, of course, the duty of the driver to procure passengers, and a different question is presented.<sup>10</sup>

**Sec. 639. Liability for conduct of chauffeur — chauffeur permitting another to run machine.**

Where a chauffeur intrusted with the running of a motor vehicle permits another person to operate the machine without the knowledge or express consent of the owner, there is some conflict of authority on the question whether the owner is liable for the negligent act of such substituted driver. The solution of the question in some jurisdictions hinges on the express or implied authority of the chauffeur to permit another to drive the car. Thus, if a master sends a servant to bring to his place of business an automobile for the purpose of having it repaired, and the servant procures another to take the machine to its destination, the master is not liable

695, 87 S. E. 888; *Walker v. Fuller*, 223 Mass. 566, 122 N. E. 230; *Dearborn v. Fuller* (N. H.), 107 Atl. 607; *Rolfe v. Hewitt*, 227 N. Y. 486, 125 N. E. 804; *Gresh v. Wanamaker*, 237 Pa. St. 13, 84 Atl. 1108; *Hughes v. Murdoch Storage & Transfer Co.*, 68 Pitts Leg. Journ. (Pa.) 476, affirmed (Pa.) 112 Atl. 111; *McQueen v. People's Store Co.*, 97 Wash. 387, 166 Pac. 626; *Seidl v. Knap* (Wis.), 182 N. W. 980. See also *Carroll v. City of Yonkers*, 193 N. Y. App. Div. 655, 184 N. Y. Suppl. 847; *Rook v. Schultz* (Oreg.), 198 Pac. 234.

7. *Walker v. Fuller*, 223 Mass. 566, 122 N. E. 230. Compare *Royal Indemnity Co. v. Platt & Washburn Refining*

*Co.*, 98 Misc. (N. Y.) 631, 163 N. Y. Suppl. 197.

**Wilful injury.**—The owner may be liable if the driver without authority takes a passenger, but such passenger is injured by a wanton or wilful act within the scope of the driver's employment. *Higbee Co. v. Jackson* (Ohio), 128 N. E. 61.

8. *Christensen v. Christiansen* (Tex. Civ. App.), 155 S. W. 995.

9. *Donahue v. Vorenberg*, 227 Mass. 1, 116 N. E. 246. See also *Howard v. Marshall Motor Co.*, 106 Kans. 775, 190 Pac. 11; *Kennedy v. Knott*, 264 Pa. St. 26, 107 Atl. 390.

10. *Swancutt v. Trout Auto Livery Co.*, 176 Ill. App. 606.

for the negligence of such person, unless the servant has authority, express or implied, to employ him, or unless the employment is ratified by the master.<sup>11</sup> But where it is the duty of a chauffeur to demonstrate an automobile for the benefit of a proposed purchaser thereof, he is acting within the scope of his employment when he permits the servant of the proposed purchaser to run the car.<sup>12</sup> And one to whom the driver has intrusted the operation of the machine while the driver takes another position to ascertain the trouble with the operation of the machine, may be classed as a servant of the owner so far as third persons are concerned.<sup>13</sup> In some States the rule is applied that, when the master intrusts the performance of an act to a servant, he is liable for the negligence of one who, though not a servant of the master, in the presence of his servant and with his consent, negligently does the act which was intrusted to the servant.<sup>14</sup>

11. *White v. Levi & Co.*, 137 Ga. 269, 73 S. E. 376.

**Helper.**—Where in an action to recover for personal injuries received by the plaintiff, whose pushcart was struck and overturned by the defendant's automobile truck, it appears that the defendant's truck, which was used to deliver express packages, was in charge of a licensed chauffeur who alone was authorized to drive the same and that a helper who rode upon the truck was forbidden by the defendant's rules from operating the truck, the defendant cannot be held liable for the negligence of the helper who was driving the truck at the time of the accident. But where it appears that the licensed chauffeur mounted the truck and allowed the helper to drive it unskillfully for a distance of sixty feet before the accident and did nothing to prevent the helper from operating the machine except to tell him to stop, a recovery can be predicated upon the negligence of the licensed chauffeur. *Esposito v. American Rep. Exp. Co.*, 194 N. Y. App. Div. 347, 185 N. Y. Suppl. 353.

12. *Wooding v. Thorn*, 148 N. Y.

App. Div. 21, 132 N. Y. Suppl. 50.

**Liability of proposed purchaser.**—

Where one contemplating the purchase of an automobile sends his servant, who is a man of all work, to the garage to examine the engine of the car and report its condition, he is not liable for injuries occasioned by the running of the machine by such servant. *Wooding v. Thorn*, 148 N. Y. App. Div. 21, 132 N. Y. Suppl. 50.

13. *Thomas v. Lockwood Oil Co.* (Wis.), 182 N. W. 841.

14. *Geiss v. Twin City Taxicab Co.*, 120 Minn. 368, 139 N. W. 611; *Slothwer v. Clark*, 191 Mo. App. 105, 179 S. W. 55; *Dillon v. Mundet*, 145 N. Y. Suppl. 975.

**Coachman permitting son of owner to run car.**—In an action brought to recover damages for personal injuries sustained by the plaintiff in consequence of the alleged negligent management of an automobile owned by the defendant, it appeared that immediately before the accident the defendant, accompanied by his son and his coachman, had gone to the railway station in the automobile and had

**Sec. 640. Liability for conduct of chauffeur — procurement of repairs to machine.**

A chauffeur directed to take steps for the repair of the machine may be authorized to operate it to the extent reasonably necessary to carry out such instructions; and the fact that he becomes intoxicated and makes a trip to the garage which is not strictly necessary, does not relieve the master from liability for his negligence.<sup>15</sup> But a chauffeur in charge of his employer's car has no implied or apparent authority to order, upon the credit of his employer, permanent repairs thereto, or any repairs other than such as are necessary to enable him to proceed upon his journey.<sup>16</sup> It would seem that supplies purchased by a chauffeur which are reasonably necessary for the purpose of continuing his journey, which in itself is authorized, may be purchased by him, and his employer will be compelled to pay the bills. The theory of this rule is that the chauffeur, having been ordered to proceed to a certain place, necessarily must have authority to buy the things necessary to carry him there, such, for instance, as gasoline, oil and probably parts of the car which have become lost or broken. But there is no authority to make any permanent repairs to the car. Most certainly a chauffeur would not have authority to have a car repainted, unless he were expressly given the power to do so, or to have new shoes put on the car. However, the chauffeur's authority in these respects might

there left the automobile; that at the time the accident occurred the defendant's son and coachman were the occupants of the automobile and that the son was guiding and controlling it. It was a disputed question whether the defendant on leaving the machine had committed the custody thereof to his son or to his coachman. It was held, that the court might properly charge: "If the jury find either that the defendant left the automobile in charge of his son to take it home, or in charge of his son and coachman together to take it home; or in charge of the coachman alone, and the coachman

neglected his duty in that regard and allowed the son to run the machine, and by the negligence of the son the accident occurred, without contributory negligence on the plaintiff's part, then in either case the defendant is responsible and liable for that negligence and its consequences. *Collard v. Beach*, 81 N. Y. App. Div. 582, 81 N. Y. Suppl. 619.

15. *Whimster v. Holmes* (Mo. App.), 190 S. W. 62.

16. *Gage v. Callanan*, 57 Misc. (N. Y.) 479, 109 N. Y. Suppl. 844, reversed on other grounds, 128 N. Y. App. Div. 752, 113 N. Y. Suppl. 227.

be presumed by law, where, according to the custom of dealing between the supply man and the owner, the chauffeur has been given full authority to order whatever is necessary for the car, as though he were the owner. In such a case custom would broaden the authority of the agent. The tendency of the court decisions is to hold that the owner is not responsible for the acts of his chauffeur, unless it is alleged and proved that at the time of the commission of an injury the chauffeur was acting for the master.

**Sec. 641. Liability for conduct of chauffeur — chauffeur furnished by another.**

A master may lend his servant to another person so that in a particular transaction the former relation of master and servant is temporarily discontinued, and such person rather than the former master is responsible for the negligent acts of the servant.<sup>17</sup> Thus, the fact that ordinarily the driver of an automobile is in the general employ of another person will not absolve the owner from liability in a particular transaction where he has borrowed the servant to drive the machine in his own business.<sup>18</sup> Where an automobile company stores the machine of an owner and furnishes a driver to such owner upon request as needed to operate the car, such driver is deemed a servant of the owner while driving the car pursuant to his instructions, and the owner is liable for his negligence.<sup>19</sup> The situation may be somewhat different when the

17. *Janik v. Ford Motor Co.*, 180 Mich. 557, 147 N. W. 510, 52 L. R. A. (N. S.) 294; *McHarg v. Adt*, 163 N. Y. App. Div. 782, 149 N. Y. Suppl. 244; *Crouse v. Lubin*, 260 Pa. 329, 103 Atl. 725. See also *Russell v. Scharfe* (Ind.), 130 N. E. 437.

18. *Wennell v. Dowson*, 88 Conn. 710, 92 Atl. 663; *Crouse v. Lubin*, 260 Pa. 329, 103 Atl. 725.

19. *Jimmo v. Frick*, 255 Pa. St. 353, 99 Atl. 1005, wherein it was said: "It is clear, we think, that, while Gannon was in the general employment of the automobile company, he was

the servant of defendant as long as he had charge of and was operating the latter's car on the morning of the accident. A person may be in the employment and pay of another person and yet not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct. . . . The relation of master and servant was created between the defendant and the chauffeur, and, as Gannon was driving the car on Frick's business at the time



automobile company sends its servant with the owner's machine to the residence or place of business of the owner or is taking it back for storage; while making such trip, the driver is in the employ of the automobile company and not in the service of the owner.<sup>20</sup> In such a case, the company may be liable for the negligence of the driver it furnishes.<sup>21</sup> Moreover, where a garage company or automobile company stores an owner's car and furnishes a driver as needed by the owner, the driver may be deemed the servant of such company during the time he is driving the owner, where such owner does not assume to control the manner or method of the driving further than to tell the driver where to go.<sup>22</sup> Where a person took his automobile to an automobile company to have a "rattle" in the car located, and an employee of the company got into the car and rode with the owner, and later, at the suggestion of the owner, the employee drove the machine until it collided with a street car and the owner was injured, it was held that the negligence of the driver could not be imputed to the company, it appearing that the company had no authority to control the employee in driving it and that the company had not assumed the service of driving or operating it.<sup>23</sup>

of the accident and was under Frick's control, the latter was responsible for the chauffeur's negligence. The principle controlling the case is well settled by many authorities, and it is correctly stated in *Kimball v. Cushman*, 103 Mass. 194, 4 Am. Rep. 528, where it is said: "It is not necessary that he should be shown to have been in the general employment of the defendant, nor that he should be under any special engagement of service to him, or entitled to . . . compensation from him directly. It is enough that, at the time of the accident, he was in charge of the defendant's property by his assent and authority, engaged in his business, and, in respect to that property and business, under his con-

trol." See also *Baker v. Homeopathic Hospital*, 190 App. Div. 39, 179 N. Y. Suppl. 675, modified 231 N. Y. 8.

20. *Sweetman v. Snow*, 187 Mich. 169, 153 N. W. 770; *Neff v. Brandeis*, 91 Neb. 11, 135 N. W. 232, 39 L. R. A. (N. S.) 933; *Luckett v. Reighard*, 248 Pa. St. 24, 93 Atl. 773, Ann. Cas. 1916 A. 662.

21. *Luckett v. Reighard*, 248 Pa. 24, 93 Atl. 773, Ann. Cas. 1916 A. 662.

22. *Dalrymple v. Covey, etc., Co.*, 66 Oreg. 533, 135 Pac. 91, 48 L. R. A. (N. S.) 424; *Onlette v. Superior Motor & M. Works*, 157 Wis. 531, 147 N. W. 1014.

23. *Bastien v. Ford Motor Co.*, 189 Ill. App. 367.

### Sec. 642. Liability for conduct of chauffeur — car loaned to third person.

Although the rule may be changed by statute,<sup>24</sup> it is generally held that the owner of a motor vehicle may loan the machine to another person, and, while the latter uses it for his own purposes, the owner is not liable for the negligence of the driver.<sup>25</sup> Thus, if one rents his automobile to another who furnishes a driver and uses it for his own purposes, liability is not imposed on the owner for the negligent acts of the driver.<sup>26</sup> Nor is the negligence of the bailee imputed to the owner so as to defeat the owner's right of action against a third person negligently injuring the machine.<sup>27</sup> The principle involved is the same as when the owner loans his machine to his own chauffeur for private purposes of the latter, and the liability of the master is avoided for the same rea-

**24.** *Wolf v. Sulik*, 93 Conn. 431, 106 Atl. 443, 4 A. L. R. 356; *Stapleton v. Independent Brewing Co.*, 198 Mich. 170, 164 N. W. 520 L. R. A. 1918 A. 916. And see section 626.

**25.** *Alabama*.—*Beville v. Taylor*, 202 Ala. 305, 80 So. 370.

*California*.—*Stoddard v. Fiske*, 35 Cal. App. 607, 170 Pac. 663; *Brown v. Chevrolet Motor Co.*, 39 Cal. App. 738 179 Pac. 697; *Gates v. Pendleton* (Cal.), 195 Pac. 664.

*Illinois*.—*Arkin v. Page*, 287 Ill. 420, 123 N. E. 30.

*Kansas*.—*Halverson v. Blosser*, 101 Kans. 683, 168 Pac. 863; *Marullo v. St. Pasteur*, 144 La. 926, 81 So. 403.

*Massachusetts*.—*Kennedy v. R. & L. Co.*, 224 Mass. 207, 112 N. E. 872; *Phillips v. Gookin*, 231 Mass. 250, 120 N. E. 691.

*Michigan*.—*Eberle Brewing Co. v. Briscoe Motor Co.*, 194 Mich. 140, 160 N. W. 440.

*Minnesota*.—*Mogle v. A. W. Scott Co.*, 144 Minn. 173, 174 N. W. 832; *Menton v. L. Patterson Co.*, 145 Minn. 310, 176 N. W. 991.

*Missouri*.—*Allen v. Coglizer*, Mo.

App. 208 S. W. 102.

*New Jersey*.—*Doran v. Thomson*, 74 N. J. L. 445, 66 Atl. 897.

*New York*.—*Stenzler v. Standard Gas Light Co.*, 179 App. Div. 774, 167 N. Y. Suppl. 282; *Seigel v. White Co.*, 81 Misc. 171, 142 N. Y. Suppl. 318; *Hornstein v. Southern Boulevard R. Co.*, 79 Misc. 34, 138 N. Y. Suppl. 1080; *Limbacher v. Fannon*, 102 Misc. 703, 169 N. Y. Suppl. 490.

*Pennsylvania*.—*Dunmore v. Padden*, 262 Pa. 436, 105 Atl. 559.

*Tennessee*.—*Core v. Resha*, 204 S. W. 1149.

*Utah*.—*Wright v. Intermountain Motorcar Co.*, 53 Utah, 176, 177 Pac. 237.

*Canada*.—See *Lane v. Crandell* (No. 2), 10 Dom. L. R. (Canada) 763, 5 A. L. R. 42, 23 W. L. R. 69.

**26.** *Hornstein v. Southern Boulevard R. Co.*, 79 Misc. (N. Y.) 34, 138 N. Y. Suppl. 1080.

**27.** *Fischer v. International Ry. Co.*, 112 Misc. (N. Y.) 212, 182 N. Y. Suppl. 313; *Lloyd v. Northern Pac. R. Co.*, 107 Wash. 57, 181 Pac. 29, 6 A. L. R. 307

sions.<sup>28</sup> A presumption of liability may arise from the ownership of the vehicle,<sup>29</sup> but, in such a case, the presumption is deemed to be overcome by facts.<sup>30</sup> Where it appears that at the time one was injured by an automobile owned by the defendant, it was in charge of a designer employed by defendant, to whom the automobile had been loaned on request of the designer for his purposes only, defendant is not responsible for the negligence of the designer.<sup>31</sup> And where a corporation loaned the use of its motor truck to a social organization of its employees to be used to carry them to and from a picnic which the employees had organized, and the person driving the truck, who was one of the employees, while returning members of the party to their homes on his way to the garage, collided with a vehicle driven by the plaintiff, the defendant is not liable for damages as a matter of law, as the truck at the time was not being used in the business of the employer. And this is true although the defendant's superintendent told the driver of the truck to take members of the party to their homes.<sup>32</sup> The fact that the owner of the car or some of his family is riding therein does not render him liable for the negligence of the driver where he is riding merely as a guest of the persons to whom it is loaned and exercises no control over its operation.<sup>33</sup> If the person to whom the machine is loaned is an incompetent driver, it may be that the owner can be charged with negligence, but it is necessary in such a case that the injured person assume the burden of showing that the driver's want of skill was known to the owner.<sup>34</sup>

#### **Sec. 643. Liability for conduct of chauffeur — car and driver loaned.**

In the case of the loan of a vehicle, liability is not imposed on the owner merely because the driver of the machine is in

28. Section 631.

29. Section 673.

30. *Hornstein v. Southern Boulevard R. Co.*, 79 Misc. (N. Y.) 34, 138 N. Y. Suppl. 1080.

31. *Seigel v. White Co.*, 81 Misc. (N. Y.) 171, 142 N. Y. Suppl. 318.

32. *Stenzler v. Standard Gas Light*

*Co.*, 179 N. Y. App. Div. 774, 167 N. Y. Suppl. 282.

33. *Halverson v. Blosser*, 101 Kans. 683, 168 Pac. 863; *Pease v. Montgomery*, 111 Me. 582, 88 Atl. 973.

34. *Beville v. Taylor*, 202 Ala. 305, 80 So. 370.

his general employ.<sup>35</sup> The master is not ordinarily liable for the negligence of his servant when acting under the control of another person and engaged solely in the private business of such person.<sup>36</sup> Servants who are employed and paid by one person may nevertheless be *ad hoc* the servants of another in a particular transaction.<sup>37</sup> The test of liability is generally the control of the driver at the time of the particular occasion under investigation; if the owner has the control, he may be liable; if not, the person injured should look to another for recompense.<sup>38</sup> Thus, the owner of a car may loan the machine and his chauffeur to a relative, and while the machine is used for purposes other than the owner's business, he is not liable for the negligence of the driver.<sup>39</sup> Where two brothers owned motor cars and agreed that either could use the car of the other as he desired, the owner of one car is not liable for injuries to a pedestrian occurring through the negligence of the chauffeur while the car was being used by his brother in his own business, even if the chauffeur driving the car were employed and paid by the owner.<sup>40</sup> Or the owner may lend his car and driver to his guests so that while they are using it the owner is relieved from liability for the driver's negligence; but such a case is to be carefully distinguished from the situation where the machine is not loaned but the owner is attempting to furnish transportation and pleasure to his

35. *Kennedy v. R. & L. Co.*, 224 Mass. 207, 112 N. E. 872; *Clark v. Buckmobile Co.*, 107 N. Y. App. Div. 120, 94 N. Y. Suppl. 771; *Cunningham v. Castle*, 127 N. Y. App. Div. 580, 111 N. Y. Suppl. 1057; *Dunmore v. Padden*, 262 Pa. 436, 105 Atl. 559.

36. *Carr v. Burke*, 183 N. Y. App. Div. 361, 169 Suppl. 981.

37. *Pease v. Gardner*, 113 Me. 264, 93 Atl. 550; *Cunningham v. Castle*, 127 N. Y. App. Div. 580, 111 N. Y. Suppl. 1057; *Freibaum v. Brady*, 143 N. Y. App. Div. 220, 128 N. Y. Suppl. 121; *McHarg v. Adt*, 163 N. Y. App. Div. 782, 149 N. Y. Suppl. 244. See also *Moyers v. Tri-State Auto Co.*, 121

Minn. 68, 140 N. W. 184.

38. *Hutchinson v. Fawkes* (Minn.), 180 N. W. 116; *Colwell v. Saperston*, 149 App. Div. 373, 134 N. Y. Suppl. 284; *McHarg v. Adt*, 163 N. Y. App. Div. 782, 149 N. Y. Suppl. 244; *Norwegian News Co. v. Simokovitch*, 112 Misc. (N. Y.) 141, 182 N. Y. Suppl. 595.

39. *Burns v. Jackson* (Cal. App.), 200 Pac. 80; *Shevlin v. Schneider*, 193 N. Y. App. Div. 107, 183 N. Y. Suppl. 178; *Rex v. Jacques*, 10 D. L. R. (Canada) 763.

40. *Freibaum v. Brady*, 143 App. Div. 220, 128 N. Y. Suppl. 121

guests.<sup>41</sup> In the latter case it may be said that the driver is operating the car within the scope of the master's business, and the liability of the owner may continue though he is not riding in the machine.<sup>42</sup>

#### Sec. 644. Liability for conduct of chauffeur — owner letting car for hire.

When the owner of a motor vehicle rents the same to another person and the latter furnishes his own chauffeur, the chauffeur is thought to be in the employ of the hirer rather than of the owner, and the owner is not liable for his negligence when following the directions of the hirer.<sup>43</sup> The situation is the same if the hirer himself drives the vehicle.<sup>44</sup> But the situation is different when the owner of a vehicle rents for hire, not only the machine, but also a driver. If the hirer exercises no control or supervision over the driver as to the management of the machine, except to direct him as to the route and direction and similar matters, the owner is responsible for the negligence of the driver.<sup>45</sup> The fact that the

41. *Campbell v. Arnold*, 219 Mass. 160, 106 N. E. 599; *Kennedy v. R. & L. Co.*, 224 Mass. 207, 112 N. E. 872.

42. *Campbell v. Arnold*, 219 Mass. 160, 106 N. E. 599; *Kennedy v. R. & L. Co.*, 224 Mass. 207, 112 N. E. 872.

43. *Neubrand v. Kraft*, 169 Iowa, 444, 151 N. W. 455, L. R. A. 1915 D. 691; *Hornstein v. Southern Boulevard R. Co.*, 79 Misc. (N. Y.) 34, 138 N. Y. Suppl. 1080.

44. *Atkins v. Points*, 148 La. —, 88 So. 231.

45. *Arkansas*.—*Forbes v. Reinman*, 112 Ark. 417, 166 S. W. 563, 51 L. R. A. (N. S.) 1164.

*Illinois*.—*Johnson v. Coey*, 237 Ill. 88, 86 N. E. 678, 21 L. R. A. (N. S.) 81; *Dunne v. Boland*, 199 Ill. App. 308.

*Indiana*.—*Sargent Paint Co. v. Petrovitsky* (Ind. App.), 124 N. E. 881.

*Louisiana*.—*Wilkinson v. Myatt Dicks Motor Co.*, 136 La. 977, 68 So. 96.

*Massachusetts*.—*Tornroos v. R. H. White Co.*, 220 Mass. 336, 107 N. E. 1015; *Shepard v. Jacobs*, 204 Mass. 110, 90 N. E. 392, 26 L. R. A. (N. S.) 142.

*Minnesota*.—*Meyers v. Tri-State Auto Co.*, 121 Minn. 68, 140 N. W. 184, 44 L. R. A. (N. S.) 113.

*Missouri*.—*Fitzgerald v. Cardwell* (Mo. App.), 226 S. W. 971.

*New Jersey*.—*Rodenburg v. Clinton Auto & Garage Co.*, 85 N. J. L. 729, 91 Atl. 1070.

*New York*.—*McMamara v. Leipzig*, 227 N. Y. 291, 125 N. E. 244, 8 A. L. R. 480; *Schweitzer v. Thompson & Norris Co.*, 229 N. Y. 97, 127 N. E. 904; *Harding v. City of New York*, 181 N. Y. App. Div. 251, 168 N. Y. Suppl. 265; *Grastataro v. Brodie*, 189 App. Div. 779, 179 N. Y. Suppl. 324; *Wagener v. Motor Truck Renting Corp.*, 197 App. Div. 371; *Norwegian News Co. v. Simkovitch*, 112 Misc. (N. Y.) 141, 182 N. Y. Suppl. 595; *Wald-*

owner only occasionally lets automobiles for hire is not important, for the rule does not depend on the frequency with which the act is done.<sup>46</sup> But if the machine and its driver are hired for a particular purpose or to go to a particular place, the owner may not be liable for the act of the driver while diverging from the purpose for which the car was hired.<sup>46a</sup> And, if the hirer exercises the sole control over the machine and the driver, the hirer, not the owner, is liable for the driver's negligence.<sup>47</sup> The question necessarily depends upon

*man v. Picker Bros.*, 140 N. Y. Suppl. 1019.

*Pennsylvania*.—*Wallace v. Keystone Automobile*, 239 Pa. St. 110. 86 Atl. 699; *Neumiller v. Acme Motor Car Co.*, 49 Pa. Super. Ct. 183.

*Texas*.—*Routledge v. Rambler* (Civ. App.), 95 S. W. 749.

*Wisconsin*.—*Gerretson v. Rambler*, 149 Wis. 528. 136 N. W. 186, 40 L. R. A. (N. S.) 457. See also *Wagner v. Larsen*, 182 N. W. 336.

And see chapters IX and X, as to the hire of motor vehicles.

46. *Meyers v. Tri-State Auto Co.*, 121 Minn. 68, 140 N. W. 184.

46a. *Fritz v. F. W. Hochspeier Co.*, 287 Ill. 574, 123 N. E. 51.

47. *California*.—*Burns v. Southern Pac. Co.* (Cal. App.), 185 Pac. 875.

*Georgia*.—*Greenburg & Bond Co. v. Yarborough* (Ga. App.), 106 S. E. 624.

*Indiana*.—*Sargent Paint Co. v. Petrovitsky* (Ind. App.), 124 N. E. 881.

*Massachusetts*.—*Melchionda v. American Locomotive Co.*, 229 Mass. 202, 118 N. E. 265.

*Missouri*.—*Simmons v. Murray* (Mo. App.), 232 S. W. 754.

*New York*.—*McNamara v. Leipzig*, 180 N. Y. App. Div. 515, 167 N. Y. Suppl. 981. 8 A. L. R. 480; *Carr v. Burke*, 183 N. Y. App. Div. 361, 169 N. Y. Suppl. 981; *De Perri v. Motor Haulage Co.*, 185 N. Y. App. Div. 384, 173 N. Y. Suppl. 189; *Finnegan v. Piercy Contracting Co.*, 189 N. Y. App.

Div. 699, 178 N. Y. Suppl. 785; *Braxton v. Mendelson*, 190 N. Y. App. Div. 278, 179 N. Y. Suppl. 845; *Diamond v. Sternburg, etc. Co.*, 87 Misc. 305. 149 N. Y. Suppl. 1000.

"The vexed question as to when and under what circumstances the servant of one master is transferred to the service of another is the subject of many decisions which are in apparent conflict one with the other. It seems plain that the owner of a car, who gratuitously lends his car with his chauffeur to another person, with the consent of the chauffeur, express or implied, is thereby absolved from all acts of the chauffeur while he is in the service of the new master. The moment, however, a bailment of the car and services of the chauffeur are made for a money consideration, the same moment difficulty ensues in determining in and about whose business the chauffeur is then acting. Clearly, when he is earning money for his original master and owner of the car, he is about his master's business; the master's liability for his servant's acts should not cease unless it is clearly apparent that entire dominion and control of the car and the servant are no longer present in the owner. As has been repeatedly stated, the servant must, in the course of the master's employment, be doing the work of the master under the will, direction and control of the master throughout all the details of the work." Norwegian

whether the owner or the hirer is the party in control of the driver; the contract of hiring may be made either way, generally hinging on the use the hirer desires of the machine and its operator. Thus frequently a question may be presented within the province of the jury.<sup>48</sup> The same troublesome question arises with reference to whether the negligence of the driver shall be imputed to the hirer in case of an injury to the latter; if the hirer has control of the driver, negligence

*News Co. v. Simkovitch*, 112 Misc. (N. Y.) 141, 182 N. Y. Suppl. 595.

*Washington*.—*Olson v. Veness*, 105 Wash. 599, 178 Pac. 822; *Olson v. Clark*, 191 Pac. 810.

**Rent of machine by garage.**—Where, in an action to recover damages for the death of plaintiff's intestate, a boy eight years of age, who was struck and killed through the negligence of the chauffeur of an automobile in which the defendant was riding, it appeared that a garage company had, under a written agreement, rented and turned over to the defendant for a period of three months an automobile and the services of a chauffeur, and had exercised no control either over the automobile or the chauffeur during the period of the agreement, and had instructed the chauffeur to take his orders from the defendant, and the defendant not only gave the chauffeur all of his orders but actually interfered with the operation of the automobile by substituting his judgment for that of the chauffeur as to the route to be taken on the occasion of the accident, said chauffeur, although in the general employment of the garage company, had become *pro hac vice* the servant of the defendant, so as to render him liable for the negligence. *McNamara v. Leipzig*, 180 N. Y. App. Div. 515, 167 N. Y. Suppl. 981, 8 A. L. R. 480.

**Agreement that owner shall be deemed master.**—Where a company engaged in the business of hiring au-

tomobile trucks agreed with its lessee that the employees on the trucks would be furnished by the lessor and should be under its control and that the relation of master and servant should not exist between such employees and the lessee so that no claim for damages could be made against the lessee, and it was further provided that the lessor would indemnify the lessee for any legal liability arising through the acts of the chauffeurs furnished by the lessor, which also agreed to take out indemnity insurance for the benefit of the lessee, such agreement does not inure to the benefit of a person who was injured by a motor truck while engaged in delivering the goods of the lessee, the chauffeur being at the time subject to the directions and orders of the lessee. Irrespective of the ultimate liability as between lessor and lessee the liability for the injury to the third person depends upon the question as to who had the direction and control of the chauffeur at the time of the accident and in whose business he was then engaged, and recourse to the contract can be had to determine these questions. *Finnegan v. Piercy Contracting Co.*, 189 N. Y. App. Div. 699, 178 N. Y. Suppl. 785.

<sup>48</sup> *Sargent Paint Co. v. Petrovitsky* (Ind. App.), 124 N. E. 881; *Conroy v. Murphy Transfer Co.* (Minn.), 180 N. W. 704; *McCale v. Lynch* (Wash.), 188 Pac. 517; *Olsen v. Clark* (Wash.) 191 Pac. 810.

may be imputed; if he does not have such control, the driver's negligence is not generally imputed.<sup>49</sup>

**Sec. 645. Liability for conduct of chauffeur — independent contractor having possession of machine.**

When one, who is classified by the law as an independent contractor has possession of an automobile, the owner is not generally liable for his negligence in operating it.<sup>50</sup> Thus, where the owner of an automobile delivers it to a mechanic for repairs and surrenders the entire control thereof to him, such mechanic is not a servant of the owner but is an independent contractor, and the owner is not liable for the negligence of the contractor or servant in running the car.<sup>51</sup> And this may be true though the owner is riding in the machine at the time the mechanic is testing it.<sup>52</sup> Where the administrator of an estate employs a garage man to repair automobiles belonging to the estate for the purpose of a public sale, he is not personally liable to a third person for personal injuries caused by a garage man in running the machines to and from the premises of the estate.<sup>53</sup> The fact that an owner who is engaged in carrying passengers for hire gives the driver a share of the receipts, does not establish that such driver is an independent contractor, and the owner may be liable for his negligence.<sup>54</sup> But where the purchaser of an

49 *Harding v. City of New York*, 181 N. Y. App. Div. 251, 168 N. Y. Suppl. 265. And see sections 679-687.

50 *Whalen v. Sheehan* (Mass.), 129 N. E. 379; *Bosso v. Boston Store of Chicago*, 195 Ill. App. 133; *Woods v. Bowman*, 200 Ill. App. 612; *Terry Dairy Co. v. Parker* (Ark.), 223 S. W. 6; *Luckie v. Diamond Coal Co.* (Cal. App.), 183 Pac. 178; *Barton v. Studebaker Corp.* (Cal. App.), 189 Pac. 1025; *Gall v. Detroit Journal Co.*, 191 Mich. 405 158 N. W. 36; *Woodcock v. Sartle*, 84 Misc. (N. Y.) 488 146 N. Y. Suppl. 540. See also *National Cash Register Co. v. Williams*, 161 Ky. 550, 171 S. W. 162.

51 *Lafitte v. Schuramann*, 19 Ga.

App. 799, 92 S. E. 295; *Whalen v. Sheehan* (Mass.), 129 N. E. 379; *Woodcock v. Sartle*, 84 Misc. (N. Y.) 488, 146 N. Y. Suppl. 540; *Perry v. Fox*, 93 Misc. (N. Y.) 89, 156 N. Y. Suppl. 369.

52 *Lafitte v. Schunamann*, 19 Ga. App. 799, 92 S. E. 295.

53 *Woods v. Bowman*, 200 Ill. App. 612.

54 *Edwards v. Yarbrough* (Mo. App.), 201 S. W. 972; *Fitzgerald v. Cardwell* (Mo. App.), 226 S. W. 971; *King v. Brehm Auto Co.* (Tex. Civ. App.), 145 S. W. 278; *McDonald v. Lawrence*, 170 Wash. 576, 170 Pac. 576



automobile delivers it to another to drive under an agreement that such driver is to use it for hire and to pay the price to such purchaser out of the money derived from its use, and such purchaser never has any control over the machine after it leaves his possession and never rides in it, and such driver is not in the employ or under the control of such purchaser, the purchaser is not chargeable with the negligence of such driver.<sup>55</sup> A salesman working on a commission, using his own machine, and having complete choice of routes within his territory, may be an independent contractor.<sup>56</sup> One employed to go to a place to get an automobile for the owner thereof may be an independent contractor or may not, depending on the control which the owner reserves over the conduct of the driver.<sup>57</sup> The evidence may present a question for the jury as to whether a driver is an independent contractor.<sup>58</sup>

**Sec. 646. Liability for conduct of chauffeur — garage keeper or bailee having possession of automobile.**

It is clear that, when the owner of an automobile permits another to have the possession and use of it as a bailee, the owner is not liable for the negligent conduct of such bailee.<sup>59</sup> Thus, if he loans the machine to another,<sup>60</sup> or lets it for hire,<sup>61</sup> and such bailee drives it or furnishes his own driver, the owner is not responsible for the negligent operation of the machine. Where, in an action to recover damages to plaintiff's automobile, the result of a collision with the defendant's automobile, it appears that the driver of the defendant's car was a garage-keeper for the repair of cars to whom the defendant had delivered his car for repair, the relation between

55. *Braverman v. Hart*, 105 N. Y. Suppl. 107.

56. *Aldrich v. Tyler Grocery Co.* (Ala.), 89 So. 289.

57. *Warne v. Moore*, 86 N. J. L. 710, 94 Atl. 307.

58. *Terry Dairy Co. v. Parker* (Ark.), 223 S. W. 6; *Vaughn v. Davis* (Mo. App.), 221 S. W. 782.

59. *Woods v. Bowman*, 200 Ill. App. 612; *Whalen v. Sheehan* (Mass.), 129

N. E. 379; *Emery v. McCombs*, 180 N. Y. App. Div. 225, 167 N. Y. Suppl. 474; *Perry v. Fox*, 93 Misc. (N. Y.) Rep. 89, 156 N. Y. 369.

Statutory enactments may change the rule in some states. *Wolf v. Sulik*, 93 Conn. 431, 106 Atl. 443, 4 A. L. R. 356.

60. Section 642.

61. Section 644.

the two is that of bailor and bailee, and for the negligence of the bailee in driving the defendant's machine, the defendant is not liable.<sup>62</sup> So, too, where the owner sent his machine in charge of his chauffeur to a repair shop to have it painted, and the manager of the shop told the chauffeur to run the car upon an elevator to raise it to the third floor, and while running the machine in the paint shop on that floor an injury was caused by a collision with another car, it was held it was a jury question whether at the time of the accident the chauffeur had ceased to be the agent of his master and was acting for the repair company.<sup>63</sup> Likewise, where a driver employed by a garage after making repairs to the machine is testing the machine in company with the owner, a finding that he was then acting as a servant of the garageman will not be disturbed.<sup>64</sup> Or the garage employee, under similar circumstances may be found to be the servant *ad hoc* of the owner and acting on his behalf in the testing of the machine.<sup>65</sup> If the garage employee is using the machine without the scope of his employment, the garage owner is not liable.<sup>66</sup>

62. *Woodcock v. Sattle*, 84 Misc. (N. Y.) 488, 146 N. Y. Suppl. 540; *Perry v. Fox*, 93 Misc. (N. Y.) 89, 156 N. Y. Suppl. 369. See also *Whalen v. Sheehan* (Mass.), 129 N. E. 379.

63. *Zorn v. Pendleton*, 163 N. Y. App. Div. 33, 148 N. Y. Suppl. 370, wherein it was said: "When a person takes his car to a place for repairs, the proposed bailee may indicate where he wishes it delivered, and if the owner comply, in the absence of overruling circumstances, he presumably remains in the custody and control of the car and responsible for its usual operation. I conceive of no different legal conclusion if the owner commit the car to his chauffeur. The car in the present instance was carried to a paint shop on the third floor. Had the paint

shop been on the first floor and the chauffeur been asked to take the car to it, the case would be equivalent. There is no presumption of law that when a car stops upon its first entrance a delivery is effected. It is quite as much as is due the defendant to submit to the jury the question whether, at the time the chauffeur started the car forward on the third floor, he had for the purposes of the acts ceased to be defendant's agent and servant, and had become the servant of the Ormond Company."

64. *Mulroy v. Tarrilli*, 190 N. Y. App. Div. 637, 180 N. Y. Suppl. 427.

65. *Clute v. Morey* 134 Mass. 387, 125 N. E. 574.

66. *Patton v. Woodward Co.* (Cal. App.), 197 Pac. 368.

**Sec. 647. Liability for conduct of chauffeur — seller's agent accompanying purchaser.**

Where, on the sale of a motor vehicle, a servant of the seller accompanies the purchaser to instruct him in the operation of the machine or for some other purpose, and such servant is guilty of negligence contributing to injuries received by another traveler, a difficult question sometimes arises as to whether such servant is then acting in the employment of the seller or of the purchaser. In some cases, it has been held that the seller of the vehicle is liable for the negligence of such a driver.<sup>67</sup> In an English case, where it appeared that the defendant purchased and paid for a motor car in London and the vendor agreed to provide a driver to drive the car to a certain place outside of the city and deliver it there, as the defendant's driver did not know the locality and had no experience with the class of car purchased; and, while the car was being driven by the driver supplied by the vendor, it collided with a motorcycle, it was held that the driver of the car, though he was in the general employ of the vendor, was at the time under the control of the defendant and the latter was liable for his negligence.<sup>68</sup>

**Sec. 648. Liability for conduct of chauffeur — agent trying to sell machine.**

One having possession of an automobile as an agent of the owner for the purposes of selling the same, has implied authority, unless forbidden, to run the machine to demonstrate it to a proposed purchaser.<sup>69</sup> If guilty of negligence in so

<sup>67</sup>. Section 665.

<sup>68</sup>. Perkins v. Stead, 23 Times L. Rep. (Eng) 433.

<sup>69</sup>. Hoffman v. Liberty Motors Co., 234 Mass. 437, 125 N. E. 845; Bertrand v. Hunt, 89 Wash. 475, 154 Pac. 804. See also Rollins v. City of Winston-Salem, 176 N. Car. 411, 97 S. E. 211. But see Emery v. McCombs, 180 N. Y. App. Div. 225, 167 N. Y. Suppl. 474, holding that the owner of a mo-

tor car, who has placed the same in the possession of the keeper of a garage, either as a prospective buyer or as a factor or sales agent, is not liable for the negligence of said garage keeper while driving the car for demonstration, there being no relation of master and servant or any other relation justifying the imputation of the driver's negligence.

running it, the owner may be liable for injuries proximately resulting from such negligence. The agent, however, cannot use the car for his own private purposes, and his negligence when so using the machine cannot be chargeable to the owner.<sup>70</sup> Where an automobile sales company, in order to demonstrate the efficiency of a truck to a prospective purchaser, sends it to deliver goods under the care and control of its own driver, it is solely liable for the negligence of its driver, although an employee of the purchaser accompanies the truck in order to direct the driver where to stop.<sup>71</sup> And, one selling a machine may be liable for the act of his servant, though at the time of the accident in question the proposed purchaser was running it.<sup>72</sup> But, it has been held in such a case, that, where the agent of the seller permits the servant of the purchaser to run the machine, it is a question for the jury whether such servant was the agent of the purchaser for that purpose.<sup>73</sup>

#### **Sec. 649. Liability for conduct of chauffeur — school giving instruction.**

A school which is engaged in the business of teaching automobile driving may be liable for injuries received by another traveler, where the servant of the school permits a student to

70. *Hoffman v. Liberty Motors Co.*, 234 Mass. 437, 125 N. E. 845; *Evans v. Dyke Automobile Supply Co.*, 121 Mo. App. 266, 101 S. W. 1132; *Wright v. Intermountain Motorcar Co.*, 53 Utah, 176, 177 Pac. 237.

71. *McGuire v. Autocar Sales Co.*, 150 N. Y. App. Div. 278, 134 N. Y. Suppl. 702, wherein it was said: "While in one sense he was doing this work for Greenhut & Co., yet the doing of this work was but incidental to a larger work which he was doing for the defendant appellant, and which was the main purpose of his operating the machine. That is to say, he was demonstrating by actual experience on behalf of the defendant appellant the effectiveness of its auto truck, for the purpose of inducing, for the

benefit of his general employer, the purchase either of that truck or other by Greenhut & Co. from his general employer. It seems to me unquestionable that during every part of this performance he was primarily and particularly the servant and agent of his general employer. To hold otherwise it would follow that every time one takes passage in a motor car when it is under demonstration for the purpose of inducing a sale or purchase he shall become liable for the negligent operation of the car by the driver furnished by the intending vendor."

72. *Holmbræ v. Morgan*, 69 Oreg. 395, 138 Pac. 1084.

73. *Hammons v. Setzer*, 72 Wash. 550, 130 Pac. 1141.

operate the machine and his inexperience is a proximate cause of the injury.<sup>74</sup>

**Sec. 650. Liability for conduct of chauffeur — chauffeur teaching operation of automobile.**

Where, upon the sale a motor vehicle, one of the terms of the contract is that the seller shall give the purchaser instruction in driving the machine, it is generally held that the seller, not the purchaser, is liable for the negligence of his employee while instructing the purchaser in the use of the machine.<sup>75</sup> Where the contract of sale of an automobile provided that an instructor should be furnished by the company selling the machine to give lessons in its operation to the purchaser and that the instructor would adjust and test the machine until the lessons were completed, the company was held to be responsible to the purchaser for any damage to the automobile through the negligence of the instructor while the latter was acting within the scope of his duties. But it was held that the owner could not recover damages from the company for the detention of the automobile while it was being repaired where he offered no proof as to the market rate of hire of a similar machine.<sup>76</sup> And where the demonstrator was sent with an automobile to an intending purchaser and permitted him, with an assurance that he could do it, to attempt to crank the car without warning him of the danger which inhered in the process of cranking, it was held that he was not a mere volunteer or licensee, that it was within the apparent authority of the demonstrator to either expressly or impliedly invite him to crank the car himself, and that, where such intending purchaser was injured by reason of the force of the engine releasing the crank from his hand, the company was liable therefor by reason of the demonstrator having failed

<sup>74</sup> *Easton v. United Trades School Contracting Co.*, 173 Cal. 199, 159 Pac. 597.

<sup>75</sup> *Tornroos v. White Co.*, 220 Mass. 336, 107 N. E. 1015; *Buick Au-*

*tomobile Co. v. Weaver* (Tex. Civ. App.), 163 S. W. 594. And see section 665.

<sup>76</sup> *Burnham v. Central Automobile Exchange* (R. I.), 67 Atl. 429.

to warn him of such danger.<sup>77</sup> In another case where a chauffeur was employed to teach the owner's son to run an automobile for the family use, it was held that the relation of master and servant existed so as to hold the owner liable for the negligence of the chauffeur in causing injury to a pedestrian.<sup>78</sup>

**Sec. 651. Liability for conduct of chauffeur—driver employed to tow automobile.**

Where a motor vehicle becomes disabled and another machine is employed to tow it, the driver of the assisting machine is generally deemed to be in the employ of the owner or possessor of the disabled car.<sup>79</sup> But the owner's son who is steering the disabled machine is not liable for the negligence of owner's chauffeur who is driving the forward vehicle.<sup>80</sup>

**Sec. 652. Liability for conduct of chauffeur — fellow servants of chauffeur.**

Under the common law rules relating to the master and servant, the master is not generally liable for injuries caused by the negligence of one servant to a fellow servant.<sup>81</sup> Thus, it has been held that a maid who accompanies her employer's wife on an automobile trip is a fellow servant of the husband's chauffeur, and cannot recover of her employer for injuries caused by the chauffeur's negligence.<sup>82</sup> But it has been

77. *Martin v. Maxwell-Brisco Motor Vehicle Co.*, 158 Mo. App. 188, 138 S. W. 65.

78. *Hiroux v. Baum*, 137 Wis. 197, 118 N. W. 533, 19 L. R. A. (N. S.) 332.

79. *McLaughlin v. Pittsburgh Rys. Co.*, 252 Pa. St. 32, 97 Atl. 107.

80. *Titus v. Tangeman*, 116 N. Y. App. Div. 487, 101 N. Y. Suppl. 1000.

81. *Brooks v. Central Sainte Jeanne*, 228 U. S. 688, 33 S. Ct. 700, affirming 5 Porto Rico Red. Rep. 281.

82. *Erjanschek v. Kramer*, 141 N. Y. App. Div. 545, 126 N. Y. Suppl. 289, wherein it was said: "While the evidence does not plainly show how the plaintiff came to accompany the defendant and his wife on the automobile

trip the fair inference is that she went along in the capacity of maid to the wife and the question involved on this appeal is whether she and the chauffeur were fellow servants. . . . Assuming, as we must, that the plaintiff's presence in the automobile was incident to her employment, it is difficult to understand why, within the principle of all the cases on the subject, she did not assume the risk of the chauffeur's negligence. Certainly her employment subjected her to that risk. The fact that her duty differed from that of the chauffeur is of no consequence. The controlling fact is that, in the performance of her duty, she incurred the risk of injury from the chauffeur's negligence."

held that a domestic servant whose contract includes the right to be transported to church in the employer's automobile, does not retain during such transportation the relation of servant to the master so as to be considered a fellow servant of the driver of the machine, within the meaning of the fellow servant rule.<sup>83</sup>

### **Sec. 653. Liability for conduct of chauffeur — pleading.**

Where a complaint in an action by one injured by the negligent operation of the defendant's automobile alleges that the machine was run by a chauffeur or another person not the owner, it is generally required that it allege that the driver was a servant of the owner and was acting within the scope of his employment at the time of the accident.<sup>84</sup> But an allegation that the machine was driven by a person to whom its operation was intrusted by the owner, may be construed as a sufficient statement that the chauffeur was acting within the scope of his employment.<sup>85</sup> Generally, the plaintiff is permitted to allege merely that the injury was caused by the negligence of the defendant, without alleging the name of the servant or other facts showing agency of the driver.<sup>86</sup>

### **Sec. 654. Liability for conduct of chauffeur — admissibility of statements of driver.**

As a general rule, before statements of an agent may be received as evidence against the principal, it is essential that

<sup>83.</sup> *O'Beirne v. Stafford*, 87 Conn. 354, 87 Atl. 743, 46 L. R. A. (N. S.) 1183.

<sup>84.</sup> *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338; *Cullen v. Thomas*, 150 N. Y. App. Div. 475, 135 N. Y. Suppl. 22; *Rubin v. Burman*, 87 Misc. (N. Y.) 174, 149 N. Y. Suppl. 483. See also *Edwards v. Yarbrough* (Mo. App.), 201 S. W. 972.

**Sufficiency of complaint.**—In an action for damages brought by one who was run over by an automobile, an allegation in the complaint that "plaintiff was struck and run over by an automobile operated by the agents and servants of the above-named defend-

ants." is insufficient to charge the defendant with the negligence of the driver, for there is no allegation or proof that the driver, although he may have been the defendant's servant, was engaged upon his master's business and acting within the scope of his employment, and some proof to this effect is necessary in order to charge the master with his servant's negligence." *Cullen v. Thomas*, 150 N. Y. App. Div. 475, 135 N. Y. Suppl. 22.

<sup>85.</sup> *Jones v. Strickland*, 201 Ala. 138, 77 So. 562.

<sup>86.</sup> See *Pangburn v. Buick Motor Co.*, 151 N. Y. App. Div. 756, 137 N. Y. Suppl. 37.

it be shown by other relevant evidence that the relation of principal and agent existed and that the statements were made in the course of the principal's business.<sup>87</sup> Statements made by defendant's chauffeur, while he was disobeying defendant's instructions and was not engaged in the business of his employer, are generally regarded as hearsay.<sup>88</sup> And statements made by him before the accident in question that he was going to use the machine for his own purposes are also inadmissible.<sup>89</sup> And evidence that before the injury the chauffeur visited an inn and invited a person there to ride with him is not competent as part of the *res gestae*.<sup>90</sup> But statements or exclamations made by the driver at the time of the accident or immediately thereafter, may be received as part of the *res gestae*.<sup>91</sup> If made subsequent to the accident, at a time when they may have been inspired by retrospection or deliberation, they are not part of the *res gestae*.<sup>92</sup> Admissions made by the owner of an automobile as to his liability for an injury occasioned by the driving thereof by a member of his family, may be received in evidence against him.<sup>93</sup>

### Sec. 655. Liability based on control of machine.

Liability for the operation of a motor vehicle is imposed on the person having "control" of its movements.<sup>94</sup> Primarily,

87. Dearholt Motor Sales Co. v. Meritt, 133 Md. 323, 105 Atl. 316; Rollins v. City of Winston-Salem, 176 N. Car. 411, 97 S. E. 211; Tow v. McClements, 68 Puts. Leg. Journ. (Pa.) 680; Frank v. Wright, 140 Tenn. 535, 205 S. W. 434; Parmele v. Abdo (Tex. Civ. App.), 215 S. W. 369.

88. Riley v. Roach, 168 Mich. 294, 134 N. W. 14. Compare Levine v. Ferlisi, 192 Ala. 362, 68 So. 269.

89. Whimster v. Holmes, 177 Mo. App. 164, 164 S. W. 236.

90. Donnelly v. Harris, 219 Mass. 466, 107 N. E. 435.

91. Denver Omnibus & Cab Co., 253 Fed. 543; Offner v. Wilke, 208 Ill. App. 463; Reid Auto Co. v. Gorsezya (Tex. Civ. App.), 144 S. W. 688;

Samuels v. Hiawatha Holstein Dairy Co. (Wash.), 197 Pac. 24.

92. Beville v. Taylor, 202 Ala. 305, 80 So. 370; Benton v. Regeser, 20 Ariz. 273, 179 Pac. 966; Frank v. Wright, 140 Tenn. 535, 205 S. W. 434; Main Street Garage v. Eganhouse (Tex. Civ. App.), 223 S. W. 316.

93. Salinen v. Ross, 185 Fed. 997. See also Reid Auto Co. v. Gorsezya (Tex. Civ. App.), 144 S. W. 688.

94. Windham v. Newton, 200 Ala. 258, 76 So. 24; Penticost v. Massey, 201 Ala. 261, 77 So. 675; Houseman v. Karicoffe, 201 Mich. 420, 167 N. W. 964; Williams v. Blue, 173 N. C. 452, 92 S. E. 270.

Objection on appeal.—The objection that the plaintiff has not shown the



this is the chauffeur, and he is, of course, charged with his personal negligence. But liability may go farther than a personal judgment against the driver, for the doctrine of *respondet superior* may charge his employer or the owner of the machine with liability. The negligence of the driver, moreover, may be imputed to one having control, though such person is not the owner of the machine or the employer.<sup>95</sup> One assisting in the operation of the machine may be liable for injuries sustained in a collision.<sup>96</sup>

**Sec. 656. Machine driven by member of owner's family — relation of parent and child does not determine liability of owner.**

The mere fact that a son or daughter of the owner of an automobile was driving the machine at the time of an injury to another traveler, and that such child was guilty of negligence contributing to the injury, does not necessarily render the owner liable for the injuries.<sup>97</sup> It is a broad general rule

defendant's ownership or control of the machine, cannot be raised for first time upon appeal. *Rubin v. Whan*, 188 N. Y. App. Div. 16, 176 N. Y. Suppl. 385.

**95.** *Windham v. Newton* (Ala.), 76 So. 24; *Morken v. St. Pierre* (Minn.), 179 N. W. 681.

**96.** *Williams v. Blue*, 173 N. C. 452, 92 S. E. 270.

**97.** *United States*.—*Denison v. McNorton*, 288 Fed. 401, 142 C. C. A. 631.

*Alabama*.—*Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87; *Erlick v. Heis*, 193 Ala. 669, 69 So. 530.

*California*.—*Crittenden v. Murphy*, 36 Cal. App. 803, 173 Pac. 595; *Spence v. Fisher* (Cal.), 193 Pac. 255.

*Georgia*.—*Griffin v. Russell*, 144 Ga. 275, 87 S. E. 10, L. R. A. 1916 F. 216, Ann. Cas. 1917 D. 994; *Dougherty v. Woodward*, 21 Ga. App. 427, 94 S. E. 636.

*Illinois*.—*Arkin v. Page*, 287 Ill. 420, 123 N. E. 30; *Kitchen v. Weatherby*, 205 Ill. App. 10.

*Iowa*.—*Dirks v. Tonne*, 183 Iowa, 403, 167 N. W. 103; *Lemke v. Ady*, 159 N. W. 1011.

*Kansas*.—*Zeeb v. Babnmaier*, 103 Kans. 599, 176 Pac. 326, 2 A. L. R. 883.

*Maryland*.—*Buckey v. White* 111 Atl. 777.

*Massachusetts*.—*Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761.

*Michigan*.—*Loehr v. Abell*, 174 Mich. 590, 140 N. W. 926; *Johnston v. Cornelius*, 193 Mich. 115, 159 N. W. 318.

*Mississippi*.—*Woods v. Clements*, 113 Miss. 720, 74 So. 422; *Woods v. Clements*, 114 Miss. 301, 75 So. 119; *Dempsey v. Frazier*, 119 Miss. 1, 80 So. 341.

*Missouri*.—*Hays v. Hogan*, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918 C. 715, Ann. Cas. 1918 E. 1127; *Daily v. Maxwell*, 152 Mo. App. 415, 133 Nev. 351; *Marshall v. Taylor*, 168 Mo. App. 240, 153 S. W. 527; *Mayer v. Fields* (Mo. App.), 217 S. W. 589; *Buskie v. Januchowsky* (Mo. App.), 218 S. W. 696.

in the law of torts that a parent is not liable for the wrongful acts of his children, whether they are minors or adults. In order to charge the parent with responsibility, he must be connected with the wrongful acts.<sup>98</sup> Generally, it must be shown that he induced or approved the acts or that the relation of master and servant existed between the parent and the child.<sup>99</sup> If the machine does not belong to the father and

*Montana*.—Lewis v. Steel, 52 Mont. 300, 157 Pac. 575.

*New Jersey*.—Doran v. Thompson, 76 N. J. L. 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677.

*New Mexico*.—Boes v. Hawell, 24 N. Mex. 142, 173 Pac. 966, L. R. A. 1918 F. 288.

*New York*.—Maher v. Benedict, 123 App. Div. 579, 108 N. Y. Suppl. 228; Legenbauer v. Esposito, 187 App. Div. 811, 176 N. Y. Suppl. 42; Schultz v. Modrison, 91 Misc. 248, 154 N. Y. Suppl. 257.

*North Carolina*.—Linville v. Nissen, 162 N. Car. 95, 77 S. E. 1096; Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134; Wilson v. Polk, 175 N. Car. 490, 95 S. E. 849; Bilyeu v. Beck, 100 S. E. 891; Tyree v. Tudor, 106 S. E. 675.

*Ohio*.—Elms v. Flick, 126 N. E. 66.

*South Carolina*.—Davis v. Littlefield, 97 S. Car. 171, 81 S. E. 487.

*Tennessee*.—King v. Smythe, 104 Tenn. 217, 204 S. W. 296, L. R. A. 1918 F. 293.

*Texas*.—Allen v. Bland (Civ. App.), 168 S. W. 35.

*Utah*.—McFarlane v. Winters, 47 Utah, 598, 155 Pac. 437.

*Virginia*.—Cohen v. Meador, 119 Va. 429, 89 S. E. 876; Blair v. Broadwater, 121 Va. 301, 93 S. E. 632, L. R. A. 1918 A. 1011.

*Washington*.—Warren v. Norguard, 103 Wash. 284, 174 Pac. 7.

*Canada*.—Walker v. Martin, 450 L. R. 504, 460 L. R. 144.

**98.** Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87;

Gardiner v. Solomon, 200 Ala. 115, 75 So. 621; Griffin v. Russell, 144 Ga. 275, 87 S. E. 10, L. R. A. 1916 F. 216, Ann. Cas. 1917 D. 994; Dougherty v. Woodward, 21 Ga. App. 427, 94 S. E. 636; Kitchen v. Weatherby, 205 Ill. App. 10; Smith v. Jordan, 211 Mass. 269, 97 N. E. 761; Woods v. Clements, 114 Miss. 301, 75 So. 119; Dempsey v. Frazier, 119 Miss. 1, 80 So. 341; Hays v. Hogan (Mo.), 200 S. W. 286; Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351; Lewis v. Steel, 52 Mont. 300, 157 Pac. 575; Linville v. Nissen, 162 N. Car. 95, 77 S. E. 1096; Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134.

**99.** *United States*.—Denison v. McNorton, 288 Fed. 401, 142 C. C. A. 631.

*California*.—Spence v. Fisher, 193 Pac. 255; Crittenden v. Murphy, 36 Cal. App. 803, 173 Pac. 595.

*Iowa*.—"The general rule is that a parent is not liable for the torts of his minor child, even though the child lives with the parent and is under his control, when such acts are done without his authority, knowledge, or consent, have no connection with his business, are not ratified by him, and are no benefit to him." Sultzbach v. Smith, 174 Iowa, 704, 156 N. W. 673.

*Kansas*.—Zeeb v. Bahnmaier, 176 Pac. 326.

*Massachusetts*.—Smith v. Jordan, 211 Mass. 269, 97 N. E. 761.

*Michigan*.—Johnston v. Cornelius, 193 Mich. 115, 159 N. W. 318; Foster v. Rinz, 202 Mich. 601, 168 N. W. 420.

*North Carolina*.—Linville v. Nissen, 162 N. Car. 95, 77 S. E. 1096.

he has no control over its operation, there is no ground to charge him for the misconduct of his son who drives it.<sup>1</sup> Statutory provisions may change the common law rules to some extent.<sup>2</sup> Thus, positive law may render the owner liable when his machine is driven by a minor child,<sup>3</sup> or other immediate member of his family.<sup>4</sup>

**Sec. 657. Machine driven by member of owner's family — relation of master and servant.**

Though the mere relationship existing between the owner of a motor vehicle and a member of his family who is driving the same is not sufficient to render the owner responsible for the negligent conduct of such relative, it is clear that, if the relationship of master and servant exists between them as to the driving of the machine on the occasion in question, the owner may be liable.<sup>5</sup> That is to say, a relative may be a ser-

*Tennessee*.—*King v. Smythe*, 104 Tenn. 217, 204 S. W. 296, L. R. A. 1918 F. 293.

*Virginia*.—*Blair v. Broadwater*, 121 Va. 301, 93 S. E. 632, L. R. A. 1918 A. 1011.

*Washington*.—*Warren v. Norguard*, 103 Wash. 284, 174 Pac. 7.

1. *Holland v. Goode*, 188 Ky. 525, 222 S. W. 950.

2. Section 626.

3. *Crittenden v. Murphy*, 36 Cal. App. 803, 173 Pac. 595.

4. *Hatter v. Dodge Bros.*, 202 Mich. 97, 167 N. W. 935; *Hawkins v. Erma-tinger* (Mich.), 179 N. W. 249.

5. *United States*.—*Denison v. Mc-Norton*, 228 Fed. 401, 142 C. C. A. 631.

*Alabama*.—*Levine v. Ferlisi*, 192 Ala. 362, 68 So. 269; *Erlick v. Heis*, 193 Ala. 669, 69 So. 530.

*Arizona*.—*Benton v. Regeser*, 20 Ariz. 273, 179 Pac. 966.

*California*.—*House v. Fry*, 30 Cal. App. 157, 157 Pac. 500.

*Connecticut*.—*Russo v. McAviney*, 112 Atl. 657.

*Georgia*.—*Griffin v. Russell*, 144 Ga. 275, 87 S. E. 10, L. R. A. 1916 F. 216,

Ann. Cas. 1917 D. 994; *Lacey v. Fore-band* (Ga. App.), 108 S. E. 247.

*Iowa*.—*Crawford v. McElhinney*, 171 Iowa, 606, 154 N. W. 310; *Collison v. Cutter*, 186 Iowa, 276, 170 N. W. 420.

*Maine*.—*Farnham v. Clifford*, 106 Me. 299, 101 Atl. 468.

*Massachusetts*.—*Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761.

*Minnesota*.—*Kayser v. Van Nest*, 125 Minn. 277, 146 N. W. 1091, 51 L. R. A. (N. S.) 970.

*Mississippi*.—*Winn v. Haliday*, 109 Miss. 691, 69 So. 685; *Woods v. Cle-ments*, 113 Miss. 720, 74 So. 422.

*Missouri*.—*Marshall v. Taylor*, 168 Mo. App. 240, 153 S. W. 527; *Hays v. Hogan*, 180 Mo. App. 237, 165 S. W. 1125; *Hufft v. Dougherty*, 184 Mo. App. 374, 171 S. W. 17.

*Montana*.—*Lewis v. Steel*, 52 Mont. 300, 157 Pac. 575.

*North Carolina*.—*Clark v. Sweaney*, 176 N. Car. 529, 97 S. E. 474.

*Oklahoma*.—*McNeal v. McKain*, 33 Okla. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775.

*Pennsylvania*.—*Raub v. Donn*, 254 Pa. St. 203, 98 Atl. 861.

vant of the owner in a particular transaction with similar legal effect as if he were a paid chauffeur.<sup>6</sup> But, even if the driver can be classed as the servant of the owner, it is held that the latter is not liable for his negligent conduct, unless at the time of the accident under consideration he was acting in the scope of his employment and in regard to the master's business.<sup>7</sup> The relation of master and servant is not to be

*South Carolina*.—Davis v. Littlefield, 97 S. Car. 171, 81 S. E. 487. "When a master sends his servant to town on the master's business, we know of no court that has held that, if the servant is induced to go mainly because he wants to make purchases for himself, the private purpose of the servant will relieve the master from liability for the negligence of his servant in the conduct of the master's business. The parent is not liable for the negligence of the child by reason of the relation of parent and child, yet if the child is the agent of the father, then the existence of the relation of parent and child does not destroy the liability of the principal for the acts of the agent. So here the non-liability of the father for the acts of the son does not destroy the liability of the master for the acts of his servant done in the course of his employment." Davis v. Littlefield, 97 S. Car. 171, 81 S. E. 487.

*Texas*.—Allen v. Bland (Civ. App.), 168 S. W. 35.

*Virginia*.—Cohen v. Meador, 119 Va. 429, 89 S. E. 876.

*Washington*.—Guignon v. Campbell, 80 Wash. 543, 141 Pac. 1031.

*Wisconsin*.—Hiroux v. Baum, 137 Wis. 197, 118 N. W. 533, 19 L. R. A. (N. S.) 332.

6. Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87; Offner v. Wilke, 208 Ill. App. 463; Smith v. Jordan, 211 Mass. 269, 97 N. E. 761; Doran v. Thompson, 76 N. J. L. 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677. "To

constitute the relation of master and servant as to third persons, it is not essential that any actual contract should subsist between the parties, or that compensation should be expected by the servant. While the relation of master and servant in its full sense invariably and only arises out of a contract between the servant and the master, yet such contract may be either express or implied." Doran v. Thompson, 76 N. J. L. 764, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677.

7. *Alabama*.—Gardiner v. Solomon, 200 Ala. 115, 75 So. 621.

*Georgia*.—Dougherty v. Woodward, 21 Ga. App. 427, 94 S. E. 636.

*Iowa*.—Reynolds v. Buck, 127 Iowa. 601, 103 N. W. 946; Lemke v. Aty, 159 N. W. 1011.

*Michigan*.—Johnston v. Cornelius, 193 Mich. 115, 159 N. W. 318.

*Minnesota*.—Wilde v. Pearson, 140 Minn. 394, 168 N. W. 582.

*Mississippi*.—Woods v. Clements, 113 Miss. 720, 74 So. 422; Woods v. Clements, 114 Miss. 301, 75 So. 119.

*Missouri*.—Bolman v. Bullens, 200 S. W. 1068; Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351; Mayes v. Fields (Mo. App.), 217 S. W. 589.

*New Jersey*.—Doran v. Thompson, 76 N. J. L. 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677.

*New York*.—Maher v. Benedict, 123 App. Div. 579, 108 N. Y. Suppl. 228.

*North Carolina*.—Linville v. Nissen, 162 N. Car. 95, 77 S. E. 1096; Wilson v. Polk, 173 N. Car. 78, 95 S. E. 849.

inferred merely from the circumstance that the driver is a son or other member of the owner's family.<sup>8</sup> Where one purchased a machine and employed a chauffeur to instruct his daughter in the management of the machine for the convenience of the family, and while driving the machine with the aid of the instructor collided with another vehicle, the jury may find that the relation of master and servant was in force between the owner and the daughter at the time of the injury.<sup>9</sup>

**Sec. 658. Machine driven by member of owner's family — use without consent of owner.**

As in the case of a paid chauffeur sustaining no family relationship to the owner of an automobile,<sup>10</sup> if a member of an owner's family uses his automobile without his consent or knowledge, the owner, as a general proposition, is not responsible for his negligence.<sup>11</sup> Especially is this so, when the ma-

*Oregon.*—Smith v. Burns, 71 Oreg. 133, 142 Pac. 352.

*Tennessee.*—King v. Smythe, 104 Tenn. 217, 204 S. W. 296. L. R. A. 1918 F. 293.

*Utah.*—McFarlane v. Winters, 47 Utah, 598, 155 Pac. 437.

*Virginia.*—Cohen v. Meador, 119 Va. 429, 89 S. E. 876.

8. Knight v. Cossitt, 102 Kans. 764, 172 Pac. 533; Maher v. Benedict, 123 N. Y. App. Div. 579, 108 N. Y. Suppl. 228; McFarlane v. Winters, 47 Utah, 598, 155 Pac. 437; Blair v. Broadwater, 121 Va. 301, 93 S. E. 632. L. R. A. 1918 A. 1011.

9. Williams v. May (N. C.), 91 S. E. 604.

**Son learning to run machine.**—Where a father purchases an automobile largely upon the solicitation of his son who is to learn to run it for the benefit of the family, the father is liable for his negligence while receiving instructions. Hiroux v. Baum, 137 Wis. 197, 118 N. W. 533, 19 L. R. A. (N. S.) 332.

10. Section 630.

11. *Alabama.*—Gardiner v. Solomon, 200 Ala. 115, 75 So. 621.

*Georgia.*—Dougherty v. Woodward, 21 Ga. 427, 94 S. E. 636.

*Illinois.*—Kitchen v. Weatherby, 205 Ill. App. 10.

*Iowa.*—Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946.

*Massachusetts.*—Weiner v. Mairs, 234 Mass. 156, 125 N. E. 149.

*Minnesota.*—Wilde v. Pearson, 140 Minn. 394, 168 N. W. 582.

*Missouri.*—Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918 C. 715. Ann. Cas. 19, 18 E. 1127; Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351.

*Montana.*—Lewis v. Steel, 52 Mont. 300, 157 Pac. 575.

*North Carolina.*—Linville v. Nissen, 162 N. Car. 95, 77 S. E. 1096.

*Oregon.*—Smith v. Burns, 71 Oreg. 133, 142 Pac. 352.

**Machine delivered by child to third person.**—Where the daughter of the owner of an automobile takes the same from the garage without the consent or knowledge of the owner, and delivers it

chine is used contrary to express prohibition of the owner.<sup>12</sup> But the knowledge of the owner as to the use of the machine is not always essential to fasten liability on the owner. If the machine is used in the prosecution of his business, the owner will be liable for the negligence of the driver, though he had no knowledge of the particular trip in question.<sup>13</sup> Thus, where a machine is furnished for family purposes, the owner may be liable for injuries resulting from the negligence of a son taking a servant to a street car, though the owner had no knowledge of the particular use of the machine.<sup>14</sup>

**Sec. 659. Machine driven by member of owner's family — use for carriage of owner's family.**

Where an automobile was purchased for the pleasure of the owner's family, it is not essential to the owner's liability that he be enjoying the journey when an injury is occasioned to another traveler from the negligent operation of the machine. The owner is liable for the negligence of his child or other member of the family who is driving the car for the convenience or pleasure of other members of the family.<sup>15</sup> The "business" of the owner in such a case is the furnishing of pleasure to his family, and the driver is acting for him in the scope of his "business" when he is driving the machine for

to a third person who runs the same negligently, even the daughter being absent at the time, the owner is not liable. *Wilde v. Pearson* (Minn.) 168 N. W. 582.

12. *Sultzbach v. Smith*, 174 Iowa, 704, 156 N. W. 673; *Linville v. Nissen*, 162 N. Car. 95, 77 S. E. 1096; *Wilson v. Polk*, 175 N. Car. 490, 95 S. E. 849.

13. *House v. Fry*, 30 Cal. App. 157, 157 Pac. 500.

14. *Guignon v. Campbell*, 80 Wash. 543, 141 Pac. 1031. And see section 659.

15. *United States*.—*Denison v. McNorton*, 228 Fed. 401, 142 C. C. A. 631.

*Massachusetts*.—*Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761.

*Mississippi*.—*Winn v. Haliday*, 109 Miss. 691, 69 So. 685.

*Nebraska*.—*Stevens v. Luther*, 180 N. W. 87.

*New Jersey*.—*Missell v. Hayes*, 86 N. J. L. 348, 91 Atl. 322.

*North Carolina*.—*Clark v. Sweaney*, 175 N. Car. 280, 95 S. E. 568.

*Washington*.—*Guignon v. Campbell*, 80 Wash. 543, 141 Pac. 1031.

**Contrary decision.**—In a case in *New York*, it has been held that the authority given by the owner of a car to his brother to take the same out whenever his mother wanted to go, does not render the owner liable for an accident resulting from the negligence of the brother while using the car at the request of the mother and without further authority from or notice to the owner. *DeSmet v. Niles*, 175 N. Y. App. Div. 822, 161 N. Y. Suppl. 566.

such purpose.<sup>16</sup> The fact that during business hours, the machine is used in the mercantile business of the owner, does not afford an exception to the general rule.<sup>17</sup> Thus, the owner is liable when the car is driven by his child furnishing transportation to the wife of such owner.<sup>18</sup> Similarly, a son of the owner, in taking his brother or sister for a ride in the machine, may be acting as agent for the owner.<sup>19</sup> And in the

16. *Missell v. Hayes*, 86 N. J. L. 348, 91 Atl. 322.

17. *Denison v. McNorton*, 228 Fed. 401, 142 C. C. A. 631.

18. *Erlick v. Heis*, 193 Ala. 669, 69 So. 530; *Lemke v. Ady* (Iowa), 159 N. W. 1011; *Collison v. Cutter*, 186 Iowa, 276, 170 N. W. 420; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761; *Missell v. Hayes*, 86 N. J. L. 348, 91 Atl. 322; *Clark v. Sweaney* (N. Car.), 97 S. E. 474. Compare *Dougherty v. Woodward*, 21 Ga. App. 427, 94 S. E. 636. "The boy was not running it for any purpose of his own, but for the convenience of his mother and by her express direction, for whose use in common with the rest of the family it had been purchased by his father. If the father had employed a chauffeur outside the family at a stated compensation, it could not be contended seriously that taking the wife out for an afternoon call was not the business for which he had been employed. If, instead of hiring a stranger, the father chose to have the same work performed by his minor son to whose time and services he was entitled as a matter of law, it could not be ruled as a matter of law that a jury might not find the business to be that of the father. This is not a case of mere permissive use of the father's vehicle by the son for his own pleasure. Although the father had no knowledge of the particular journey which was taken on the occasion of the accident, his knowledge that on previous occasions the wife had used the car and his testimony of the purpose for which it was bought and that it

was not customary when the wife was going on errands with the automobile to ask his permission were enough to support a finding that the trip was authorized by him. The fact that the son was the only person in the family who could legally operate the car had some tendency in that direction. The relation of husband and wife is such that, when the former has purchased an automobile for family use, a ride by the wife in it with his general permission is not as matter of law the business of the wife, but may be found to be that of the husband." *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761.

19. *Denison v. McNorton*, 228 Fed. 401, 142 C. C. A. 631; *Dirks v. Tonre*, 183 Iowa, 403, 167 N. W. 103; *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224; *Uphoff v. McCormick*, 139 Minn. 392, 166 N. W. 788; *Missell v. Hayes*, 86 N. J. L. 348, 91 Atl. 322; *McNeal v. McKain*, 33 Okla. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775; *Lynde v. Browning*, 2 Tenn. C. C. A. 262; *Jacger v. Salentine* (Wis.), 177 N. W. 886. Compare *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876. "We have been unable to find any case holding that where the father bought an automobile to be used for the purpose of the pleasure of his family, and a minor child, who was a member of his family, either with the express or implied consent of the father, took the automobile out and drove it, carrying therein members of the family, including guests of said family, the child who drove that machine was not the servant, expressly or impliedly.

carriage of guests, a son or daughter of the owner may be deemed acting within the scope of the father's business, so that liability will fall on such owner for the negligent operation of the machine.<sup>20</sup> And, although at the time of the injury in question, the driver is unaccompanied, the parent may be liable if the driver is seeking a member of the family, or is returning home after an unsuccessful quest.<sup>21</sup>

**Sec. 660. Machine driven by member of owner's family — use for private purposes of driver.**

Where the head of a house provides an automobile for the pleasure purposes of himself and the members of his family, it is clear that the running of the machine by a child to carry other members of the family is within the scope of the owner's "business" so that he is liable for the negligence of such child on the theory that the relation of master and servant existed between him and the driver.<sup>22</sup> But it is a more troublesome question to determine whether a child is acting in his father's business when such child is running the car for his own pleasure or to take his own friends on a trip. The decisions are not harmonious. On the one hand, in some jurisdictions the view is taken that, when an automobile is procured for the pleasure and entertainment of the members of his family, the "business" of the owner is the running of the machine for their purposes, and the operation of the machine by a member of the family is deemed within the scope of the owner's business, though the operator is not taking other members of the family on a trip but is using it for the pleasure of himself and his own friends.<sup>23</sup> On the other hand,

of the father." *McNeal v. McKain*, 33 Okla. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775.

20. *Lewis v. Steele*, 52 Mont. 300, 157 Pac. 575. See also *Johnson v. Smith*, 143 Minn. 350, 173 N. W. 675; *McNeal v. McKain*, 33 Okla. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775.

21. *Benton v. Regeser*, 20 Ariz. 273, 179 Pac. 966.

22. Section 659.

23. *Colorado*.—*Hutchins v. Haffner*, 63 Colo. 365, 167 Pac. 966, L. R. A. 1918 A. 1008.

*Georgia*.—*Griffin v. Russell*, 144 Ga. 275, 87 S. E. 10, L. R. A. 1916 F. 216, Ann. Cas. 1917 D. 994. Compare *Dougherty v. Woodward*, 21 Ga. App. 427, 94 S. E. 636.

*Iowa*.—*Fullerton v. U. S. Casualty Co.*, 167 N. W. 700; *Landry v. Over-*  
*sen*, 174 N. W. 255. Compare *Reynolds*



in some jurisdictions it is held that, when a child or other member of an owner's family uses such a vehicle solely for his own purposes or for the entertainment of his own friends,

*v. Buck*, 127 Iowa, 601, 103 N. W. 946.

*Kentucky*.—*Miller v. Week*, 186 Ky. 552, 217 S. W. 904.

*Massachusetts*.—*Flynn v. Lewis*, 231 Mass. 550, 121 N. E. 493, 2 A. L. R. 876.

*Minnesota*.—*Kayser v. Van Nest*, 125 Minn. 277, 146 N. W. 1091, 51 L. R. A. (N. S.) 970; *Uphoff v. McCormick*, 139 Minn. 392, 166 N. W. 788; *Johnson v. Evans*, 141 Minn. 356, 170 N. W. 220, 2 A. L. R. 891; *Johnson v. Smith*, 143 Minn. 350, 173 N. W. 675; *Mogle v. A. W. Scott Co.*, 144 Minn. 173, 174 N. W. 832. See also *Morken v. St. Pierre*, 179 N. W. 681.

*Montana*.—*Lewis v. Steele*, 52 Mont. 300, 157 Pac. 575.

*New Mexico*.—*Boes v. Howell*, 24 N. Mex. 142, 173 Pac. 966, L. R. A. 1918 F. 288.

*North Carolina*.—*Tyrell v. Tudor*, 106 S. E. 675. *Compare* *Linville v. Nissen*, 162 N. Car. 95, 77 S. E. 1096; *Bilyeu v. Beck*, 178 N. Car. 481, 100 S. E. 891.

*Pennsylvania*.—*Ruskover v. Linder*, 67 Pitts. Leg. Journ. (Pa.) 144.

*South Carolina*.—*Davis v. Littlefield*, 97 S. Car. 171, 81 S. E. 487.

*Tennessee*.—*King v. Smythe*, 104 Tenn. 217, 204 S. W. 296, L. R. A. 1918 F. 293, wherein it is said: "If a father purchases an automobile for the pleasure and entertainment of his family, and, as Dr. Smythe did, gives his adult son, who is a member of his family, permission to use it for pleasure, except when needed by the father, it would seem perfectly clear that the son is in the furtherance of this purpose of the father while driving the car for his own pleasure. It is immaterial whether this purpose of the father be called his business or not. The law of agency is not confined to business

transactions. It is true that an automobile is not a dangerous instrumentality so as to make the owner liable, as in the case of a wild animal loose on the streets; but, as a matter of practical justice to those who are injured, we cannot close our eyes to the fact that an automobile possesses excessive weight, that it is capable of running at a rapid rate of speed, and when moving rapidly upon the streets of a populous city, it is dangerous to life and limb and must be operated with care. If an instrumentality of this kind is placed in the hands of his family by a father, for the family's pleasure, comfort, and entertainment, the dictates of natural justice should require that the owner should be responsible for its negligent operation, because only by doing so, as a general rule, can substantial justice be attained. A judgment for damages against an infant daughter or an infant son, or a son without support and without property, who is living as a member of the family, would be an empty form. The father, as owner of the automobile and as head of the family, can prescribe the conditions upon which it may be run upon the roads and streets, or he can forbid its use altogether. He must know the nature of the instrument and the probability that its negligent operation will produce injury and damage to others. We think the practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric theory concerning the law of principal and agent. If owners of automobiles are made to understand that they will be held liable for injury to person and property occasioned by their negligent operation by infants or others who are financially

the machine is not being used in the scope of the owner's business, and consequently he escapes responsibility for the negligence of the driver.<sup>24</sup> In its ultimate deduction, the ques-

irresponsible, they will doubtless exercise a greater degree of care in selecting those who are permitted to go upon the public streets with such dangerous instrumentalities. An automobile cannot be compared with golf sticks and other small articles bought for the pleasure of the family. They are not used on public highways, and are not of the same nature of automobiles."

*Washington.*—*Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59. "The daughter was using the machine for the very purpose for which the father owned it, kept it, and intended that it should be used. It was being used in furtherance of the very purpose of his ownership, and by one of the persons by whom he intended that purpose should be carried out. It was in every just sense being used in his business by his agent. There is no possible distinction, either in sound reason, sound morals, or sound law, between her legal relation to the parent and that of a chauffeur employed by him for the same purpose. The fact that the agency was not a business agency, nor the service a remunerative service, has no bearing upon the question of liability. . . . In running his vehicle, she was carrying out the general purpose for which he owned it and kept it. No other element is essential to invoke the rule *Respondeat superior*. . . . It seems too plain for cavil that a father who furnishes a vehicle for the customary conveyance of the members of his family makes their conveyance by that vehicle his affair, that is, his business, and any one driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent. The fact that only one member of the family was in

the vehicle at the time is in no sound sense a differentiating circumstance abrogating the agency. It was within the general purpose of the ownership that any member of the family should use it, and the agency is present in the use of it by one as well as by all." *Birch v. Abercrombie*, 74 Wash. 846, 133 Pac. 1020, 50 L. R. A. (N. S.) 59.

*24. Alabama.*—*Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87; *Erlick v. Heis*, 193 Ala. 669, 69 So. 530; *Gardiner v. Soloman*, 200 Ala. 115, 75 So. 621.

*Arkansas.*—*Norton v. Hall*, 232 S. W. 934.

*California.*—*Spence v. Fisher*, 193 Pac. 255, *overruling*, *Crittenden v. Murphy*, 36 Cal. App. 803, 173 Pac. 595.

*Illinois.*—*Arkin v. Page*, 287 Ill. 420, 123 N. E. 30, *reversing*, 212 Ill. App. 282. *Compare*, *Smith v. Tappen*, 208 Ill. App. 433.

*Kansas.*—*Knight v. Cossitt*, 102 Kans. 764, 172 Pac. 533; *Watkin v. Clark*, 103 Kans. 629, 176 Pac. 131. "The development of the law on this subject has been attended by a rather slow process of clarification. When the automobile was new and strange, and was regarded with some wonder and considerable fear, there was a tendency to look upon it as a dangerous thing, fraught with such possibility for harm that the owner should always be held responsible for its use. When it commenced to take the place of the family horse, this view had to be abandoned. The notion, however, of general liability on the part of the owner for use of his car having been planted in the mind, it lingered there like a superstition. Courts were reluctant to ignore it, and as a result, an adaptation of the law of

tion seems to be whether the master's business includes the operation of the machine by one member of the family, when

master and servant, and principal and agent, was resorted to, to explain the liability. If a man purchased an automobile and allowed his wife and his son and his daughter to use it, the use was his by virtue of representation, whether representation existed in fact or not. The deduction was facilitated by employment of the fine art of definition—putting into the definition of the term 'business' the attributes necessary to bolster up liability. So, if daughter took her friend riding, she might think she was out purely for the pleasure of herself and her friend, but she was mistaken; she was conducting father's 'business' as his 'agent.' As this incongruity became more and more apparent, a further concession was sometimes made. If the owner allowed a member of his family to use the automobile, he might not be liable, but it was 'presumed' the use was his by representation. If a son took his best girl riding, *prima facie* it was father's little outing by proxy, and if an accident happened, *prima facie* father was liable. Some courts were inclined to get rid of the difficulty of resting liability on the one existing fact, ownership of the car, by declaring that the question of 'agency' was one for the jury, a process known in some quarters as 'passing the buck.' The sooner the courts settle down and deal on the basis of fact and actuality with a vehicle which has revolutionized the business and the pleasure of the civilized world, the better it will be, not only for society, but for the courts." *Watkins v. Clark*, 103 Kans. 629, 176 Pac. 131.

*Maine*.—*Farnum v. Clifford*, 118 Me. 145, 106 Atl. 344; *Pratt v. Cloutier*, 110 Atl. 353, 10 A. L. R. 1434. See also, *Farnum v. Clifford*, 116 Me. 299, 101 Atl. 468.

*Massachusetts*.—*Weiner v. Mairs*, 234 Mass. 156, 125 N. E. 149. See also, *Flynn v. Lewis*, 231 Mass. 550, 121 N. E. 493, 2 A. L. R. 896.

*Michigan*.—*Loehr v. Abell*, 174 Mich. 590, 140 N. W. 926.

*Mississippi*.—*Woods v. Clements*, 113 Miss. 720, 74 So. 422; *Woods v. Clements*, 114 Miss. 301, 75 So. 119. "If the relation of master and servant is sufficiently established, then the doctrine of *respondent superior* applies, and the negligence of Miss Majorie at the time of the collision in question would be the negligence of the master. To constitute this relation there need not be either an express contract or compensation. The relationship may arise from an implied agreement. Most of the adjudicated cases brought to our attention grew out of the alleged negligence of minor children. It is elementary that the father has a right to the services of his minor son; a right, to a large extent, to control his actions or movements. It may be conceded that, if the father supplies his family with an automobile to be used for the pleasure and entertainment of the entire family, he may be held liable for the negligent operation of the car by one of the minor children selected to run or operate the machine. If the father should turn the car over to a child inexperienced in driving or incompetent to handle so powerful a machine, he might be liable upon another theory. Each case must turn upon its own peculiar facts. The authorities are in accord that an automobile is not *per se* a dangerous agency. *McNeal v. McKain*, 33 Okla. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775, and authorities cited. Responsibility in this case, then, turns upon the negligence of the driver and the further and important inquiry

such use does not inure to the pleasure or benefit of other members. When the machine is driven by an adult son who is *not* a member of the owner's family, the rule under consideration does not impose liability on the owner.<sup>25</sup>

whether the driver could be regarded as a family chauffeur or servant at the particular time of the accident. It appears that she was on no mission for her father and the proof fails to show that the father even knew his daughter intended to use the car on the pleasure trip, here marred by an unfortunate accident. The proof, in our judgment, fails to establish the relationship of master and servant. This is not a case where the father is presumed to have use of his child's services, and it would be going far to say that the unmarried adult daughter of the family could on the occasion in question be classed as a servant. The car was not purchased or maintained primarily for the pleasure of the family. The father was not even the sole owner of the car. Under the facts, we think appellant was entitled to a peremptory instruction. The only previous announcement of our court anywise in point is to be found in *Winn v. Haliday*, 109 Miss. 691, 69 South 685, the holding in which fully accords with the views now expressed." *Woods v. Clement*, 113 Miss. 720, 74 So. 422.

*Missouri*.—*Hays v. Hogan*, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918C, 715, Ann. Cas. 1918E, 1127; overruling *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Marshall v. Taylor*, 168 Mo. App. 240, 153 S. W. 527; *Hays v. Hogan*, 180 Mo. App. 237, 165 S. W. 1125. See also *Bolman v. Bullene*, 200 S. W. 1068; *Mast v. Hirsh*, 199 Mo. App. 1, 202 S. W. 275; *Bright v. Thacher*, 202 Mo. App. 301, 215 S. W. 789; *Mayes v. Fields* (Mo. App.), 217

S. W. 589; *Bushie v. Januchowsky* (Mo. App.), 218 S. W. 696.

*New Jersey*.—*Doran v. Thompson*, 76 N. J. L. 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677; *Misell v. Hayes*, 86 N. J. L. 348, 91 Atl. 322.

*New York*.—*Van Blaricom v. Dodgson*, 220 N. Y. 111, 115 N. E. 443, L. R. A. 1915F, 363; *Maher v. Benedict*, 123 N. Y. App. Div. 579, 108 N. Y. Suppl. 228; *Tanzer v. Read*, 160 N. Y. App. Div. 584, 145 N. Y. Suppl. 708. *Heissenbittel v. Meigher*, 162 N. Y. App. Div. 752, 147 N. Y. Suppl. 1087; *DeSmet v. Niles*, 175 N. Y. App. Div. 822, 161 N. Y. Suppl. 566; *Roberts v. Schanz*, 83 Misc. 139, 144 N. Y. Suppl. 824.

*Ohio*.—*Elms v. Flick*, 126 N. E. 66.

*Oregon*.—*Smith v. Burns*, 71 Oreg. 133, 142 Pac. 352.

*Utah*.—*McFarlane v. Winters*, 47 Utah, 598, 155 Pac. 437, L. R. A. 1916 D. 618.

*Virginia*.—*Cohen v. Meador*, 119 Va. 429, 89 S. E. 876; *Blair v. Broadwater*, 121 Va. 301, 93 S. E. 632, L. R. A. 1918 A. 1011.

**Express prohibition.**—If the owner of a motor vehicle expressly prohibits the use thereof by his son for the purposes of such son and his friends, an implied consent for such use cannot be found, and the owner will not be liable for the son's negligence when wrongfully using the machine. *Sultzbach v. Smith*, 174 Iowa 704, 156 N. W. 673.

<sup>25</sup> *Warren v. Norguard*, 103 Wash. 284, 174 Pac. 7.

### Sec. 661. Machine driven by member of owner's family — husband and wife.

Under the modern system of the law of domestic relations, a husband is not generally liable for the torts of his wife merely because of the relationship.<sup>26</sup> But, if he permits her to operate his automobile and she is guilty of negligence resulting in injury to another traveler he may be liable on the theory that she is acting as his agent in the running of the machine.<sup>27</sup> In some jurisdictions, however, if the wife is operating the machine for her own pleasure and not on any business of her husband and he is not riding in the machine, he is not liable.<sup>28</sup> The rule is the same when it is sought to charge the wife with liability for the acts of her husband driv-

26. *Bourland v. Baker* (Ark.), 216 S. W. 707; *Hutchins v. Haffner* (Colo.), 167 Pac. 966; *Crawford v. McElhinney*, 171 Iowa, 606, 154 N. W. 310; *Mast v. Hirsh*, 199 Mo. App. 1, 202 S. W. 275; *Tanzer v. Read*, 160 N. Y. App. Div. 584, 145 N. Y. Suppl. 708; *Bretzfelder v. Demaree* (Ohio), 130 N. E. 505; *Crouse v. Lubin*, 260 Pa. 329, 103 Atl. 725.

**Liability of wife for purchases made by husband.**—The wife is not liable for the purchase price of supplies bought by the husband for her automobile, unless it is shown that the wife authorized the husband to contract on her account. *Armstrong v. Backus*, 196 Mich. 735, 163 N. W. 1.

27. *Hutchins v. Haffner* (Colo.), 167 Pac. 966; *Crawford v. McElhinney*, 171 Iowa, 606, 154 N. W. 310; *Plasch v. Fass* (Minn.), 174 N. W. 438. See also *Standard Oil Co. of Kentucky v. Thompson* (Ky.), 226 S. W. 368. "It is not contended by plaintiff that the husband is responsible for the negligence of his wife because of the marriage relation, but because of the nature of the work she was doing, and because the trip was being taken for their mutual pleasure, in his car. It is not contended by defendant that the wife

may not be an employee or agent of her husband. It is doubtless true that the mere existence of the relation of husband and wife will not create the relation of master and servant, or agent on the part of the wife, so as to render the husband liable for negligence in operating his automobile; but here there are other circumstances. It is further shown that the wife acted as the chauffeur of the car, bought by the husband for the use of both of them, and in the particular instance was being used for the mutual pleasure of both. In the instant case, if defendants were engaged in a common enterprise, or if Mrs. McElhinney was the employee and agent of her husband at the time, in the use of the car by his authority, for some purpose for which the car was bought and kept by him, they would both be liable for her negligence in such use." *Crawford v. McElhinney*, 171 Iowa, 606, 154 N. W. 310.

28. *Minasian v. Poff*, 217 Ill. App. 8; *Mast v. Hirsh* (Mo. App.), 202 S. W. 275; *Tanzer v. Read*, 160 N. Y. App. Div. 584, 145 N. Y. Suppl. 708; *Duffy v. Ascher*, 191 N. Y. App. Div. 918, 181 N. Y. Suppl. 934; *Bretzfelder v. Demaree* (Ohio), 130 N. E. 505.

ing her car.<sup>29</sup> In other jurisdictions, a broader liability is imposed on the owner of a motor vehicle when it is operated by members of his or her family.<sup>30</sup> And the rule has been extended so as to hold the husband for the negligence of a chauffeur employed by the wife.<sup>31</sup> Apparently the rule is the same whether the machine is operated on the occasion in question by the wife or by some other member of the family.<sup>32</sup> If the husband has control of the machine at the time of an accident, he is not relieved from liability because he shows that the ownership of the machine is in his wife, for the one controlling the operation is liable for negligence in such operation.<sup>33</sup> Or, if the wife has the control of the machine, she is liable though it is owned by the husband. And, if it is owned and operated by the wife, the husband may be thought to occupy the position of a passenger and not to be liable.<sup>34</sup> It has been held, that, when the husband is operating a machine for

29. *Smith v. Weaver* (Ind. App.), 124 N. E. 503.

30. *Wolf v. Sulik*, 93 Conn. 431, 106 Atl. 443, 4 A. L. R. 356; *Hutchins v. Haffner* (Colo.), 167 Pac. 966, L. R. A. 1918 A. 1008; *Plasch v. Fass*, 144 Minn. 44, 174 N. W. 438, 10 A. L. R. 1446; *Vanett v. Cole* (N. Dak.), 170 N. W. 663; *Ulman v. Lindeman* (N. Dak.), 176 N. W. 25, 10 A. L. R. 1440. "The decisions bearing upon the liability of an owner of an automobile, kept for family use, for the negligence of a member of his family in driving the machine with his consent, cannot be reconciled. A majority of this court have chosen to adopt the doctrine that a husband is liable for an injury inflicted by his automobile, which he purchased for family use, while it was being operated by his wife solely for her own pleasure under his general permission to use the machine whenever and wherever she pleased, upon the theory that the wife was the husband's agent in carrying out one of the purposes for which the car was purchased and

owned." *Hutchins v. Haffner*, 63 Colo. 365, 167 Pac. 966, L. R. A. 1918 A. 1008.

31. *Ulman v. Lindeman* (N. Dak.), 176 N. W. 25, 10 A. L. R. 1440.

32. "We find only a limited number of reported decisions wherein the liability of the husband for the negligence of the wife has been involved. But it is obvious that the courts, when the question is squarely presented, will apply the rule held by each as to liability for the negligence of a son or daughter. . . . In our view of the question, no distinction can well be drawn between different members of the family in such cases. The rule of liability should apply equally for the negligence of the wife as for the negligence of the son or daughter." *Plasch v. Fass*, 144 Minn. 44, 174 N. W. 438, 10 A. L. R. 1446. And see section 660.

33. *Penticost v. Massey*, 201 Ala. 261, 77 So. 675. And see section 655.

34. *Christensen v. Johnston*, 207 Ill. App. 209.

the benefit of the community, the community is liable for his negligence.<sup>35</sup>

**Sec. 662. Machine driven by member of owner's family — immature or incompetent driver.**

Where a motor vehicle is driven by a minor child of the owner or by an incompetent servant, though the negligence of such driver cannot be imputed to the owner on the theory of the existence of the relation of master and servant, nevertheless, the owner may be liable on the ground that he himself has been negligent in knowingly permitting an incompetent person to operate his vehicle.<sup>36</sup> It may be the duty of an owner to see that his automobile is run, not by a careless person, but by a competent and skillful operator.<sup>37</sup> As was said in one case,<sup>38</sup> "No one can deny that an automobile in the hands of a careless and incompetent driver would be a dangerous machine to turn loose on busy streets, and would constitute a menace to travelers. The owner of a car must exercise reasonable care in the selection of a chauffeur, and, failing in this, will be held liable for the consequences of his own negligence in sending out his car in charge of an incompetent operator." While an automobile is not a dangerous instrumentality when driven by a competent chauffeur, the operation of a heavy machine by a boy only eleven years old may be a dangerous menace to other travelers.<sup>39</sup> And, when the statutes of the State prescribe a minimum limit as the age for drivers of motor vehicles, if the owner permits his son under such age to run the machine, he is generally liable for in-

**35.** *Milne v. Kane*, 64 Wash. 254, 116 Pac. 659.

**36.** *Alabama*.—*Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87; *Gardiner v. Solomon*, 200 Ala. 115, 75 So. 621.

*Missouri*.—*Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351.

*New York*.—*Schultz v. Morrison*, 91 Misc. 248, 154 N. Y. Suppl. 257. See also *Limbacher v. Fannon*, 102 Misc. 703, 169 N. Y. Suppl. 490.

*North Carolina*.—*Linville v. Nissen*,

162 N. Car. 95, 77 S. E. 1096; *Taylor v. Stewart*, 172 N. Car. 203, 90 S. E. 134; *Taylor v. Stewart*, 95 S. E. 167.

*Texas*.—*Allen v. Brand* (Civ. App.), 168 S. W. 35. See also *Prince v. Taylor* (Civ. App.), 171 S. W. 826.

**37.** *Raub v. Donn*, 254 Pa. St. 203, 98 Atl. 861. And see sections 292-296.

**38.** *Dailey v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351.

**39.** *Allen v. Bland* (Tex. Civ. App.), 168 S. W. 35.

juries which result to other travelers from the violation of the statute.<sup>40</sup> When the owner of a motor vehicle permits one of his own family, whose acts he has the right and authority to control, to operate the machine, he becomes a party to the violation of the statute and should be held responsible for the consequences which follow.<sup>41</sup> Such a statute is a legislative determination that a child under the statutory limit of age is incompetent to act as the driver of a motor vehicle.<sup>42</sup> And its violation at least affords the jury an opportunity to charge the owner with negligence,<sup>43</sup> and may be said to constitute negligence *per se*.<sup>44</sup> But even if negligence *per se*, a question may remain for the jury as to whether the violation of the statute was the proximate cause of the injury sustained by the plaintiff.<sup>45</sup>

### Sec. 663. Liability of corporations.

A corporation can act only through its officers and employees, but it is liable, as a general proposition, for the negligence of an officer or servant operating its motor vehicle in the conduct of its business.<sup>46</sup> Every act of an authorized

40. *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Schultz v. Morrison*, 91 Misc. (N. Y.) 248, 154 N. Y. Suppl. 257; *Taylor v. Stewart*, 172 N. Car. 203, 90 S. E. 134.

41. *Schultz v. Morrison*, 91 Misc. (N. Y.) 248, 154 N. Y. Suppl. 257; *Roe v. Wellesley*, 43, O. L. R. (Canada) 214.

42. *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Schultz v. Morrison*, 91 Misc. (N. Y.) 248, 154 N. Y. Suppl. 257.

43. *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Taylor v. Stewart*, 172 N. Car. 203, 90 S. E. 134.

44. *Taylor v. Stewart* (N. Car.), 95 S. E. 167.

45. *Taylor v. Stewart*, 175 N. Car. 199, 95 S. E. 167.

46. *United States*.—*Panama R. Co. v. Bosse*, 239 Fed. 303.

*Alabama*.—*Stovall v. Corey High-*

*lands Land Co.*, 189 Ala. 576, 66 So. 577.

*California*.—*Chamberlain v. Southern Cal. Edison Co.*, 167 Cal. 500, 140 Pac. 25.

*Iowa*.—*Ewing v. Artic Ice Cream Co.*, 166 Iowa. 146, 147 N. W. 294.

*Maryland*.—*Stewart Taxi-Service Co. v. Roy*, 127 Md. 70, 95 Atl. 1057.

*Massachusetts*.—*Roach v. Hincheliff*, 214 Mass. 267, 101 N. E. 383.

*New Jersey*.—*Lewis v. National Cash Register Co.*, 84 N. J. L. 598, 87 Atl. 345.

*New York*.—*Stern v. International Ry. Co.*, 167 N. Y. App. Div. 503, 153 N. Y. Suppl. 520.

*Texas*.—*Studebaker Bros. Co. v. Kitts* (Tex.), 152 S. W. 464.

An incorporated hospital supported by voluntary contributions, by endowment, and by appropriation from the city of New York, and which received



agent within the scope of his employment is the act of the company.<sup>47</sup> On the other hand, it is not liable for the negligence of the driver, if the machine is operated for the private purposes of officers or employees, and not for the purposes of the corporation.<sup>48</sup> The legal situation is similar to the case of the chauffeur who uses the car of an individual owner against the directions of such owner or for purely private purposes.<sup>49</sup> Thus, where the general manager of a company which owned an automobile took a day off and went out of town upon his own private business, and on his return home he telephoned for another employee of the corporation to come to the depot for him with the automobile and on the way from the depot the automobile ran into and injured a third person, it was held that the company was not liable for the injuries.<sup>50</sup> A plaintiff who, while driving along a high-

from said city an annual sum for the maintenance of motor ambulances which are required to be at the service of the city in response to calls, but hires the drivers itself, is liable for the negligence of one of said drivers resulting in a collision with another motor car injuring a passenger therein. *Van Ingen v. Jewish Hospital*, 182 N. Y. App. Div. 10, 169 N. Y. Suppl. 412.

**Authority of agent to procure automobile.**—In the case of a sales agent of a cash register company, he not being able to carry the heavy machines, the use of some sort of conveyance is impliedly authorized; and, in the absence of directions forbidding the use of a motor vehicle, such may be procured, and the company will be liable for the agent's negligence in driving the same. *Lewis v. National Cash Register Co.*, 84 N. J. L. 598. 87 Atl. 345.

47. *Panama R. Co. v. Bosse*, 239 Fed. 303.

48. *California*.—*Mullia v. YePlanry Bldg. Co.*, 32 Cal. App. 6, 161 Pac. 1008; *Mauchle v. Panama-Pacific Exposition Co.*, 179 Cal. App. 697, 174 Pac. 400; *Hirst v. Morris & Co* (Cal. App.), 187 Pac. 770.

*Illinois*.—*Szszatkowski v. People's Gas Light & Coke Co.*, 209 Ill. App. 460.

*Kentucky*.—*Louisville Lozier Co. v. Sallee*, 167 Ky. 499. 180 S. W. 841.

*Maryland*.—See also *Zink v. State to Use of Renstrom*, 132 Md. 670, 104 Atl. 264.

*Minnesota*.—*Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133; *Mogle v. A. W. Scott Co*, 144 Minn. 173, 174 N. W. 832; *Menton v. L. Patterson Co.*, 145 Minn. 321. 176 N. W. 991.

*Missouri*.—*Vallery v. Hesse Bldg. Material Co.* (Mo. App.), 211 S. W. 95.

*New York*.—*Power v. Arnold Eng. Co.*, 142 App. Div. 401, 126 N. Y. Suppl. 839; *Stern v. International Ry. Co.*, 167 App. Div. 503, 153 N. Y. Suppl. 520; *Ostrand v. Armour & Co.*, 176 App. Div. 152, 161 N. Y. Suppl. 961; *Clawson v. Pierce-Arrow Motor Car Co.*, 182 App. Div. 172, 170 N. Y. Suppl. 310; *Davis v. Anglo American. etc. Co.*, 145 N. Y. Suppl. 341.

*Washington*.—*Bursch v. Greenough Bros. Co.*, 79 Wash. 109, 139 Pac. 870

49. Section 630.

50. *Clark v. Buckmobile Co.*, 107 N. Y. App. Div. 120. 94 N. Y. Suppl. 771.

way is injured in a collision with an automobile owned by a corporation and used in its business, cannot recover from the corporation where it appears that the car at the time of the accident, though driven and occupied by officers of the corporation and their friends, is being used solely for a pleasure trip having nothing to do with the business of the corporation.<sup>51</sup> Even the consent of the general manager or other officer of the corporation will not change the rule; though consent is given to the use of the company's machine for the pleasure purposes of a driver or other employee, the company is not liable.<sup>52</sup>

A question of *ultra vires* may arise in connection with the liability of corporations. The operation of a motor vehicle for the ordinary purposes of a corporation is generally within the scope of its powers. But a business corporation organized for some purposes may not be authorized to engage in the business of renting automobiles and drivers by the hour; and the corporation, in such a case, might escape liability for the negligence of one of its drivers. When such is a situation, the managing officers of the company may be liable as partners.<sup>53</sup>

### Sec. 664. Municipal corporations.

In so far as municipal corporations are engaged in the discharge of powers and duties imposed upon them by the Legislature as governmental agencies of the State, they are not liable for breach of duty by their officers; in that respect, the officers are agents of the State, although selected by the municipality. When acting in their ministerial or corporate character in the management of property used for their own benefit or profit, discharging powers and duties voluntarily assumed for their own advantage, they are liable in an action by persons injured by the negligence of their servants, agents

51. *Power v. Arnold Eng. Co.*, 142 N. Y. App. Div. 401, 126 N. Y. Suppl. 839.

52. *Szszatkowski v. People's Gas Light & Coke Co.*, 209 Ill. App. 460; *O'Rourke v. A-G Co., Inc.*, 232 Mass. 129, 122 N. E. 193; *Calhoun v. Mining Co.*, 202 Mo. App. 564, 209 S. W.

318; *Ostrander v. Armour & Co.*, 176 N. Y. App. Div. 152, 161 N. Y. Suppl. 961; *Davis v. Anglo-American. etc. Co.*, 145 N. Y. Suppl. 341.

53. *Stacke v. Routledge* (Tex. Civ. App.), 175 S. W. 444.

and officers.<sup>54</sup> In the class of governmental duties imposed upon a municipality is the operation of an automobile in the service of the fire or police alarm system of the municipality, and it is not liable for the negligence of one operating a machine for such a purpose.<sup>55</sup> And, also, the operation of a city hospital has been held to be a governmental function, so that the city is not liable for the negligence of the driver of a motor ambulance.<sup>56</sup> On the other hand, the maintenance of the streets is a proprietary activity, and the negligence of a municipal employee operating a motor vehicle for such purpose may render a municipal corporation liable for ensuing damages.<sup>57</sup> And a municipal corporation which, under statutory authority, organizes and attempts to maintain a public library for the use of its inhabitants, is liable for injury caused by the negligence of a library employee in transporting books by automobile from one branch of the library to another.<sup>58</sup>

54. *Jones v. Sioux City*, 185 Iowa, 1178, 170 N. W. 445, 10 A. L. R. 474; *Fisher v. City of New Bern*, 140 N. Car. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 543, 111 Am. St. Rep. 857. See also *Cone v. City of Detroit*, 191 Mich. 198, 157 N. W. 417.

55. *Jones v. Sioux City*, 185 Iowa, 1178, 170 N. W. 445, 10 A. L. R. 474; *Engle v. City of Milwaukee*, 158 Wis. 480, 149 N. W. 141.

**Liability of chief of fire department.**

—The chief of the fire department is not liable for the negligent acts of the chauffeur driving the chief's automobile to a fire, for the principal of *respondere superior* is not applicable. On the other hand, the chief and the driver of his machine are to be considered more as fellow servants. *Skerry v. Rich*, 228 Mass. 462, 117 N. E. 824. But see *Farrell v. Fire Ins. Salvage Corps.*, 189 N. Y. App. Div. 795, 179 N. Y. Supp. 477, wherein the negligence of the chauffeur was imputed to the chief who was riding with him and had control and direction of the vehicle.

56. *Watson v. Atlanta*, 136 Ga. 370, 71 S. E. 664, wherein it was said:

"The operation of the ambulance is an incident to the maintenance and operation of the hospital itself, and is consequently to be classed with those acts in the performance of which the municipal corporation is exercising a governmental function."

57. *Jones v. Sioux City*, 185 Iowa, 1178, 170 N. W. 445, 10 A. L. R. 474; *Moss v. Aiken County* (S. Car.), 103 S. E. 520; *Hewitt v. City of Seattle*, 62 Wash. 377, 113 Pac. 1084. See also *Johnston v. Chicago*, 258 Ill. 494, 101 N. E. 960, Ann. Cas. 1914 B. 339, 45 L. R. A. (N. S.) 1167.

58. *Johnston v. Chicago*, 258 Ill. 494, 101 N. E. 960, Ann. Cas. 1914 B. 339, 45 L. R. A. (N. S.) 1167, wherein it was said: "The operation of an automobile by city employees in the class of work shown here on principle is very like the proper exercise of the city's powers in caring for and keeping the streets in repair. We find no decisions directly in point on the question of the liability of a municipal corporation for the negligent operation of any vehicle, whether horseless or otherwise, on the public highways under such cir-

Where a State has consented to be sued, it may be liable for the acts of its State fair commissioners in permitting automobile races to be held on its race track without sufficient protection to bystanders, as a result of which a racing machine leaves the track and breaks through the insufficient barricade.<sup>59</sup> If a machine is used for the personal purposes of a municipal officer or employee, the municipality is plainly not liable.<sup>60</sup>

**Sec. 665. Liability of seller of automobile for act of servant.**

Where an automobile manufacturer sold a car in the regular conduct of its sales business, and, following its custom, permitted the buyer to use its license number in driving through the city, and furnished to the seller at his request a chauffeur, who was one of the regular employees of the manufacturer, to drive the machine through the city streets, it was held that the manufacturer was not liable for the negligence of the driver on such trip.<sup>61</sup> On the other hand, under very similar circumstances, it has been held that the manufacturer is liable.<sup>62</sup> When the seller of a motor vehicle engages to give

cumstances. The conveyance of books from one library building to another, by means of an automobile, along the public highways by employees of the city, is plainly a ministerial duty. For that reason, if for no other, we hold the city liable in this case."

59. *Arnold v. State*, 163 N. Y. App. Div. 253, 148 N. Y. Suppl. 479.

60. *Carroll v. City of Yonkers*, 193 App. Div. 655, 184 N. Y. Suppl. 847.

61. *Janik v. Ford Motor Co.*, 180 Mich. 557, 147 N. W. 510, 52 L. R. A. (N. S.) 294. See also *Keek v. Jones*, 97 Kaus. 470, 155 Pac. 950.

62. *Dalrymple v. Corey Motor Car Co.*, 66 Oreg. 533, 135 Pac. 91, 48 L. R. A. (N. S.) 424, wherein it was said: "While one buying a car and paying therefor has the right to smash it up as soon as circumstances permit after the same has been turned over to him and he relies upon his own skill to run it, it does not necessarily follow as a

matter of law that the vendor of an auto who assumes or undertakes, either expressly or impliedly, to see that the car is properly run for a time can so negligently manage the same as to cause injury to a third person, without being liable therefor. The evidence tended to show, and the jury found in effect, that the company undertook to perform the service as a part of the transaction, in connection with the sale of the automobile, as a part of its general business, and in furtherance of the same; that Harrington, the servant, was doing the work for his master, the company, and not for himself, nor on his own account, nor as a mere favor to the purchaser; that it was as much a part of the general business of the company as though it had been performed prior to the time of the purchase of the car; that the company alone had the right to control and discharge Harrington."

instruction in its operation to the purchaser, the seller, not the purchaser, is responsible for the negligent acts of the driver giving the instruction.<sup>63</sup> If a machine is sold under a contract of conditional sale, the vendor reserving title, the vendor is not liable for the negligence of the purchaser.<sup>64</sup>

### **Sec. 666. Liability of bailee.**

Where a motor vehicle is loaned or hired to another except possibly in some cases where the owner furnishes both the machine and the driver, the owner is not liable for the negligence of the person operating the machine.<sup>65</sup> Under such circumstances the driver of the machine is deemed to be acting not as the servant of the owner, but as the servant of the one having possession of the machine, and the latter is responsible for his conduct.<sup>66</sup> Thus, a garageman who has possession of an automobile for the purpose of repairing the same and whose servant is running it, may be liable for injuries sustained by other travelers resulting from the negligence of such servant.<sup>67</sup> Of course, as in other cases, the operation of the machine by the driver must be an act within the scope of his employment or liability will not attach to the bailee. Where a motor car after being repaired by the defendants was sent back to the owner under the charge of a driver in the defendants' employment, and such driver was directed not to give up the driving to anyone, but at one stage of the journey a man not in the employment of the defendants accompanied the driver, and the driver hearing a noise at the back of the car, intrusted the driving to such person while he

63. Section 650.

64. *Coonse v. Bechold* (Ind. App.), 125 N. E. 416.

65. Sections 642-644.

66. *Pease v. Gardner*, 113 Me. 264, 93 Atl. 550; *John M. Hughes Sons Co. v. Bergen & Westside Auto Co.*, 75 N. J. L. 355, 67 Atl. 1018; *Diamond v. Sternburg, etc. Co.*, 87 Misc. 305, 149 N. Y. Suppl. 1000; *Baum v. Link*, 110 Misc. (N. Y.) 297, 180 N. Y. Suppl. 468; *Waldman v. Picker Bros.*, 140 N.

Y. Suppl. 1019.

**Machine kept for public hire.**—Where a machine with its chauffeur is kept for public hire, the hirer is not the superior of the chauffeur and is not responsible for his negligence, unless he in some way participates in or sanctions such negligence. *Hannon v. Van Dyke Co.*, 154 Wis. 454, 143 N. W. 150.

67. *Geiss v. Twin City Taxicab Co.*, 120 Minn. 368, 139 N. W. 611.

went to ascertain the cause of the noise, it was held that, as there was no necessity for keeping the car going while the driver examined the machine, the defendants were not liable for the negligence of such companion while driving the car.<sup>68</sup> Where two members of a political committee were given the use of an automobile for campaign purposes and hired the chauffeur of the owner to run the machine and placed the car and driver at the disposal of a campaign speaker, it was held that the members of the committee were liable for the driver's negligence, but the speaker, who was only a passenger and could not direct the route to be taken, was not liable.<sup>69</sup> An express company which hires a motor van to deliver packages, but has no power or obligation to repair the vehicle, which is operated wholly by a chauffeur furnished by the bailor, is not liable for the death of a pedestrian who was run over by reason of a defect in the steering gear at a time when the chauffeur, having finished delivering packages, was either taking the vehicle to his employer for repair or was going to get his luncheon, because the chauffeur was not *ad hoc* the servant of the express company.<sup>70</sup> If two or more persons jointly hire an automobile for a common enterprise, and damages are collected from one, the law will in some cases allow contribution between the borrowers.<sup>71</sup>

68. *Harris v. Fiat Motors, Ltd.*, 22 Times Law Rep. (Eng.) 556.

69. *Pease v. Gardner*, 113 Me. 264, 93 Atl. 550.

70. *Bohan v. Metropolitan Express Co.*, 122 N. Y. App. Div. 590, 107 N. Y. Suppl. 530, wherein the court explained its views as follows: "The question presented depends primarily for its determination upon whether at the time of the accident the chauffeur was a servant of the express company or of the transportation company. If a servant of the latter, obviously there can be no recovery against the defendant. *Maxmilian v. Mayor*. 62 N. Y. 160. The doctrine of *respondeat superior*, whereby the negligence of the

servant may be imputed to the master, is based upon his right to select and discharge his servants and control and direct them while in his employ. The doctrine, however, has recently been extended in certain instances to apply to cases where servants employed and paid by one person are engaged in the business of and under the direction and control of another, though he have no right of selection or power to discharge. It has been held in several cases that servants thus employed may become *ad hoc* the servants of the latter, and this even though he does not employ and cannot discharge them."

71. *Hobbs v. Hurley (Me.)*, 104 Atl. 815.

**Sec. 667. Liability of passenger.**

One, who is a mere passenger in an automobile, as a general proposition, does not have any part in controlling the management thereof, and is not liable for the negligence of the driver.<sup>72</sup> Even the owner of the machine, it is held, may loan the machine to another and then ride as a passenger and escape liability for the conduct of those having control of the vehicle.<sup>73</sup> But a passenger who participates in the active management of the machine, as a near relative of the owner may sometimes do, may render himself liable for the negligent conduct of the chauffeur.<sup>74</sup> The problem, in its ultimate analysis, is to find the person who has *control* of the machine at the time of the injury in question. One having control is liable whether he is the owner, a bailee of the machine, or a passenger riding therein.<sup>75</sup> Whether a person riding in a vehicle as a guest is with the other persons riding therein engaged in the joint prosecution of a common purpose so that liability may be charged against all, may be a question for the jury.<sup>76</sup>

**Sec. 668. Automobile jointly owned.**

It has been held that where two persons jointly own an automobile and employ a chauffeur and practically have an equal right to the use of the machine and the services of such chauffeur, both of such joint owners are liable for the negligence of the chauffeur upon an occasion when only one of the owners is enjoying the use of the machine.<sup>77</sup> A stronger case

<sup>72</sup> Burns v. Southern Pac. Co. (Cal. App.), 185 Pac. 875; Pease v. Gardner, 113 Me. 264, 93 Atl. 550; Hobbs v. Hurley, 117 Me. 449, 104 Atl. 815; Christensen v. Johnston, 207 Ill. App. 209; Reiter v. Graber (Wis.), 181 N. W. 739; Foxley v. Gallagher (Utah), 185 Pac. 775. See also Neve v. Graves (Ga. App.), 106 S. E. 305, dismissing the action because the owner and driver was not made a party.

<sup>73</sup> Sections 629, 642.

<sup>74</sup> Hutchings v. Vaeca, 224 Mass. 269, 112 N. E. 652.

<sup>75</sup> Section 655.

<sup>76</sup> Ward v. Meads, 114 Minn. 18, 130 N. W. 2; Tereau v. Meads, 114 Minn. 517, 130 N. W. 3.

<sup>77</sup> Goodman v. Wilson, 129 Tenn. 464, 166 S. W. 752, 51 L. R. A. (N. S.) 1116, where it was said: "Upon principle, it would seem that if two or more persons, as the case under consideration, purchase an automobile in partnership and employ a driver, whose duty it is to drive the vehicle for the joint and separate use of the partnership, that both owners would be liable

of joint liability is created when it appears that both owners were riding in the machine at the time under investigation.<sup>78</sup> And, if a father and son jointly own the machine, the father may be liable for the negligence of the son driving the car, when the father is riding in the machine and participating in its operation.<sup>79</sup> But, when the machine is being operated, not by a servant, but by one of the owners, the owner not participating in the trip is not usually liable.<sup>80</sup> Or, if one of the owners singly employs a chauffeur and has the sole control of his conduct at the time of an accident, the co-owner is not charged with liability.<sup>81</sup> One partner is the agent of the other, and, if in the course of the partnership business one partner commits a tort, the other may be held in damages therefor, but if this is done, even in the use of partnership property without the scope of such business, there can be no recovery against both.<sup>82</sup>

### Sec. 669. Criminal liability for acts of driver.

Ordinarily the owner of a motor vehicle is not liable to a criminal prosecution for the acts of his chauffeur, though the

for injuries resulting from the negligence of the driver, whether they were both using the automobile at the time or not. . . . While it is entirely true that the driver and the automobile were going for Mr. Goodman, it is none the less true that the driver was doing the thing for which he was jointly employed, and the machine was being used for one of the purposes for which it was jointly owned. The machine is partnership property, and the driver was in the service of the partnership. There is no separateness of time at which the driver may serve, or of interest in the automobile, so that it could be said that the machine belonged exclusively to one, or the driver was exclusively in his service. The case might be different if the understanding between Mrs. Richardson and Mr. Goodman had been that at certain hours of the day one should have the exclusive use of the machine and the driver. But the proof is that each one

has an equal right to the use of the machine and the services of the driver, with the slight exception stated heretofore."

78. *Solon & Billings v. Pasche* (Tex. Civ. App.), 153 S. W. 672.

79. *Seiden v. Reimer*, 190 N. Y. App. Div. 713, 180 N. Y. Suppl. 345.

80. *Knight v. Cossitt*, 102 Kans. 764, 172 Pac. 533; *Mittlestadt v. Kelly* (Mich.), 168 N. W. 501; *Hamilton v. Vioue*, 90 Wash. 618, 156 Pac. 853; *Morris v. Raymond*, 101 Wash. 34, 171 Pac. 1006. See also *Cassutt v. George W. Miller Co.*, 103 Wash. 222, 174 Pac. 433. See also *Switzer v. Baker*, 178 Iowa, 1063, 160 N. W. 372, where two officers of a corporation by turns drove an automobile belonging to the company.

81. *Mittlestadt v. Kelly* (Mich.), 168 N. W. 501.

82. *Hall v. Young* (Iowa), 177 N. W. 694.



liability has been sustained in exceptional cases. This question is discussed in another place in this work.<sup>83</sup>

### **Sec. 670. Ratification of servant's act.**

It may be, if a chauffeur acting in his master's business but beyond the authority granted to him is retained in the same employment after the discovery by the master of the conduct, that it can be held that the master thereby ratifies the conduct and is liable accordingly. But, when the chauffeur was not acting in the business of his employer and did not profess to be so acting, but used the machine for his personal benefit without the knowledge of the owner, the fact that he was not discharged upon discovery of his wrongful conduct, is not evidence that the owner ratified his acts.<sup>84</sup> Nor does the fact that the owner renders aid to an injured person after an accident show a ratification of the driver's conduct.<sup>85</sup> Similarly, the conduct of the owner in making expressions of sympathy to the bereaved family and in stating that "he would do the right thing by her," and would do his Christian duty in the matter, does not amount to a ratification of the tort or an acknowledgment of his liability therefor.<sup>86</sup>

83. Section 725.

84. *Knight v. Laurens Motor Car Co.*, 108 S. Car. 179, 93 S. E. 869, wherein it was said: "But it is said that, whether Boyd was then about the business of his master or not, yet the master subsequently found out what had happened and ratified the act, and that makes the master liable, and further that there was testimony tending to prove that the motor company ratified the act of Boyd. And the testimony pointed to as tending to prove ratification is the retention of Boyd in the service of the master after the master had knowledge of the tort. It is true that a master may, after the event, approve the tort of his servant, and that is called ratification. But it is manifest that the master is liable without such approval, if the act was done by the servant while about the

master's business. If the act done by the servant was about the master's business, but the servant went beyond his commission, the master is held liable if, knowing of the act, he should approve it after the event. And there are cases which rightly hold that under some circumstances the retention of the servant after the event is evidence of approval of the event. But when Boyd committed the delict he was not acting at all for the master, and did not profess to be. He was acting solely for himself; and there is no such thing as a master assuming, by ratification, liability for an act of another in which the master had no part."

85. *Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87.

86. *Dougherty v. Woodward*, 21 Ga. App. 427, 94 S. E. 636.

**Sec. 671. Presumption of ownership — from license number.**

Evidence that the automobile which occasions an injury to a traveler was licensed in the name of the defendant raises a presumption that he is the owner of the machine.<sup>87</sup> The aim of the statutory provisions requiring registration, licensing, and the display of number plates, is for the safe operation of the machines on the public highways and to fix the identity of one who offends the traffic laws or the public safety.<sup>88</sup> Moreover, in some jurisdictions, proof that the car is registered in the name of the defendant is held to be *prima facie* proof that the custodian of the car at the time of an accident was then engaged in the owner's service.<sup>89</sup> But evidence that an alleged owner registered one or more automobiles has no probative force, where the machine in question is not identified as one of those registered by the defendant.<sup>90</sup> Presump-

<sup>87</sup> *Patterson v. Millican*, 12 Ala. App. 324, 66 So. 914; *Hatter v. Dodge Bros.*, 202 Mich. 97, 167 N. W. 935; *Uphoff v. McCormick*, 139 Minn. 392, 166 N. W. 788; *Whimster v. Holmes*, 177 Mo. App. 130, 164 S. W. 236; *Ferris v. Sterling*, 214 N. Y. 249, 108 N. E. 406; *Berger v. Watjen* (R. I.), 106 Atl. 740; *Ferguson v. Reynolds* (Utah), 176 Pac. 267. "There was more than a scintilla of evidence of ownership to go to the jury. The statute upon the subject of motor vehicles (chap. 89, Comp. Laws 1915), requires every automobile driven upon a 'public highway' to be annually registered by and in the name of the owner with the secretary of state, who must assign to it a distinctive number, and furnish to the owner, who has paid the license fee and complied with the law, a number plate, which must be carried and conspicuously displayed on the vehicles it identifies when the same is in use. Penalties are provided for violation of this legislation, which is regulatory in its nature and an exercise of the police power of the state. The manifest intent of many of its provisions, such as registration in the name of the

owner with detailed description, assignment of a distinctive license number, issuance of an official number plate of special design, which must be conspicuously displayed upon the motor vehicle when driven upon a highway, etc., is for identification of the vehicle and its owner. Proof of the license number upon an automobile being driven upon a highway and of the person in whose name such distinctive number is registered as owner *prima facie* identifies both vehicle and ownership." *Hatter v. Dodge Bros.*, 202 Mich. 97, 167 N. W. 935.

**Application for license.**—The fact that one applied for a license may be evidence of ownership. *Windham v. Newton*, 200 Ala. 258, 76 So. 24.

<sup>88</sup> *Studebaker Bros. Co. v. Kitts* (Tex.), 152 S. W. 464.

<sup>89</sup> *Ferris v. Sterling*, 214 N. Y. 249, 108 N. E. 406. See also *Terry Dairy Co. v. Parker* (Ark.), 223 S. W. 6; *Wald v. Packard Motor Car Co.*, 204 Mich. 147, 169 N. W. 957. See section 673.

<sup>90</sup> *Nugent v. Campbell*, 180 N. Y. App. Div. 257, 167 N. Y. Suppl. 617.

tions arising from the registration of the machine are rebuttable.<sup>91</sup>

### **Sec. 672. Presumption of ownership—from name on machine.**

In an action to recover injuries sustained from the alleged operation of a motor vehicle by the defendant, in some States, the ownership and control by the defendant of the vehicle is *prima facie* proved by evidence showing that his name was painted on the outside of the truck.<sup>92</sup>

### **Sec. 673. Presumption of management from ownership—in general.**

The decisions are not harmonious as to the presumptions which arise from the ownership of a motor vehicle. Technically speaking, the burden of proof is on the plaintiff who has been injured by the operation of a motor vehicle to show, if the machine was operated on the particular occasion by one other than the defendant, that such driver was acting for the defendant and within the scope of the defendant's business.<sup>93</sup>

91. *Brown v. Chevrolet Motor Co.*, 39 Cal. App. 738, 179 Pac. 697.

92. *Bosco v. Boston Store of Chicago*, 195 Ill. App. 133; *Buckley v. Sutton*, 231 Mass. 504, 121 N. E. 527; *Weber v. Thompson-Belden & Co.* (Neb.), 181 N. W. 649; *Baum v. Link*, 110 Misc. (N. Y.), 297, 180 N. Y. Supp. 468; *Gershel v. White's Express Co.*, 113 N. Y. Suppl. 919; *Holzheimer v. Lit Bros.*, 162 Pa. 150, 105 Atl. 73. See also *Hatter v. Dodge Bros.*, 202 Mich. 97, 167 N. W. 935; *O'Malley v. Public Ledger Co.*, 257 Pa. 17, 101 Atl. 94.

93. *Nussbaum v. Traung Label, etc., Co.* (Cal. App.), 189 Pac. 728. *Navratel v. Curtiss Door & Sash Co.*, 290 Ill. 529, 125 N. E. 282.

"The burden of proof was on the plaintiff, in order to make out his case, to show, not only that his injury was the proximate result of the negligence of the person operating the automobile, but also, as was alleged, that such per-

son was the servant or agent of the defendant, and was, at the time of such negligence, acting within the line and scope of his employment." *Patterson v. Millican*, 12 Ala. App. 324, 66 So. 914.

**Burden of proof not shifted.**—"Several authorities have been cited to the effect that when it is shown that when an injury has been negligently inflicted by a servant of the owner of the car, it will be presumed, in the absence of countervailing proof, that the servant was at the time employed in the business of his master. . . . We think, however, that the inference arising from the facts stated, are properly speaking, inferences of fact, and not of law. That is, it may be true that upon proof that the car of an owner is being driven by one of his servants is sufficient as a matter of evidence, in the absence of explanation that the driver at the time was engaged in the master's business,

The mere ownership of the machine, without proof that the driver is in the employment of the owner or that he is member of the owner's family, has been held not sufficient to afford a presumption that he is a servant of the owner or that he was acting within the scope of the owner's employment.<sup>94</sup> On the other hand, it has been thought that ownership of the machine is *prima facie* proof that the custodian of the car is acting within the scope of owner's business.<sup>95</sup> The conflict of

and would support a finding to that effect. The inference, however, we think is one of fact. The burden of proof as a matter of law, as we understand the rule, yet remains upon the plaintiff to establish upon the whole case the material allegations upon which his right of recovery must rest. While the weight of the evidence may, from time to time, shift, the burden of proof as to the essential elements of the cause of action does not do so." *Gordon v. Texas & Pacific Mercantile & Mfg. Co.* (Tex. Civ. App.), 190 S. W. 748.

94. *Lamanna v. Stevens*, 5 Boyce's (Del.) 402, 93 Atl. 962; *Dearholt Motor Sales Co. v. Merritt*, 133 Md. 323, 105 Atl. 316; *Hays v. Hogan*, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918 C. Ann. Cas. 1918 E. 1127; *Davis v. Neivsum Auto Tire & Vulcanizing Co.*, 141 Tenn. 527, 213 S. W. 914.

Name of defendant on truck.—The control of an auto truck by a defendant is *prima facie* shown by evidence that the name of the defendant was painted on the outside of the truck. *Bosco v. Boston Store of Chicago*, 195 Ill. App. 133.

95. *Arkansas*.—*Terry Dairy Co. v. Parker*, 223 S. W. 6.

*Arizona*.—*Baker v. Maseeh*, 20 Ariz. 201, 179 Pac. 53.

*California*.—*Dierks v. Newsom* (Cal. App.), 194 Pac. 519.

*Iowa*.—*Hall v. Young* (Iowa), 177 N. W. 694.

*New York*.—*Ferris v. Sterling*, 214

N. Y. 249, 108 N. E. 406; *Potts v. Pardee*, 220 N. Y. 431, 116 N. E. 78, 8 A. L. R. 785; *Quirk v. Worden*, 190 N. Y. App. Div. 773, 180 N. Y. Suppl. 647; *Duffy v. Ascher*, 191 N. Y. App. Div. 918, 181 N. Y. Suppl. 934; *Limbacher v. Fannon*, 102 Misc. (N. Y.) 703, 169 N. Y. Suppl. 490.

*Oregon*.—*West v. Kern*, 88 Ore. 247, 171 Pac. 413; *West v. Kern*, 171 Pac. 1050; *Doherty v. Hazelwood Co.*, 90 Ore. 475, 175 Pac. 849; *Clark v. Jones*, 179 Pac. 272. "An automobile is a valuable piece of personal property. It is ordinarily driven by the owner or his agent. Proof of ownership therefore logically tends to prove responsibility of the owner for the acts of the party in charge. If, as is suggested in the petition, the automobile is stolen while the owner is away from home, the owner is able to prove this fact. The rules of law on the subject of the burden of proof have for their purpose the establishment of the material facts in the most convenient way. In the administration of justice it is often wise to place the ultimate burden of proof on the party best able to sustain it." *West v. Kerr* (Oreg.), 171 Pac. 1050.

*Tennessee*.—*Davis v. Newsum Auto Tire & Vulcanizing Co.*, 141 Tenn. 527, 213 S. W. 914.

*Washington*.—*Moore v. Roddie*, 103 Wash. 386, 174 Pac. 648; *Olsen v. Clark*, 191 Pac. 810; *Samuels v. Hiawatha Holstein Dairy Co.*, 197 Pac. 24.

authority continues through the decisions when the fact that the driver was in the general employment of the owner is added to the fact of ownership. In a majority of the jurisdictions passing upon the question, it is held that evidence of defendant's ownership of a motor vehicle, coupled with proof that the driver is in his regular employment, raises a presumption that at the time he is acting for the owner and within the scope of the owner's business.<sup>96</sup> The burden is then placed

<sup>96.</sup> *United States*.—*Benn v. Forrest*, 213 Fed. 763, 130 C. C. A. 277; *Foundation Co. v. Henderson*, 264 Fed. 483.

*Alabama*.—*Penticost v. Massey*, 201 Ala. 261, 77 So. 675; *Dowdell v. Reasley* (Ala. App.), 82 So. 40.

*California*.—*Chamberlain v. Southern Cal. Edison Co.*, 167 Cal. 500, 140 Pac. 25; *Maupin v. Solomon* (Cal. App.), 183 Pac. 198.

*Colorado*.—*Ward v. Teller Reservoir & I. Co.*, 60 Colo. 47, 153 Pac. 219.

*Georgia*.—*Fielder v. Davidson*, 139 Ga. 509, 77 S. E. 618; *Gallagher v. Gunn*, 16 Ga. App. 600, 85 S. E. 930.

*Kentucky*.—*Wood v. Indianapolis Abattoir Co.*, 178 Ky. 188, 198 S. W. 732. "The authority of the master is implied when it is the duty generally of the agent, under the terms of his employment, to drive the automobile, and when the authority, either express or implied, is proven the presumption is indulged the employee was on the master's business. Thus it has frequently been held that where it not only appears that the defendant was the owner of the machine, but also that it was in charge of his chauffeur, an employee whose duties are to operate an automobile, at the time the injury occurred, such evidence raises a presumption that the chauffeur was engaged in the defendant's business and acting within the scope of his employment, and the burden then shifted to the defendant to prove that the chauffeur was not, at the time, acting for him." *Wood v. Indianapolis Abattoir*

*Co.*, 178 Ky. 188, 198 S. W. 732.

*Michigan*.—*Hatter v. Dodge Bros.*, 202 Mich. 97, 167 N. W. 935.

*Missouri*.—*Guthrie v. Holmes*, 272 Mo. 215, 198 S. W. 854; *Long v. Nute*, 123 Mo. App. 204, 100 S. W. 511; *Shamp v. Lambert*, 142 Mo. App. 567, 121 S. W. 770; *Marshall v. Taylor*, 168 Mo. App. 240, 153 S. W. 527; *Glassman v. Harry*, 182 Mo. App. 304, 170 S. W. 403; *Wiedeman v. St. Louis Taxicab Co.*, 182 Mo. App. 523, 165 S. W. 1105; *Gordon v. Bleek Auto Co.* (Mo. App.), 233 S. W. 265. See also *Whimster v. Holmes*, 177 Mo. App. 130, 164 S. W. 236. "Where a servant, who is employed for the special purpose of operating an automobile for the master, is found operating it in the usual manner such machines are operated, the presumption naturally arises that he is running the machine in the master's service. If he is not so running it, this fact is peculiarly within the knowledge of the master, and the burden is on him to overthrow this presumption by evidence which the law presumes he is in possession of. It would be a hard rule, in such circumstances, to require the party complaining of the tortious acts of the servant, to show by positive proof that the servant was serving the master, and not himself." *Long v. Nute*, 123 Mo. App. 204, 100 S. W. 511. "Now in this case it appears the defendant admitted he owned the automobile, and that the chauffeur in charge of the same at the time plaintiff received her injury was his chauffeur: that is to say, the chauffeur."

on the defendant to show that at the time of the particular occasion the driver was not acting for him, but that such driver was using the machine for his own purposes or outside of the scope of his employment.<sup>97</sup> In a minority of juris-

feur was his servant, employed for the purpose of managing and operating the automobile. These facts tended to prove the plaintiff received her injury through the negligence of defendant's servant while acting within the scope of his employment. And even though it does not appear that the chauffeur was present at the particular time and place in question by instruction from his master, the defendant, or perchance in the performance of his duties in conveying his master either to or from the Union Station, it does appear that he was acting within the scope of his authority as defendant's chauffeur; that is to say, he was operating defendant's automobile, the very act for which he was employed. We believe this to be sufficient, *prima facie* at least, to shift the burden of proof upon the defendant if the chauffeur was not acting for him at the time." *Shamp v. Lambert*, 142 Mo. App. 567, 121 S. W. 770.

*New York*.—*Ferris v. Sterling*, 215 N. Y. 249, 103 N. E. 406; *Rose v. Balfe*, 223 N. Y. 481, 119 N. E. 842; *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Suppl. 161; *Stern v. International Ry. Co.*, 167 App. Div. 503, 153 N. Y. Suppl. 520; *Bogorad v. Dix*, 176 App. Div. 774, 162 N. Y. Suppl. 992.

*North Carolina*.—*Wilson v. Polk*, 175 N. Car. 490, 95 S. E. 849; *Clark v. Sweeney*, 175 N. Car. 280, 95 S. E. 568.

*Oregon*.—*Kahn v. Home Telep. & Teleg. Co.*, 78 Ore. 308, 152 Pac. 240.

*Tennessee*.—*Frank v. Wright*, 140 Tenn. 538, 205 S. W. 434.

*Texas*.—*Gordon v. Texas & Pacific Mercantile & Mfg. Co.* (Civ. App.), 190 S. W. 748; *Studebaker Bros. Co. v. Kitts*, 152 S. W. 464; *City Service Co. v. Brown* (Civ. App.), 231 S. W. 140.

*Washington*.—*Kneff v. Sanford*, 63

Wash. 503, 115 Pac. 1040; *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519; *Purdy v. Sherman*, 74 Wash. 309, 133 Pac. 440.

**Reason for rule.**—"Owing to the difficulty of showing ownership of an automobile and responsibility therefor when an accident is caused thereby, the courts, applying and extending a rule of evidence theretofore obtaining with respect to accidents caused by other vehicles, have declared that it is to be presumed that the automobile is owned by the person to whom the license shown by the number was issued and that it was being used in his business; but that this presumption may be met and overcome by evidence." *Bogorad v. Dix*, 176 N. Y. App. Div. 774, 162 N. Y. Suppl. 992.

**Manager of corporation.**—When it is shown that the defendant corporation owned the automobile causing the injury in question and that the machine was then operated by its manager, a presumption making out a *prima facie* case arises that it was operated for the defendant. *Wood v. Indianapolis Abattoir Co.*, 178 Ky. 188, 198 S. W. 732; *Stern v. International Ry. Co.*, 167 N. Y. App. Div. 503, 153 N. Y. Suppl. 520.

**Carriage for hire.**—Where the driver of an automobile used for the common carriage of passengers about a city testifies that at the time of the accident he had three passengers in the machine, the jury may properly find that at the time he was engaged in the business of the owner. *Barfield v. Evans*, 187 Ala. 579, 65 So. 928.

<sup>97</sup> *Benn v. Forrest*, 213 Fed. 763, 130 C. C. A. 277; *Gallagher v. Gunn*, 16 Ga. App. 600, 85 S. E. 930; *Clar v. Sweeney* (N. Car.), 95 S. E. 568; *Kahn*

dictions, however, it is held that such evidence does not present a *prima facie* case of liability, but that the plaintiff must show affirmatively that at the particular occasion under consideration the driver was acting for his master and within the scope of his master's business.<sup>98</sup> It is possible that a dis-

v. Home Telep. & Teleg. Co., 78 Oreg. 308, 152 Pac. 240; Studebaker Bros. Co. v. Kitts (Tex.), 152 S. W. 464.

98. *Massachusetts*.—Hartnett v. Gryzmish, 218 Mass. 258, 105 N. E. 988; Gardner v. Farnum, 230 Mass. 193, 119 N. E. 666; Phillips v. Cookin, 231 Mass. 250, 120 N. E. 691; Canavan v. Giblin, 232 Mass. 297, 122 N. E. 171; O'Rourke v. A-G Co., Inc., 232 Mass. 129, 122 N. E. 193; Lewandowski v. Cohen (Mass.), 129 N. E. 378. "Whatever may be the rule elsewhere . . . it never has been the rule here that simple proof of the ownership of the car by the defendant and that the chauffeur is his servant makes out a *prima facie* case for the plaintiff on the question whether on an occasion like that in the present case the chauffeur was acting within the scope of his employment." Hartnett v. Gryzmish, 218 Mass. 258, 105 N. E. 988.

*Minnesota*.—See Robinson v. Pence Automobile Co., 140 Minn. 332, 168 N. W. 10.

*Ohio*.—See White Oak Coal Co. v. Rivoux, 88 Ohio, 18, 102 N. E. 302, 46 L. R. A. (N. S.) 1091, Ann. Cas. 1914 C. 1082.

*Pennsylvania*.—Lotz v. Hanlon, 217 Pa. St. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731; Curran v. Loreh, 243 Pa. 247, 90 Atl. 62; Scheel v. Shaw, 252 Pa. St. 451, 97 Atl. 685, affirming 60 Pa. Super. Ct. 73; Solomon v. Commonwealth Trust Co. of Pittsburg, 256 Pa. St. 55, 100 Atl. 534. See also Williams v. Ludwig Floral Co., 252 Pa. 140, 97 Atl. 206. "It was essential to a recovery in this case that it be made to appear that the accident from which

plaintiff's injury resulted occurred while the person in charge of the automobile was using it in the course of his employment, and on his master's business. Plaintiff offered no direct evidence as to this, but having shown the ownership of the machine to be in the defendant, sought to derive from this circumstance, and this alone, not only the fact that the person in charge was defendant's servant, but the further fact that he was at the time engaged on the master's errand. If, when plaintiff rested, a nonsuit had been ordered, he could not have been heard to complain. Ownership of the machine in cases of this character is at best but a scant basis for the inference that was here sought to be derived from it. It is allowed as adequate only when the attending circumstances point to no different conclusion. In itself it is but one of a series of circumstances, and its significance depends on the extent of the general concurrence of these. If they indicate something different, the scant basis that this single fact otherwise might afford is reduced below the point of sufficiency. Because its value as a probatory fact so entirely depends upon attending circumstances, it is always the duty of the party seeking to establish through it a *prima facie* case, to develop the whole situation, so that its significance may be correctly measured. When he fails in this regard, and his evidence leaves the general situation undisclosed, and this without explanation of the failure, he is liable to suffer from the inference that what was not disclosed was prejudicial to his case. Where this occurs the mere fact of ownership can count for little"

tion should be made between cases where it is shown that the driver of the machine was employed to drive it as a part of his employment, and cases where the driver is in the general employ of the defendant, but not particularly for the driving of the machine. There is authority to the effect that the presumption does not arise unless it is shown that one of the duties of the driver is the operation of the machine.<sup>99</sup> And a distinction may, perhaps, be justified between a case where the machine is operated by the owner's paid chauffeur, and a case where it is driven by a member of his family.<sup>1</sup> In the latter case it is necessary to make two presumptions to fix *prima facie* liability on the owner; first, that the member of his family stood in the relation of servant; and second, that as a servant he was acting within the scope of his master's business.<sup>2</sup> The general rule is that a presumption must be based on a fact, not upon another presumption.<sup>3</sup> But in some cases the presumption is created, although the driver is the child or other relative of the owner.<sup>4</sup> In those States where

Lotz v. Hanlon, 217 Pa. St. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731.

Utah.—See McFarlane v. Winters, 47 Utah, 598, 155 Pac. 437.

**Operation pursuant to request of member of family.**—When it is shown that at the time of the accident in question, the chauffeur was operating the machine at the request of a member of the defendant's family, the burden of evidence is shifted on the defendant to show that the chauffeur was not acting within the scope of his employment and within the scope of the business for which he was employed. Moon v. Matthews, 227 Pa. St. 488, 76 Atl. 219, 29 L. R. A. (N. S.) 856; Hazzard v. Carstairs, 244 Pa. St. 122, 90 Atl. 556.

99. Wood v. Indianapolis Abattoir Co., 178 Ky. 188, 198 S. W. 732; White Oak Coal Co. v. Rivoux, 88 Ohio, 18, 102 N. E. 302, 46 L. R. A. (N. S.) 1091, Ann. Cas. 1914 C. 1082; McFarlane v. Winters, 47 Utah, 598, 155 Pac. 437.

"The test for the *prima facie* responsibility of the master in such cases is not whether the particular service being performed was specially authorized, but it is whether the act which occasioned the injury was within the scope of the servant's authority in prosecuting the business for which he was employed by the master. If such is not the test, it ought to be sufficient for a *prima facie* showing: for how may the injured person show more?" Shamp v. Lambert, 142 Mo. App. 567, 121 S. W. 770.

1. Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918 C. 715, Ann. Cas. 1918 E. 1127.

2. Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918 C. 715, Ann. Cas. 1918 E. 1127.

3. Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918 C. 715, Ann. Cas. 1918 E. 1127.

4. Landry v. Oversen (Iowa), 174 N. W. 255; Clark v. Sweaney, 175 N. Car. 280, 95 S. E. 568; Wilson v. Polk, 175



the owner of a vehicle purchased for the pleasure and convenience of his family is liable, irrespective of whether the member of his family who is driving the machine is using it for his own purposes or for the purposes of the owner, the presumption of liability clearly exists.<sup>5</sup>

### **Sec. 674. Presumption of management from ownership — rebuttal of presumption.**

The presumption referred to in the foregoing paragraph is not one of the conclusive presumptions which the law enforces in some cases, but is one which may be rebutted.<sup>6</sup> Though not

N. Car. 490, 95 S. E. 849; Clark v. Jones (Oreg.), 179 Pac. 272; King v. Smythe, 104 Tenn. 217, 204 S. W. 296, L. R. A. 1918 F. 293.

**Merely an inference of fact.**—Instruction to the effect that there is a presumption that a minor child living with his father and using his father's automobile in and about the business of such father, is acting on his father's behalf and upon his father's direction, until the contrary is made to appear by the evidence, is held incorrect, in that it is not a presumption of law but merely an inference of fact that may be drawn from such facts. Garcia v. Borino, 77 Fla. 211, 81 So. 155.

5. Landry v. Oversen (Iowa), 174 N. W. 255; King v. Smythe (Tenn.) 204 S. W. 296.

6. *Alabama*.—Dowdell v. Beasley (Ala. App.), 82 So. 40.

*Arizona*.—Baker v. Maseeh, 20 Ariz. 201, 179 Pac. 53.

*California*.—Mausin v. Solomon (Cal. App.), 183 Pac. 198.

*Colorado*.—Ward v. Teller Reservoir & I. Co., 60 Colo. 47, 153 Pac. 219.

*Indiana*.—Premier Motor Mfg. Co. v. Tilford, 61 Ind. App. 164, 111 N. E. 645.

*Iowa*.—Hall v. Young, 177 N. W. 694.

*Kansas*.—Halverson v. Blosser, 101 Kans. 683, 168 Pac. 863.

*Maryland*.—State to Use of DeCelius v. C. J. Benson & Co., 100 Atl. 505.

*Minnesota*.—Menton v. L. Patterson Co., 145 Minn. 310, 176 N. W. 991.

*Missouri*.—Guthrie v. Holmes, 272 Mo. 215, 198 S. W. 854; Vallery v. Hesse Bldg. Material Co. (Mo. App.), 211 S. W. 95.

*New York*.—Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78, 8 A. L. R. 785; Rose v. Balfe, 119 N. E. 842, 223 N. Y. 481; Bogorad v. Dix, 176 App. Div. 774, 162 N. Y. Suppl. 992; Limbacher v. Fannon, 102 Misc. (N. Y.) 703, 169 N. Y. Suppl. 490.

*Oregon*.—Kahn v. Home Telep. & Teleg. Co., 78 Oreg. 308, 152 Pac. 240.

*Pennsylvania*.—Holzheimer v. Lit Bros., 262 Pa. 150, 105 Atl. 73.

*Texas*.—Godron v. Texas & Pacific Mercantile & Mfg. Co. (Civ. App.), 190 S. W. 748; City Service Co. v. Brown (Civ. App.), 231 S. W. 140.

*Washington*.—Warren v. Norguard, 103 Wash. 284, 174 Pac. 7; Samuels v. Hiawatha Holstein Dairy Co., 197 Pac. 24.

**Cross-examination of chauffeur by defendant.**—In an action against the owner of an automobile to recover damages for personal injuries, where the chauffeur of the defendant is called by the plaintiff to show that he was in the employ of the defendant, and to identify the car, it is competent for

conclusive, it may sufficiently raise an issue of fact to be determined, like any other issue of fact, upon all the evidence in the case.<sup>7</sup> And after the presentation of conflicting evidence by the defendant and countervailing rebuttal evidence on the part of the plaintiff, it is clear that generally a question for the jury is presented.<sup>8</sup> But, when affirmative evidence is presented showing that the servant was not acting within the scope of his master's business at the time of the accident, and such evidence is entitled to credibility and no conflicting evi-

the defendant on cross-examination to develop by the witness the fact that at the time of the accident he was using the machine in the prosecution of his own business and not in the business of his employer, and that in so doing he was acting contrary to the orders of his employer. *Quigley v. Thompson*, 211 Pa. St. 107, 60 Atl. 506.

**Statutory change.**—A statute may have the effect of raising a conclusive presumption when the machine is operated by a member of the owner's family. *Hatter v. Dodge Bros.*, 202 Mich. 97, 167 N. W. 935. See section 626.

7. *Penticost v. Massey*, 201 Ala. 261, 77 So. 675; *Dierks v. Newson* (Cal. App.), 194 Pac. 519; *Ward v. Teller Reservoir & I. Co.*, 60 Colo. 47, 153 Pac. 219; *Kahn v. Home Telep. & Teleg. Co.*, 78 Ore. 308, 152 Pac. 240; *Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040; *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519; *Purdy v. Sherman*, 74 Wash. 309, 133 Pac. 440; *Moore v. Reddie*, 103 Wash. 386, 174 Pac. 648.

"By the terms 'raises a presumption,' 'will be presumed,' and other similar language used in the decisions above cited, it is evident it is not meant that the circumstances of the use of possession of an automobile by an employee of the owner raises any presumption of law that the person in charge of it is using it upon the business of the master, but rather than such facts are sufficient to justify a jury in

inferring that such is the case; in other words, the fact that a person is in possession of the automobile of another, and the additional fact that he is shown to have been employed by the owner to drive and care for it, taken together, form a chain of circumstantial evidence from which a jury is authorized to infer the further fact that the employee is using the machine upon the employer's business. This being the case, the owner is called upon to rebut the evidence of these circumstances by showing, by testimony satisfactory to the jury, that the real fact is otherwise; that notwithstanding the testimony introduced by plaintiff presents those circumstances which usually justify the inference that the machine is being used for his business and by his authority, the actual fact is that the employee is not so using the machine, but is taking it in connection with his own business and in performance of errands not connected with his employment. The inference to be drawn from the facts shown by the testimony adduced on behalf of plaintiff is similar in principle and effect to that arising from evidence of the recent possession of stolen property, which it is said presents an evidential fact to be considered by the jury with other facts shown in the case in determining the guilt or innocence of the accused." *Kahn v. Home Telep. & Teleg. Co.*, 78 Ore. 308, 152 Pac. 240.

dence is presented, it is held in some States that the presumption is overcome, and that the plaintiff is not entitled to go to the jury merely on the strength of the presumption.<sup>9</sup> However, in some jurisdictions, it is held that the jury is not required as a matter of law to give credibility to the evidence of the owner, and hence the presumption may carry the question to the jury, though the defendant's explanation is not disputed by other witnesses.<sup>10</sup>

### Sec. 675. Verdict exonerating chauffeur, but holding owner.

When an action is brought against the owner of an automobile for injuries arising from its operation and also against the driver of the machine whose neglect primarily caused the injuries, a verdict against the owner but not against the driver, may be said with considerable force to be inconsistent. But, nevertheless, the verdict against the owner will not be set aside on the motion of such owner because the jury fails to render a verdict against the driver also.<sup>11</sup>

8. *Terry Dairy Co. v. Parker* (Ark.), 223 S. W. 6; *Randolph v. Hunt* (Cal. App.), 183 Pac. 358; *Dierks v. Newson* (Cal. App.), 194 Pac. 519; *Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618; *Samuels v. Hiawatha Holstein Dairy Co.* (Wash.), 197 Pac. 24.

9. *Maupin v. Solomon* (Cal. App.), 183 Pac. 198; *Martinelli v. Bond* (Cal. App.), 183 Pac. 461; *Halverson v. Blosser*, 101 Kans. 683, 168 Pac. 803; *Glassman v. Harry*, 182 Mo. App. 304, 170 S. W. 403; *Vallery v. Hesse Bldg. Material Co.* (Mo. App.), 211 S. W. 95.

10. *Ferris v. Sterling*, 214 N. Y. 249, 108 N. E. 406; *Bogorad v. Dix*, 176 App. 774, 162 N. Y. Suppl. 992; *Cunningham v. Castle*, 127 N. Y. App. Div. 580, 111 N. Y. Suppl. 1057; *Holzheimer v. Lit Bros.*, 262 Pa. 150, 105 Atl. 73; *Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040; *Purdy v. Sherman*, 74 Wash. 309, 133 Pac. 440.

#### Verdict against weight of evidence.

—Where the owner of an automobile, having reached his destination, dis-

missed the car which was in the charge of his chauffeur and directed him to go home, but the chauffeur while using the car to visit a physician who was treating him ran down and injured the plaintiff, it was held that it was proper for the court to instruct the jury that while the law presumes that an automobile is in use for the owner, the presumption may be overcome and that under the evidence it was for the jury to say whether the presumption was overcome by the testimony of the defendant and his chauffeur to the effect that the defendant had dismissed the chauffeur and the car for the remainder of the day prior to the accident; but it was further held, that a verdict for the plaintiff based on a finding that the chauffeur was using the automobile in his master's business at the time of the accident was against the weight of the evidence. *Bogorad v. Dix*, 176 N. Y. App. Div. 774, 162 N. Y. Suppl. 992.

11. *National Cash Register Co. v.*

**Sec. 676. Examination of owner before trial.**

Where in an action to recover for personal injuries alleged to have been caused by the negligent operation of an automobile the defendant denies all allegations as to negligence, and it is incumbent upon the plaintiff to show that the defendant was operating the vehicle, and, if not, his relation to the person who was operating it, the plaintiff is entitled to examine the defendant before trial on that question, but is not entitled to an examination upon other questions, if nothing indicates that the examination would be favorable or essential to him.<sup>12</sup> A plaintiff who alleges that he was run down and injured by an automobile operated by the defendant for hire and that said automobile was owned by one of the defendants and was operated by the other defendants in connection with their said business, which facts are denied by the defendants, is entitled to examination of defendants before trial in order to prove that the car was operated by all of the defendants, or by some one of them for whose negligence the others are responsible.<sup>13</sup>

**Sec. 677. Function of jury.**

The question whether a servant is acting within the scope of his master's business in the operation of a motor vehicle is frequently a question for the jury.<sup>14</sup> The scope of the

Williams, 161 Ky. 550, 171 S. W. 162; Weil v. Hagan, 166 Ky. 750, 179 S. W. 835.

12. Brichta v. Simon, 152 App. Div. 832, 137 N. Y. Suppl. 751.

13. Behl v. Greenbaum, 183 N. Y. App. Div. 238, 171 N. Y. Suppl. 129.

14. *United States*.—Benn v. Forrest, 213 Fed. 763, 130 C. C. A. 277.

*Alabama*.—Levine v. Ferlisi, 192 Ala. 362, 68 So. 269; Colley v. Lewis, 7 Ala. App. 593, 61 So. 37; Jenkins Taxicab Co. v. Estes, 201 Ala. 174, 77 So. 700.

*California*.—Adams v. Weisendanger, 27 Cal. App. 590, 150 Pac. 1016.

*Connecticut*.—Carrier v. Donovan, 88

Conn. 37, 89 Atl. 894; Stuart v. Doyle, 112 Atl. 653; Russo v. McAviney, 112 Atl. 657.

*Florida*.—Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975.

*Illinois*.—Johnson v. Hull, 199 Ill. App. 258.

*Kansas*.—Thompson v. Aultman & Taylor Machinery Co., 96 Kans. 259, 150 Pac. 587; Vail v. Marshall Motor Co., 107 Kans. 290, 191 Pac. 579.

*Massachusetts*.—Campbell v. Arnold, 219 Mass. 160, 106 N. E. 599; McKeever v. Ratliffe, 218 Mass. 17, 105 N. E. 552; Roach v. Hinchcliff, 214 Mass. 267, 101 N. E. 383; Reynolds v. Denholm, 213 Mass. 576, 100 N. E. 1006;

employment may be a mixed question of law and fact.<sup>15</sup> "The question as to whether or not the chauffeur was acting within the scope of his authority is generally one of fact for the jury under proper instructions and not a question of law for the court."<sup>16</sup> Or there may be a question for the jury as to the liability of the owner on the theory that he committed his machine to a driver known by him to be incompetent.<sup>17</sup> When the evidence upon the material points is conflicting,<sup>18</sup> or when more than one inference can be drawn from the facts,<sup>19</sup> the question may be one within the province of the jury. In some cases, however, the question may be one of law for the court.

*Donahue v. Vorenberg*, 227 Mass. 1, 116 N. E. 246; *French v. Manning*, 130 N. E. 97.

*Michigan*.—*Houseman v. Karicoffe*, 201 Mich. 420, 167 N. W. 964.

*Minnesota*.—*Emanuelson v. Johnson*, 182 N. W. 521.

*Missouri*.—*Marshall v. Taylor*, 168 Mo. App. 240, 153 S. W. 527; *Whimster v. Holmes*, 177 Mo. App. 130, 164 S. W. 236; *Gordner v. St. Louis Screw Co.*, 201 Mo. App. 349, 210 S. W. 930; *State v. Ellison (Mo.)*, 229 S. W. 1059.

*New Jersey*.—*Geise v. Mercer Bottling Co.*, 87 N. J. Law, 224, 94 Atl. 24; *Missell v. Hayes*, 86 N. J. Law, 348, 91 Atl. 322; *Nell v. Godstrey*, 101 Atl. 50.

*New York*.—*Zorn v. Pendleton*, 163 App. Div. 33, 148 N. Y. Suppl. 370; *Pangburn v. Buick Motor Co.*, 151 App. Div. 756, 137 N. Y. Suppl. 37; *Baker v. Homeopathic Hospital*, 190 App. Div. 39, 179 N. Y. Suppl. 675, modified 231 N. Y. 8; *Shelvin v. Schneider*, 193 App. Div. 107, 183 N. Y. Suppl. 178; *Schreiber v. Matlack*, 90 Misc. 667, 154 N. Y. Suppl. 109.

*North Carolina*.—*Rollins v. City of Winston-Salem*, 176 N. Car. 411, 97 S. E. 211.

*Ohio*.—*White Oak Coal Co. v. Rivoux*, 33 Ohio Cir. Ct. 642.

*Oregon*.—*Darlymple v. Dorey Motor Car Co.*, 66 Oreg. 533, 135 Pac. 91, 48

L. R. A. (N. S.) 424.

*Pennsylvania*.—*Moon v. Matthews*, 227 Pa. St. 488, 76 Atl. 219, 29 L. R. A. (N. S.) 856; *Ley v. Henry*, 50 Pa. Super. Ct. 491, 602; *Maloy v. Rosenbaum Co.*, 260 Pa. 466, 103 Atl. 882.

*Texas*.—*Auto Sales Co. v. Bland*, 194 S. W. 1021.

*Washington*.—*Ottomeier v. Hornberg*, 50 Wash. 316, 97 Pac. 235; *Hammons v. Setzer*, 72 Wash. 550, 130 Pac. 1141.

*West Virginia*.—*Goff v. Clarksburg Dairy Co.*, 103 S. E. 58.

15. *Defoe v. Stratton (N. H.)*, 114 Atl. 29.

16. *Ward v. Teller Reservoir & I. Co.*, 60 Colo. 47, 153 Pac. 219.

17. *Gardiner v. Solomon*, 200 Ala. 115, 75 So. 621.

18. *Lane v. Roth*, 195 Fed. 255; *Johnson v. Hull*, 199 Ill. App. 258; *Schreiber v. Matlack*, 90 Misc. (N. Y.) 667, 154 N. Y. Suppl. 1009; *Darlymple v. Corey Motor Car Co.*, 66 Oreg. 533, 135 Pac. 91, 48 L. R. A. (N. S.) 424; *Curran v. Lorch*, 243 Pa. St. 247, 90 Atl. 62; *Ottomeier v. Hornberg*, 50 Wash. 316, 97 Pac. 235; *Samuels v. Hiawatha Holstein Dairy (Wash.)*, 197 Pac. 24.

19. *Lane v. Roth*, 195 Fed. 255; *Sargent Paint Co. v. Petrovitsky (Ind. App.)*, 124 N. E. 881.

when the facts are uncontroverted.<sup>20</sup> The credibility of the witnesses is generally for the determination of the jury, and the judge should not divide them into two classes, those who were employees of the parties and those who were not.<sup>21</sup> If the question of the liability of the owner is not litigated on the trial, but slight evidence will be required on appeal to establish that the machine was operated in the course of the driver's employment.<sup>22</sup>

20. *Gousse v. Lowe* (Cal. App.), 183 Pac. 295; *Martinelli v. Bond* (Cal. App.), 183 Pac. 461; *Perlmutter v. Byrne*, 193 App. Div. 769, 184 N. Y. Suppl. 580; *Dalrymple v. Corey Motor Car Co.*, 66 Oreg. 533, 135 Pac. 91, 48

L. R. A. (N. S.) 424.

21. *Zamiar v. People's Gas, Light & Coke Co.*, 204 Ill. App. 290.

22. *Fame Laundry Co. v. Henry* (Ind. App.), 131 N. E. 411.

## CHAPTER XXIV.

## STATUS OF GUESTS AND PASSENGERS.

- SECTION 678. Liability of automobilist for injuries to guest.
679. Imputation of driver's negligence to other occupant—majority view.
680. Imputation of driver's negligence to other occupant—minority view.
681. Imputation of driver's negligence to other occupant—statutory change in doctrine of imputed negligence.
682. Imputation of driver's negligence to other occupant—when passenger and driver are engaged in common purpose.
683. Imputation of driver's negligence to other occupant—control by passenger of movement of machine.
684. Imputation of driver's negligence to other occupant—master and servant.
685. Imputation of driver's negligence to other occupant—husband and wife.
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687. Imputation of driver's negligence to other occupant—passenger for hire.
688. Contributory negligence of passenger—in general.
689. Contributory negligence of passenger—lookout for dangers.
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691. Contributory negligence of passenger—riding with intoxicated driver.
692. Contributory negligence of passenger—failure to warn driver of dangers.
693. Contributory negligence of passenger—remaining in machine.
694. Contributory negligence of passenger—permitting driver to run at excessive speed.
695. Contributory negligence of passenger—defective machine.

**Sec. 678. Liability of automobilist for injuries to guest.**

When the occupant of an automobile is injured through the operation of the machine, and it is shown that the driver was negligent and the occupant was not guilty of contributory negligence, it is clear that the latter can maintain an action against the driver and recover compensation for his injuries.<sup>1</sup>

1. *United States*.—See *Kilkenny v. Ala.* 265, 69 So. 875; *Galloway v. Perkins*, 198 Ala. 658, 73 So. 956.

*Alabama*.—*Perkins v. Galloway*, 184

It has been said that the negligence of the defendant is not imputed to the guest, although they are engaged in a common

*Arkansas*.—Carter v. Brown, 136 Ark. 23, 206 S. W. 71.

*California*.—Nichols v. Pacific Elec. Ry. Co., 178 Cal. 630, 174 Pac. 319.

*Georgia*.—Powell v. Berry, 145 Ga. 696, 89 S. E. 753.

*Illinois*.—Masten v. Cousins, 216 Ill. App. 268.

*Iowa*.—Hanan v. Lenander, 168 Iowa, 569, 160 N. W. 18.

*Kansas*.—Bean-Hogan v. Kloehr, 103 Kans. 731, 175 Pac. 976.

*Kentucky*.—Beard v. Klusmeir, 158 Ky. 153, 164 S. W. 319, 50 L. R. A. (N. S.) 1100.

*Louisiana*.—Jacobs v. Jacobs, 141 La. 272, 74 So. 992.

*Maine*.—Avery v. Thompson, 117 Me. 120, 103 Atl. 4.

*Maryland*.—Fitzjarel v. Boyd, 122 Md. 497, 91 Atl. 457.

*Michigan*.—Roy v. Kirn, 175 N. W. 475.

*Missouri*.—Mahaney v. Kansas City Ry. Co. (Mo.), 228 S. W. 821.

*New Jersey*.—Mackenzie v. Oakley, 108 Atl. 771.

*New York*.—Patnode v. Foote, 153 N. Y. App. Div. 494, 138 N. Y. Suppl. 221; Lowell v. Williams, 183 N. Y. App. Div. 701, 170 N. Y. Suppl. 956; Wilms v. Fournier, 111 Misc. 9, 180 N. Y. Suppl. 860.

*North Carolina*.—Gates v. Hall, 171 N. C. 360, 88 S. E. 524.

*North Dakota*.—McKeen v. Iverson, 180 N. W. 805.

*Pennsylvania*.—Steele v. Maxwell Motor Sales Corp., 68 Pitts. Leg. Journ. 97.

*Tennessee*.—Tennessee Cent. R. Co. v. Vanhoy, 226 S. W. 225.

*Utah*.—Lockhead v. Jenson, 42 Utah, 99, 129 Pac. 347.

*Wisconsin*.—Bakula v. Schwab, 167 Wis. 546, 168 N. W. 378.

*England*.—Karavias v. Callinicos (1917), W. N. 323; Harris v. Perry & Co. (1903), 2 K. B. 219.

*Canada*.—Borys v. Christowsky, 27 D. L. R. 792, 9 S. L. R. 181, 34 W. L. R. 346; Parlov v. Lozina, 180 W. N. 139, 47 O. L. R. 376.

**Explanation of rule.**—In *Beard v. Klusmeir*, 158 Ky. 153, 164 S. W. 319, 50 L. R. A. (N. S.) 1100, the court said: "Perhaps the best reasoned opinion upon the subject is found in *Patnode v. Foote*, decided in 1912 by the Appellate Division of the Supreme Court of New York, and reported in 153 App. Div. 494, 138 N. Y. Suppl. 221. In that case *Patnode* invited *Foote* to ride with him in an open buggy drawn by one horse and driven by *Patnode*. There was evidence tending to show that *Patnode* drove at a reckless speed against *Foote's* protest, and that a collision with a wagon, which threw *Foote* violently to the ground, was the result of *Patnode's* careless driving. *Foote* having recovered a verdict for \$400, *Patnode* appealed. In sustaining the recovery the court said: 'The defendant insists, as one of his grounds for reversal of the judgment, that his motion for a nonsuit should have been granted, because the plaintiff was his gratuitous passenger to whom he owed no duty of care. Counsel upon both sides confess their inability to find any reported decision defining the obligation of one who invites another to ride in his private vehicle toward the passenger so invited. After considerable research, we have not been able to find any such decision in this State, but we do find the case of *Pigeon v. Lane*, 80 Conn. 237, 67 Atl. 886, 11 Ann. Cas. 371, which impresses us as stating the true rule. In that case the person in-



enterprise.<sup>2</sup> The fact that the occupant was a guest or gratuitous passenger of the driver or owner of the machine creates

vited to ride in the private vehicle of another is declared to be a licensee, and the duty of the person giving such invitation is stated to be the refraining from doing any "negligent acts by which the danger of riding upon the conveyance was increased or a new danger created," and a summary of the decision is stated in the syllabus as follows: "Such licensee can recover only for the active negligence of the licensor." A person thus invited to ride stands in the same situation as a bare licensee who enters upon real property which the licensor is under no obligation to make safe or keep so, but who is liable only for active negligence. *Birch v. City of New York*, 190 N. Y. 397, 83 N. E. 51, 18 L. R. A. (N. S.) 595. The obligation of one who invites another to ride is not as great as that of the owner of real property who invites another thereon, specially for the purposes of trade or commerce, because, under such circumstances, the one who gives the invitation is bound to exercise ordinary care to keep such property reasonably safe. *Duhme v. Hamburg-American Packet Co.*, 184 N. Y. 404, 77 N. E. 386, 112 Am. St. Rep. 615. Under the above principles, therefore, one who invites another to ride is not bound to furnish a sound vehicle or a safe horse. If he should have knowledge that the vehicle was unfit for transportation or the horse unsafe to drive, another element would arise, and he might be liable for recklessly inducing another to enter upon danger. These latter elements, however, are not involved in the present action, and the duty of the defendant toward the plaintiff only was to use ordinary care not to increase the danger of riding with him or to create a new danger. It was practically upon this theory that

the learned trial court submitted the case to the jury.' We think the rule there stated is the correct rule, and that appellant's duty to the appellee was to use ordinary care not to increase the danger of her riding with him, or to create any new danger. In the case at bar, appellant is charged with creating a new danger by his fast and reckless driving. As said in the Foote case, *supra*, one who invites another to ride is not bound to furnish a safe vehicle, or a safe horse, or a safe automobile; but, if the driver fails to use ordinary care in driving the automobile, he thereby creates a new danger for which he is liable. In order to free themselves from the charge of reckless driving, chauffeurs should never forget that juries usually look upon an automobile as an inherently dangerous contrivance that is likely to go at an unreasonable speed, at any time, if not suppressed."

**Criminal liability.**—If a man undertakes to drive another in a vehicle, he is bound to exercise proper care in regard to the safety of the man under his charge; and if by culpably negligent driving he causes the death of the other, he will be guilty of manslaughter. But he cannot be found guilty of manslaughter if the deceased himself interfered in the management of the vehicle and thereby assisted in bringing about the accident. Even if the doctrine of contributory negligence applies to criminal cases, which is very much doubted, yet there is no contributory negligence on the part of any one in merely getting into a vehicle and allowing himself to be driven, although the driver is perceptibly drunk. *Reg. v. Jones*, 2 Cox. C. C. (Eng.) 544.

2. *Wilmes v. Fournier*, 111 Misc. (N. Y.) 9, 180 N. Y. Suppl. 860. See also, sections 679, 682.

no exception to the general rule.<sup>3</sup> The driver of a motor vehicle is under the obligation of exercising reasonable care, not only for the safety of pedestrians and other travelers, but also for the safe transportation of his guests or other passengers in the machine.<sup>4</sup> The express or implied duty of the owner and driver to the occupant of the car is to exercise reasonable care in its operation and not unreasonably to expose him to danger by increasing the hazard of that method of travel. He must exercise the care and diligence which a man of reasonable prudence, engaged in like business, would exercise for his own protection and the protection of his family and property—a care which must be reasonably commensurate with the nature and hazards attending the particular mode of travel. Failing in this duty, he will be liable to the occupant or guest in the car for injuries which are the result of such carelessness or lack of diligence.<sup>5</sup> But it is doubtful if a wife can recover such damages from her husband with whom she was cohabiting at the time of the injury.<sup>6</sup> And, an owner of an automobile will not be liable for an injury to a person riding in his car without his knowledge but as the guest of the driver.<sup>7</sup> But, if the injured passenger is a guest of the owner of the vehicle, the owner is not released from liability merely because the machine is driven by a chauffeur or a child instead of by the owner.<sup>8</sup> And the owner is not relieved from liability merely because he did not expressly invite the plaintiff to ride in the car, where he was not a trespasser, and his presence was known to and acceded to by the owner.<sup>9</sup> But

3. Galloway v. Perkins, 198 Ala. 658, 73 So. 956; Jacobs v. Jacobs, 141 La. 272, 74 So. 992; Avery v. Thompson, 117 Me. 120, 103 Atl. 4; Roy v. Kirn (Mich.), 175 N. W. 475; Lowell v. Williams, 183 N. Y. App. Div. 701, 170 N. Y. Suppl. 596.

4. Section 277.

5. Perkins v. Galloway, 184 Ala. 265, 69 So. 875; Spring v. McCabe (Cal. App.), 200 Pac. 41; Barnett v. Levy, 213 Ill. App. 129.

6. Heyman v. Heyman, 19 Ga. App. 634, 92 S. E. 25.

7. Powers v. Williamson, 189 Ala.

600, 66 So. 585. And see section 638.

8. Flynn v. Lewis, 231 Mass. 550, 121 N. E. 493, 1 A. L. R. 396; Johnson v. Evans, 141 Minn. 356, 170 N. W. 220, 2 A. L. R. 896; Lowell v. Williams, 183 N. Y. App. Div. 701, 170 N. Y. Suppl. 596.

9. Galloway v. Perkins, 198 Ala. 658, 73 So. 956, wherein it was said: "It was not necessary to a recovery that defendant himself should have expressly invited intestate to ride in the car. The deceased was clearly not a trespasser, and was expressly invited by one of the parties in the automobile,

where the occupant requests the driver to carry him, it has been held that he is a mere licensee as to whom the driver is under no obligation except to refrain from wilful or wanton acts.<sup>10</sup>

In some jurisdictions recognizing degrees of negligence, such as "gross," "ordinary" or "slight" negligence, it may be held that the driver of an automobile taking a gratuitous passenger, is liable only in case of "gross" negligence.<sup>11</sup> But, in those jurisdictions where the courts do not recognize the degrees of negligence, it is said that "ordinary" care under the circumstances measures the duty of the driver of the machine.<sup>12</sup> If the driver attempts to cross a railroad track in

and his presence in the car was known and acceded to by the defendant. The duty of the defendant not to injure the deceased was therefore the same as if he had expressly invited deceased to ride with him. As before remarked, it does seem hard that defendant should be mulcted in damages, when he was attempting to do an act of kindness and courtesy to the deceased and his comrade by taking them, tired and footsore from hunting, into his machine and proceeding to carry them home, and when he was not at all responsible for their being away from home without conveyance. But this kindness and charity, in the eyes of the law, did not excuse defendant from exercising ordinary care not to injure them. If he had been carrying their goods under like conditions, he would not have been liable except for gross negligence or wantonness. But as to the gratuitous carriage of persons the rule, as we have shown is different; the carrier is then liable for failure to exercise reasonable care as to the safety of those gratuitously riding with him, and the fact that he himself is subjected to the same liability or probability of injury, or is himself injured, as are the guests, does not preclude a recovery against him for injury to those who are so riding with

him." See also, *Graham v. Pudwill*, (N. Dak.), 178 N. W. 124.

**Sheriff attempting arrest of driver.**—Where a sheriff stepped on the running board of a car to arrest the driver, but the driver continued to run the car in an attempt to escape and in an ensuing struggle for its control, it struck a bridge support and the sheriff was killed, the liability of the driver was sustained. *Weissengoff v. Davis*, 260 Fed. 16. See also criminal prosecution arising out of same accident. *State v. Weissengoff* (W. Va.), 101 S. E. 450.

10. *Lutvin v. Dopkins* (N. J.), 108 Atl. 862. See also *Crider v. Yolande Coal & Coke Co.* (Ala.), 89 So. 285.

11. *Epps v. Parrish* (Ga. App.), 106 S. E. 297; *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N. E. 168. See also *Flynn v. Lewis*, 231 Mass. 550, 2 A. L. R. 896, 121 N. E. 493.

12. *Washington, etc. R. Co. v. State* (Md.), 111 Atl. 164; *Avery v. Thompson*, 117 Me. 120, 103 Atl. 4; *Bauer v. Gries* (Neb.), 181 N. W. 156; *Pinckard v. Pease* (Wash.), 197 Pac. 49. "Did the defendant exercise toward his invited guest that degree of care and diligence which would seem reasonable and proper from the character of the thing undertaken? The thing undertaken was the transportation of the guest in the defendant's automobile

the face of an approaching train and the machine is struck through his miscalculation of the danger, there may be a liability.<sup>13</sup> If the injury is occasioned through the concurrent negligence of the driver and a third person, they may be liable as joint tort-feasors.<sup>14</sup> The driver is not an insurer of the safety of his passenger, nor, in the case of a guest or gratuitous passenger, is he liable as a common carrier.<sup>15</sup> And contributory negligence of the passenger will defeat his action.<sup>16</sup> Where, in an action against the city of *New York*, brought by a police officer who, while riding in the course of his duty in an automobile owned by the municipality, was injured when a wheel of the car collapsed, the court, instead of taking a general verdict submitted four specific questions of fact, it was error to refuse to charge that the plaintiff was, nevertheless, under the burden of proving the negligence of the defendant or of its employee, the chauffeur.<sup>17</sup>

The act itself involved some danger, because the instrumentality is commonly known to be a machine of tremendous power, high speed, and quick action. All these elements may be supposed to have been within the contemplation of the guest when she accepted the invitation. In a sense she may be said to have assumed the risks ordinarily arising from these elements, provided the machine is controlled and managed by a reasonably prudent man who will not by his own want of due care increase their danger or subject the guest to a newly created danger. In other words, we conceive the true rule to be that the gratuitous undertaker shall be mindful of the life and limb of his guest and shall not unreasonably expose here to additional peril. This would seem to be a sane, sound, and workable rule; one consistent with established legal principles and just to both parties. It leaves the determination of the issue to the jury as a question of fact." *Avery v. Thompson*, 117 Me 120, 103 Atl. 4.

13. *Avery v. Thompson*, 117 Me. 120, 103 Atl. 4.

14. *Jacobs v. Jacobs*, 141 La. 272,

74 So. 992; *Hennekes v. Beetz* (Mo. App.), 217 S. W. 533; *Hays v. House*, 69 Pitts. Leg. Jour. (Pa.) 186.

15. *Coccora v. Vicksburg L. & T. Co.* (Miss.), 89 So. 257; *Warner v. Brill*, 195 App. Div. 64, 185 N. Y. Suppl. 586.

16. *McGeever v. O'Byrne* (Ala.), 82 So. 508; *Howe v. Corey* (Wis.), 179 N. W. 791.

17. *McCormick v. New York*, 162 App. Div. 539, 147 N. Y. Suppl. 917, wherein the court explained its views as follows: "I do not think, however, that the defendant was liable as a matter of law, whether or not this wheel collapsed after it struck the boulder or before, or that the defendant was liable to the deceased if the chauffeur drove the car negligently. Here was a policeman in the discharge of his duty, protecting a city paymaster in performing his duty in paying off the city employees. Both men were engaged in the discharge of duties devolving upon the municipality. While they may not be said to be fellow-workmen in the strict acceptance of that term, they both owed a duty to the defendant and were in the performance of their duty when the accident happened. There is

### Sec. 679. Imputation of driver's negligence to other occupant — majority view.

Though the decisions are not entirely harmonious on the subject, the view established by the overwhelming weight of authority is that the negligence of the driver of a motor vehicle is not imputed to a passenger who has no control over his operation of the machine.<sup>18</sup> To state the rule in other words,

not the slightest evidence that this chauffeur was not a perfectly competent man, or that he was intoxicated or driving the car in a reckless and improper manner. They were on a country road outside of the city limits; the chauffeur, so far as appears from the evidence, was attending to his duties and driving the car, considering the condition of the road and the locality as well as he could. I think it very doubtful whether the finding that the chauffeur was guilty of negligence was sustained by the evidence, but at any rate I do not think that a municipal corporation is liable to one of its employees or a public officer engaged in the business of the municipality because another employee engaged in performing the same duty was negligent. All three men, the paymaster, chauffeur and the police officer, were engaged in the performance of a common duty to the municipal corporation of the city of New York. While engaged in that common employment or performance of a common duty, an accident to the automobile happened, at which time the jury have found that the chauffeur was negligent. There was no finding here that this negligence of the chauffeur caused the accident which resulted in the death of the deceased. There was a simple abstract question as to whether the driver of the machine was negligent, to which the jury answered "Yes." I do not think that that finding standing alone was sufficient to justify a general verdict against the defendant for the injuries which were

caused by the accident to the automobile."

**18. United States.**—City of Baltimore v. State of Maryland, 166 Fed. 641; Dale v. Denver City Tramway Co., 173 Fed. 787, 97 C. C. A. 511; Long Island R. Co. v. Darnell, 221 Fed. 191; Lehigh Valley R. Co. v. Emens, 231 Fed. 636, 145 C. C. A. 522.

**Alabama.**—Birmingham, etc. Co. v. Carpenter, 194 Ala. 141, 69 So. 626; Galloway v. Perkins, 198 Ala. 658, 73 So. 956; McGeever v. O'Byrne, 82 So. 508; Birmingham So. R. Co. v. Harrison, 203 Ala. 284, 82 So. 534; Birmingham Ry. I. & P. Co. v. Barranco, 203 Ala. 639.

**Arkansas.**—Carter v. Brown, 136 Ark. 23, 206 S. W. 71; Miller v. Ft. Smith Light & Tract. Co., 206 S. W. 329; Pine Bluff Co. v. Whitelaw, 227 S. W. 13.

**California.**—Bresee v. Los Angeles Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. (N. S.) 1059; Thompson v. Los Angeles, etc. R. Co., 165 Cal. 748, 134 Pac. 709; Lynn v. Goodwin, 170 Cal. 112, 148 Pac. 927; Parmenter v. McDougall, 173 Cal. 306, 156 Pac. 460; Bryant v. Pacific Elec. Ry. Co., 174 Cal. 737, 164 Pac. 385; Lininger v. San Francisco, etc. R. Co., 18 Cal. App. 411, 123 Pac. 235; Irwin v. Golden State Auto Tour Co., 178 Cal. 10, 171 Pac. 1059; Wiley v. Young, 178 Cal. 681, 174 Pac. 316; Ellis v. Central California Tract. Co., 37 Cal. App. 390, 174 Pac. 407; De Sota v. Pacific Elec. Ry. Co. (Cal. App.), 193 Pac. 270; Stewart v. San Joaquin L. & P. Co.,

the negligence of the driver of the machine does not defeat the remedy of a passenger who sustains an injury by reason of the negligence of another person.<sup>19</sup> Clearly the negligence

186 Pac. 160; *Carpenter v. Atcheson*, etc. Ry. Co. (Cal. App.), 195 Pac. 1073.

*Colorado*.—*Denver Tramway Co. v. Orbach*, 64 Colo. 511, 172 Pac. 1063.

*Connecticut*.—*Clarke v. Connecticut St. Ry. Co.*, 83 Conn. 219, 76 Atl. 523; *Sampson v. Wilson*, 89 Conn. 707, 96 Atl. 163; *Weidlich v. New York*, etc. R. Co., 93 Conn. 438, 106 Atl. 323.

*Georgia*.—*Adamson v. McEwan*, 12 Ga. App. 508, 77 S. E. 591; *Wilkinson v. Bray* (Ga. App.), 108 S. E. 133.

*Illinois*.—*Eckels v. Muttshall*, 230 Ill. 462, 82 N. E. 872; *Opp v. Pryor*, 128 N. E. 580; *Gaffney v. Dixon*, 157 Ill. App. 589; *Sutton v. City of Chicago*, 195 Ill. App. 261; *Ferry v. City of Waukegan*, 205 Ill. App. 109; *Vanek v. Chicago City Ry. Co.*, 210 Ill. App. 148; *Fredericks v. Chicago Rys. Co.*, 208 Ill. App. 172; *Deheave v. Hines*, 217 Ill. App. 427.

*Indiana*.—*Indiana Union Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005; *Pittsburgh*, etc. R. Co. v. *Kepherth*, 61 Ind. App. 621, 112 N. E. 251; *Chicago I. & L. Ry. Co. v. Lake County Savings & Trust Co.*, 186 Ind. 358, 114 N. E. 454; *Union Traction Co. of Indiana v. Haworth*, 187 Ind. 451, 115 N. E. 753; *Lake Erie & W. R. Co. v. Howarth* (Ind. App.), 124 N. E. 687.

*Iowa*.—*Lawrence v. Sioux City*, 172 Iowa. 320, 154 N. Y. 494; *Stoker v. Tri-City Ry. Co.*, 182 Iowa, 1090, 165 N. W. 30; *Nels v. Rider*, 185 Iowa, 781, 171 N. W. 150; *Willis v. Schertz*, 175 N. W. 327; *Wagner v. Kloster*, 175 N. W. 840; *Borg v. Des Moines City Ry. Co.*, 181 N. W. 10.

*Kansas*.—*Williams v. Withington*, 88 Kan. 809, 129 Pac. 1148; *Corley v. Atchison*, etc. Ry. Co., 90 Kans. 70, 133 Pac. 555; *Anthony v. Kiefner*, 96 Kans. 194, 150 Pac. 524; *Denton v. Missouri, K. & T. Ry. Co.*, 97 Kans.

498, 155 Pac. 812; *Burzie v. Joplin*, etc. Ry. Co., 102 Kans. 287, 562, 171 Pac. 351; *Schaefer v. Arkansas Valley Interurban Ry. Co.*, 179 Pac. 323.

*Kentucky*.—*Livingston & Co. v. Philley*, 155 Ky. 224, 159 S. W. 665; *Hackworth v. Ashby*, 165 Ky. 796, 178 S. W. 1074; *Collins Ex'rs v. Standard Acc. Ins. Co.*, 170 Ky. 27, 185 S. W. 112; *Coughlin v. Mark*, 173 Ky. 728, 191 S. W. 503; *Winston's Adm'r v. City of Henderson*, 179 Ky. 220, 200 S. W. 330; *Louisville & N. R. Co. v. Scott's Adm'r*, 184 Ky. 319, 211 S. W. 747.

*Louisiana*.—*Roby v. Kansas City Southern Ry. Co.*, 130 La. 880, 58 So. 696, 41 L. R. A. (N. S.) 355; *Broussard v. Louisiana Western R. Co.*, 140 La. 517, 73 So. 606; *Jacobs v. Jacobs*, 141 La. 272, 74 So. 992; *Peterson v. New Orleans Ry. & Light Co.*, 152 La. 835, 77 So. 647; *Maritzky v. Shreveport Rys. Co.* (144 La.), 692, 81 So. 253; *Dauil v. New Orleans Ry. & L. Co.*, 147 La. 1012, 86 So. 477.

*Maine*.—*Pease v. Gardner*, 113 Me. 264, 93 Atl. 550; *Cobb v. Cumberland County Power & Light Co.*, 104 Atl. 844.

*Maryland*.—*United Rys. & Elec. Co. v. Crain*, 123 Md. 332, 91 Atl. 405; *Baltimore & O. R. Co. v. State to Use of McCabe*, 133 Md. 219, 104 Atl. 465; *Washington*, etc. R. Co. v. *State*, 111 Atl. 164; *McAdoo v. State*, 111 Atl. 476; *Chiswell v. Nichols*, 112 Atl. 363.

*Massachusetts*.—*Schultz v. Old Colony St. Ry. Co.*, 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. \*St. Rep. 502, 9 Ann. Cas. 402; *Miller v. Boston & Northern Street Ry.*, 197 Mass. 535, 83 N. E. 990; *Chadbourne v. Springfield Ry. Co.*, 199 Mass. 574, 85 N. E. 737; *Loftus v. Pelletier*, 223 Mass. 63, 111 N. E. 712;

of one passenger is not ordinarily to be imputed to another

*Griffin v. Hustis*, 234 Mass. 95. 125 N. E. 387; *Fahy v. Director General*, 126 N. E. 784.

*Michigan*.—*Ommen v. Grand Trunk Western Ry.*, 169 N. W. 914.

*Minnesota*.—*Ward v. Meeds*. 114 Minn. 18, 130 N. W. 2; *Carnegie v. Great Northern R. Co.*, 128 Minn. 14, 150 N. W. 164; *Zenner v. Great Northern Ry. Co.*, 135 Minn. 37, 159 N. W. 1087; *Kokesh v. Price*, 136 Minn. 304, 161 N. W. 715; *McDonald v. Mesaba Ry. Co.*, 137 Minn. 275. 163 N. W. 298; *Carson v. Turrish*, 140 Minn. 445. 168 N. W. 349; *Praught v. Great Northern Ry. Co.*, 144 Minn. 309, 175 N. W. 998.

*Mississippi*.—*Hines v. McCullers*, 121 Miss. 666. 83 So. 734.

*Missouri*.—*Tannehill v. Kansas City, etc. Ry. Co.*, 279 Mo. 158, 213 S. W. 818; *Mahaney v. Kansas City Rys. Co. (Mo.)*, 228 S. W. 821; *Zaloutuchin v. Metropolitan St. Ry. Co.*, 127 Mo. App. 577, 106 S. W. 548; *Turney v. United Rys. of St. Louis*, 155 Mo. App. 513. 135 S. W. 93; *Rush v. Metropolitan St. R. Co.*, 157 Mo. App. 504, 137 S. W. 1029; *McFadden v. Metropolitan St. Ry. Co.*, 161 Mo. App. 652, 143 S. W. 884; *Byerley v. Metropolitan St. R. Co.*, 172 Mo. App. 470, 158 S. W. 413; *Graham v. Sly*, 177 Mo. App. 348. 164 S. W. 136; *Rappaport v. Roberts (Mo. App.)*, 203 S. W. 676; *Lawler v. Montgomery (Mo. App.)*, 217 S. W. 856; *Davis v. City L. & T. Co. (Mo. App.)*, 222 S. W. 884.

*Montana*.—*Sherris v. Northern Pac. Ry. Co.*, 55 Mont. 189, 175 Pac. 269.

*Nebraska*.—*Loso v. Lancaster County*, 77 Neb. 466, 109 N. W. 752. 8 L. R. A. (N. S.) 618; *Reudelhuber v. Douglas County*, 100 Neb. 687, 161 N. W. 174; *Berlo v. Omaha, etc. Ry. Co.*, 178 N. W. 912.

*New Hampshire*.—*Collins v. Hustis*, 111 Atl. 286.

*New Jersey*.—*Horandt v. Central R.*

*Co.*, 81 N. J. Law, 488, 83 Atl. 511; *Lange v. New York etc. R. Co.*, 89 N. J. Law, 604, 99 Atl. 346.

*New York*.—*Ward v. Brooklyn Heights R. Co.*, 119 App. Div. 487, 104 N. Y. Suppl. 95; *Noakes v. New York Central, etc. R. Co.*, 121 App. Div. 716, 106 N. Y. Suppl. 522. affirmed 195 N. Y. 543, 88 N. E. 1126; *Terwilliger v. Long Island R. Co.*, 152 App. Div. 168, 136 N. Y. Suppl. 733; *Harding v. City of New York*, 181 N. Y. App. Div. 251, 168 N. Y. Suppl. 265; *Sinica v. New York Rys. Co.*, 190 App. Div. 727, 180 N. Y. Suppl. 377.

*North Carolina*.—*Hunt v. North Carolina R. Co.*, 170 N. Car. 442. 87 S. E. 210; *McMillian v. Atlanta & C. Air Line Ry. Co.*, 172 N. C. 853, 90 S. E. 683; *Pusey v. Atlantic Coast Line R. Co.*, 106 S. E. 452; *Parker v. Seaboard Air Line Ry.*, 106 S. E. 755.

*North Dakota*.—*Chambers v. Minneapolis, etc. Ry. Co.*, 37 N. Dak. 377. 163 N. W. 824.

*Ohio*.—*Toledo Rys. & Light Co. v. Mayers*, 93 Ohio St. 304. 112 N. E. 1014.

*Oklahoma*.—*St. Louis & S. F. R. Co. v. Bell*, 58 Okla. 84, 159 Pac. 336.

*Oregon*.—*Rogers v. Portland, etc. P. Co.*, 66 Oreg. 244, 134 Pac. 9; *Tonseth v. Portland, etc. Co.*, 70 Oreg. 341, 141 Pac. 868; *Sanders v. Taber*, 79 Oreg. 522, 155 Pac. 1194 (motor cycle); *White v. Portland Gas & Coke Co.*, 84 Oreg. 643. 165 Pac. 1005; *Robinson v. Oregon-Washington R. & Nav. Co.*, 90 Oreg. 490, 176 Pac. 594.

*Pennsylvania*.—*Wachsmith v. Baltimore & O. R. Co.*, 233 Pa. St. 465. 82 Atl. 755; *Senft v. Western Md. Ry. Co.*, 246 Pa. St. 446, 92 Atl. 553; *Dunlap v. Philadelphia Rapid Transit Co.*, 248 Pa. St. 130. 93 Atl. 873; *Hardie v. Barrett*, 257 Pa. 42, 101 Atl. 75 *Sission v. City of Philadelphia*, 248 Pa. 140, 93 Atl. 936; *Vocca v. Pennsylvania R. Co.*, 259 Pa. St. 42, 102 Atl.

passenger.<sup>20</sup> In case of the concurring negligence of two persons resulting in an injury to an occupant of an automobile, both may be liable jointly or severally for the tort.<sup>21</sup> To the general rule certain exceptions are to be granted. Thus, it is said, if the driver and the passenger are engaged in a common purpose or joint enterprise, the negligence of the driver may be the negligence of the other occupant.<sup>22</sup> Another apparent exception exists when the negligence of the driver is the sole proximate cause of the injury.<sup>23</sup> This exception is

283; *Wanner v. Philadelphia, etc. Ry. Co.*, 261 Pa. 273, 104 Atl. 570; *Martin v. Pennsylvania R. Co.*, 265 Pa. St. 282, 108 Atl. 631; *Keinath v. Bullock*, 110 Atl. 755.

*Rhode Island*.—*Hermann v. Rhode Island Co.*, 36 R. I. 447, 90 Atl. 813.

*South Carolina*.—*Latimer v. Anderson County*, 95 S. Car. 187, 78 S. E. 879.

*Tennessee*.—*Knoxville Ry. & Light Co. v. Vangilden*, 132 Tenn. 487, 178 S. W. 1117.

*Texas*.—*Routledge v. Rambler Auto Co.* (Civ. App.), 95 S. W. 749; *Lyon v. Phillips*, 196 S. W. 995; *El Paso Elec. Ry. Co. v. Benjamin* (Civ. App.), 202 S. W. 996; *Chicago, etc. R. Co. v. Wentzel* (Civ. App.), 214 S. W. 710; *Chicago, etc. R. Co. v. Johnson* (Civ. App.), 224 S. W. 277.

*Utah*.—*Montague v. Salt Lake & U. R. Co.*, 52 Utah. 368, 174 Pac. 871; *Cowan v. Salt Lake, etc. R. Co.*, 189 Pac. 599.

*Vermont*.—*Wentworth v. Waterbury*, 90 Vt. 60, 96 Atl. 334; *Bancroft v. Cote*, 90 Vt. 358, 98 Atl. 915; *Howe v. Central Vermont Ry. Co.*, 91 Vt. 485, 101 Atl. 45; *Lee v. Donnelly*, 113 Atl. 542.

*Virginia*.—*Virginia Ry. & Power Co. v. Gorsuch*, 120 Vt. 655, 91 S. E. 632; *Clark v. Columbus, etc. Co.*, 108 S. E. 178.

*Washington*.—*Beach v. City of Seattle*, 85 Wash. 379, 148 Pac. 39; *Dillabough v. Okanogan County*, 105 Wash.

609, 178 Pac. 802.

*Wisconsin*.—*Reiter v. Grober*, 181 N. W. 739.

**Steam roller**.—The negligence of the driver of a steam roller is not imputed to a helper riding thereon. *Moreno v. Los Angeles Transfer Co.* (Cal. App.), 186 Pac. 800.

**Prospective passenger**.—The negligence of the driver of a vehicle is not imputed to a person who is struck by an automobile while he is entering such vehicle. *Irwin v. Golden State Auto. Tour Co.*, 178 Cal. 10, 171 Pac. 1059.

**Military service**.—The negligence of a sergeant, driving an army truck may not be imputed to the soldiers riding therein. *Charleston, etc. R. Co. v. Alwang*, 258 Fed. 297.

19. *Colorado Springs, etc. R. Co. v. Cohen*, 16 Colo. 149, 180 Pac. 307; *Indiana Union Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005; *Denton v. Missouri, K. & T. Ry. Co.*, 97 Kans. 498, 155 Pac. 812; *Hackworth v. Ashby*, 165 Ky. 796, 178 S. W. 1074; *Veach's Adm'r v. Louisville, etc. Ry. Co.* (Ky.), 228 S. W. 35; *Tonseth v. Portland, etc. Co.*, 70 Oreg. 341, 141 Pac. 868.

20. *Baker v. Streater* (Tex. Civ. App.), 221 S. W. 1039.

21. *Kilkenny v. Bockins*, 187 Fed. 582; *Coleman v. Minneapolis St. R. Co.*, 113 Minn. 364, 129 N. W. 762.

22. Section 682.

23. *Alabama*.—*Karples v. City Ice Delivery Co.*, 198 Ala. 449, 73 So. 642.



more accurately stated as a rule of proximate cause. That is to say, to take a concrete case, when an automobile collides with a railroad train and a passenger is injured, if the negligence of the driver of the machine can be said to be the sole proximate cause of the injury, the railroad company escapes liability, not so much on the theory of contributory negligence of the driver as on the ground that no negligence on its part is shown.<sup>24</sup> Under the general rule, if a guest or passenger in a vehicle is injured by reason of a collision with another vehicle,<sup>25</sup> or with a railroad train<sup>26</sup> or street railway car,<sup>27</sup> or

*Indiana*.—Lake Erie & W. R. Co. v. Howarth (Ind. App.), 124 N. E. 687.

*Kentucky*.—Louisville & N. R. Co. v. Scott's Adm'r. 184 Ky. 319, 211 S. W. 747.

*Maryland*.—Washington, etc. R. Co. v. State (Md.), 111 Atl. 164.

*North Carolina*.—Bagwell v. Southern Ry. Co., 167 N. Car. 611, 83 S. E. 814; McMillian v. Atlanta & C. Air Line Ry. Co., 172 N. Car. 853, 90 S. E. 683.

*Oregon*.—White v. Portland Gas & Coke Co., 84 Ore. 643, 165 Pac. 1005.

24. Bagwell v. Southern Ry. Co., 167 N. Car. 611, 83 S. E. 814.

25. Irwin v. Golden State Auto Tour Co., 178 Cal. 10, 171 Pac. 1059; Sampson v. Wilson, 89 Conn. 707, 96 Atl. 163; Williams v. Withington, 88 Kan. 809, 129 Pac. 1148; Hackworth v. Ashby, 165 Ky. 796, 178 S. W. 1074; Chiswell v. Nichols (Md.), 112 Atl. 363; Ward v. Meeds, 114 Minn. 18, 130 N. W. 2; Kokesh v. Price, 136 Minn. 304, 161 N. W. 715; Carson v. Turrish, 140 Minn. 445, 168 N. W. 349; Sanders v. Taber, 79 Ore. 522, 155 Pac. 1194; Baneroft v. Cote, 90 Vt. 358, 98 Atl. 915.

26. *United States*.—Lehigh Valley R. Co. v. Emens, 231 Fed. 636, 145 C. C. A. 522.

*Alabama*.—Birmingham, etc. Co. v. Carpenter, 194 Ala. 141, 69 So. 626; Birmingham So. R. Co. v. Harrison, 203 Ala. 284, 82 So. 534.

*California*.—Ellis v. Central California Tract. Co., 37 Cal. App. 390, 174 Pac. 407; Carpenter v. Atchison, etc. Ry. Co. (Cal. App.), 195 Pac. 1073.

*Indiana*.—Pittsburgh, etc. R. Co. v. Kephert, 61 Ind. App. 621, 112 N. E. 251; Chicago I. & L. Ry. Co. v. Lake County Savings & Trust Co., 186 Ind. 358, 114 N. E. 454; Lake Erie & W. R. Co. v. Howarth (Ind. App.), 124 N. E. 687.

*Kansas*.—Corley v. Atchison, etc. Ry. Co., 90 Kans. 70, 133 Pac. 555; Denton v. Missouri, K. & T. Ry. Co., 97 Kans. 498, 155 Pac. 812; Burzio v. Joplin, etc. Ry. Co., 102 Kans. 287, 562, 171 Pac. 351.

*Kentucky*.—Louisville & N. R. Co. v. Scott's Adm'r, 184 Ky. 319, 211 S. W. 747; Veach's Adm'r v. Louisville, etc. Ry. Co., 228 S. W. 35.

*Louisiana*.—Broussard v. Louisiana Western R. Co., 140 La. 517, 73 So. 606.

*Maryland*.—Baltimore & O. R. Co. v. State to Use of McCabe, 133 Md. 219, 104 Atl. 465; McAdoo v. State, 111 Atl. 476.

*Michigan*.—Ommen v. Grand Trunk Western Ry., 204 Mich. 392, 169 N. W. 914.

*Minnesota*.—Carnegie v. Great Northern R. Co., 128 Minn. 14, 150 N. W. 164; Zenner v. Great Northern Ry. Co., 135 Minn. 37, 159 N. W. 1087.

*New Hampshire*.—Collins v. Hustis, 111 Atl. 286.

on account of defects in the highways or bridges,<sup>28</sup> and he has no control over the driver and is not guilty of contributory

*New Jersey.*—*Lange v. New York*, etc. R. Co., 89 N. J. L. 604, 99 Atl. 346.

*New York.*—*Noakes v. New York Central*, etc. R. Co., 121 App. Div. 716, 106 N. Y. Suppl. 522, affirmed 195 N. Y. 543, 88 N. E. 1126; *Terwilliger v. Long Island R. Co.*, 152 App. Div. 168, 136 N. Y. Suppl. 733. "The duty which is imposed upon a passenger in a vehicle crossing a steam railroad track and the question as to the extent that a passenger in a vehicle is precluded from recovering by reason of the negligence of the driver or person operating the motive power of the vehicle have been discussed, but it is settled in this State that the contributory negligence of the driver or operator of the vehicle is not chargeable against a passenger, but that in such a case the passenger is to be judged by the duty that the law imposes upon him under the circumstances existing at the time of the accident. There is no doubt but that a traveler approaching a railroad track is bound before crossing the track to use both his eyes and his ears to discover if possible whether a train is approaching." *Noakes v. New York Central*, etc. R. Co., 121 App. Div. 716, 106 N. Y. Suppl. 522, affirmed 195 N. Y. 543, 88 N. E. 1126.

*North Carolina.*—*Hunt v. North Carolina R. Co.*, 170 N. Car. 442, 87 S. E. 210.

*Oklahoma.*—*St. Louis & S. F. R. Co. v. Bell*, 58 Okla. 84, 159 Pac. 336.

*Oregon.*—*Robinson v. Oregon-Washington R. & Nav. Co.*, 90 Ore. 490, 176 Pac. 594.

*Pennsylvania.*—*Wachsmith v. Baltimore & O. R. Co.*, 233 Pa. St. 465, 82 Atl. 755; *Senft v. Western Md. Ry. Co.*, 246 Pa. St. 446, 92 Atl. 553; *Vocca v. Pennsylvania R. Co.*, 259 Pa. St. 42, 102 Atl. 283.

*Texas.*—*Chicago*, etc. R. Co. v. John-

son (Civ. App.), 224 S. W. 277.

*Utah.*—*Montague v. Salt Lake & U. R. Co.*, 52 Utah, 368, 174 Pac. 871.

27. *United States.*—*Dale v. Denver City Tramway Co.*, 173 Fed. 787, 97 C. C. A. 511.

*Alabama.*—*Birmingham Ry. L. & P. Co. v. Barranco*, 203 Ala. 639, 84 So. 839.

*Arkansas.*—*Pine Bluff Co. v. White-law*, 227 S. W. 13.

*California.*—*Thompson v. Los Angeles*, etc. R. Co., 165 Cal. 748, 134 Pac. 709; *Lininger v. San Francisco*, etc. R. Co., 18 Cal. App. 411, 123 Pac. 235.

*Colorado.*—*Denver Tramway Co. v. Orbach*, 64 Colo. 511, 172 Pac. 1063.

*Illinois.*—*Eckels v. Muttschall*, 230 Ill. 462, 82 N. E. 872; *Fredericks v. Chicago Rys. Co.*, 208 Ill. App. 172.

*Indiana.*—*Indiana Union Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005.

*Iowa.*—*Stoker v. Tri-City Ry. Co.*, 182 Iowa, 1090, 165 N. W. 30; *Borg v. Des Moines City Ry. Co.*, 181 N. W. 10.

*Louisiana.*—*Daull v. New Orleans Ry. L. Co.*, 147 La. 1012, 86 So. 477.

*Maryland.*—*Washington*, etc. R. Co. v. State, 111 Atl. 164.

*Massachusetts.*—*Chadbourne v. Springfield Ry. Co.*, 199 Mass. 574, 85 N. E. 737.

*Minnesota.*—*McDonald v. Mesaba Ry. Co.*, 137 Minn. 275, 163 N. W. 298.

*Missouri.*—*Turney v. United Rys. of St. Louis*, 155 Mo. App. 513, 135 S. W. 93; *Rush v. Metropolitan St. R. Co.*, 157 Mo. App. 504, 137 S. W. 1029.

*New York.*—*Ward v. Brooklyn Heights R. Co.*, 119 App. Div. 487, 104 N. Y. Suppl. 95.

*Ohio.*—*Toledo Rys. & Light Co. v. Mayers*, 93 Ohio St. 304, 112 N. E. 1014.

*Oregon.*—*Rogers v. Portland*, etc. P.

negligence, he will not be barred from a recovery for his injuries, merely because the driver of the machine was guilty of negligence. With especial force does the rule apply when the passenger is merely a guest or gratuitous passenger, and there is no family or business relation between him and the driver or owner of the machine.<sup>29</sup> And the fact that the owner

Co., 66 Oreg. 244, 134 Pac. 9; Tonseth v. Portland, etc. Co. 70 Oreg. 341, 141 Pac. 868.

*Pennsylvania*.—Keinath v. Bullock, 110 Atl. 755.

*Texas*.—El Paso Elec. Ry. Co. v. Benjamin (Civ. App.), 202 S. W. 996.

*Virginia*.—Virginia Ry. & Power Co. v. Gorsuch, 120 Va. 655, 91 S. E. 632.

28. *City of Baltimore v. State of Maryland*, 166 Fed. 641; *De Sota v. Pacific Elec. Ry. Co.* (Cal. App.). 193 Pac. 270; *Ferry v. City of Waukegan*, 205 Ill. App. 109; *Lawrence v. Sioux City*, 172 Iowa, 320, 154 N. W. 494; *Loso v. Lancaster County*, 77 Neb. 466, 109 N. W. 752, 8 L. R. A. (N. S.) 618; *Keudelhuber v. Douglas County*, 100 Neb. 687, 161 N. W. 174; *Harding v. City of New York*, 181 N. Y. App. Div. 251, 168 N. Y. Suppl. 265; *Latimer v. Anderson County*, 95 S. Car. 187, 78 S. E. 879; *Knoxville Ry. & Light Co. v. Vangilden*, 132 Tenn. 487, 178 S. W. 1117; *Dillabough v. Okanogan County*, 105 Wash. 609, 178 Pac. 802.

29. *United States*.—*Dale v. Denver City Tramway Co.*, 173 Fed. 787, 97 C. C. A. 511.

*Alabama*.—*Galloway v. Perkins*, 198 Ala. 658, 73 So. 956.

*California*.—*Lininger v. San Francisco, etc. R. Co.*, 18 Cal. App. 411, 123 Pac. 235.

*Connecticut*.—*Sampson v. Wilson*, 89 Conn. 707, 96 Atl. 163.

*Indiana*.—*Indiana Union Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005; *Pittsburgh, etc. R. Co. v. Kephert*, 61 Ind. App. 621, 112 N. E. 251; *Union Traction Co. of Indiana v. Hawthorth*, 187 Ind. 451, 115 N. E. 753.

*Iowa*.—*Lawrence v. Sioux City*, 172 Iowa, 320, 154 N. W. 494.

*Kansas*.—*Corley v. Atchison, etc., Ry. Co.*, 90 Kans. 70, 133 Pac. 555.

*Kentucky*.—*Hackworth v. Ashby*, 165 Ky. 796, 178 S. W. 1074; *Collins Ex'rs v. Standard Acc. Ins. Co.*, 170 Ky. 27, 185 S. W. 112; *Coughlin v. Mark*, 173 Ky. 728, 191 S. W. 503.

*Louisiana*.—*Jacobs v. Jacobs*, 141 La. 272, 74 So. 992.

*Massachusetts*.—*Chadbourn v. Springfield Ry. Co.*, 199 Mass. 574, 85 N. E. 737.

*Minnesota*.—*Carnegie v. Great Northern R. Co.*, 128 Minn. 14, 150 N. W. 164; *Zenner v. Great Northern Ry. Co.*, 135 Minn. 37, 159 N. W. 1087; *Carson v. Turrish*, 140 Minn. 445, 168 N. W. 349.

*Missouri*.—*Turney v. United Rys. of St. Louis*, 155 Mo. App. 513, 135 S. W. 93; *Graham v. Sly*, 177 Mo. App. 348, 164 S. W. 136; *Rappaport v. Robert* (Mo. App.), 203 S. W. 676.

*New York*.—*Ward v. Brooklyn Heights Car Co.*, 119 App. Div. 487, 104 N. Y. Suppl. 95; *Terwilliger v. Long Island R. Co.*, 152 App. Div. 168, 136 N. Y. Suppl. 722; *Sinea v. New York Rys. Co.*, 190 App. Div. 727, 180 N. Y. Suppl. 377.

*North Dakota*.—*Chambers v. Minneapolis, etc. Ry. Co.*, 37 N. Dak. 377, 163 N. W. 824.

*Ohio*.—*Toledo Rys. & Light Co. v. Mayers*, 93 Ohio St. 304, 112 N. E. 1014.

*Oklahoma*.—*St. Louis, etc. R. Co. v. Bell*, 58 Okla. 84, 159 Pac. 336.

*Oregon*.—*Rogers v. Portland, etc. P. Co.*, 66 Oreg. 244, 134 Pac. 9; *Tonseth*

of an automobile permits his guest to give some directions to the chauffeur as to the running of the machine, does not make the chauffeur an agent of the guest so as to charge his negligence to the guest.<sup>30</sup> Thus the negligence of a young gentleman driving an automobile will not be imputed to a young lady who is riding with him on a pleasure trip.<sup>31</sup>

### Sec. 680. Imputation of driver's negligence to other occupant — minority view.

In *England* it was formerly held that one who voluntarily becomes a passenger in a conveyance thereby so identifies himself with the driver that he cannot recover for an injury negligently inflicted by a third person, if the driver's negligence was a contributing cause.<sup>32</sup> This view was afterwards repudiated in that country,<sup>33</sup> and has not been followed to any considerable extent in this country, but there are, nevertheless, decisions which support it.<sup>34</sup> The courts of *Wisconsin*, after following the general doctrine for fifty years, have finally repudiated it.<sup>35</sup> The theory or fiction in law on which these decisions are based is that the relation between the driver and injured occupant is that of principal and agent or master and servant. Where, as in the case of an infant, the injured person is incompetent to enter into a contract of agency, the doctrine is not applied. Hence, the negligence of the driver is not imputed to a minor riding in the machine.<sup>36</sup> And the

v. Portland, etc. Co., 70 Oreg. 341. 141 Pac. 868; Sanders v. Taber, 79 Oreg. 522, 155 Pac. 1194.

*Pennsylvania*.—Vocca v. Pennsylvania R. Co., 259 Pa. St. 42, 102 Atl. 283.

*Texas*.—Lyon v. Phillips (Civ. App.), 196 S. W. 995; El. Paso Elec. Ry. Co. v. Benjamin (Civ. App.), 202 S. W. 996.

30. Collins Exr's v. Standard Accident Ins. Co., 170 Ky. 27, 185 S. W. 112.

31. Turney v. United Rys. of St. Louis. 155 Mo. App. 513. 135 S. W. 93.

32. Thorogood v. Bryan, 8 C. B. (Eng.) 115.

33. The Bernina, L. R. 12 Prob. Div. (Eng.) 58.

34. Kneeshaw v. Detroit United Ry., 169 Mich. 697, 135 N. W. 903; Granger v. Farrant. 179 Mich. 19, 146 N. W. 218; Jewell v. Rogers, Tp., 208 Mich. 318, 175 N. W. 151; Puhr v. Chicago, etc. R. Co. (Wis.), 176 N. W. 767. See also Webber v. Billings, 184 Mich. 119 150 N. W. 332.

35. Reiter v. Grober (Wis.), 181 N. W. 739.

36. Donlin v. Detroit United Ry., 198 Mich. 327. 164 N. W. 447. See also Gulesarian v. Madison Rys. Co. (Wis.). 179 N. W. 573.

doctrine is not applied when the passenger sues the driver for his injuries.<sup>37</sup>

**Sec. 681. Imputation of driver's negligence to other occupant — statutory change in doctrine of imputed negligence.**

In *Alabama*, the Legislature enacted a statute providing, "The contributory negligence of the person operating or driving any motor vehicle in this State shall be imputed to every occupant of said motor vehicle at the time of such negligence in actions brought by such occupant or his personal representatives for the recovery for damages for death or personal injury whether the relation of principal and agent exists between such person operating or driving such motor vehicle and such occupant or not, provided that the provisions of this section shall not apply to passengers paying fare and riding in a motor vehicle regularly used for public hire." The courts, however, have held that the enactment was unconstitutional in that it was an unjust discrimination between persons riding in motor vehicles and those riding in other classes of conveyances.<sup>38</sup> The *Massachusetts* statute in some

37. *Roy v. Kirn* (Mich.), 175 N. W. 475; *Howe v. Corey* (Wis.), 179 N. W. 791.

38. *Birmingham, etc. Co. v. Carpenter*, 194 Ala. 141, 69 So. 626, wherein it was said: "We are convinced that section 34 should be stricken down as being repugnant both to our State and Federal Constitutions. It is an unwarranted and unjust discrimination between persons of the same class: that is, it discriminates against persons riding in motor vehicles, because it does not reach those riding in any other kind of vehicles under similar terms and conditions. It may be that the motor vehicle, because of its mechanism and capacity for speed, as well as its rather recent appearance and general use, is considered more dangerous than other vehicles in common use before it became such a general instrument of

use and travel— as was the case when the coal oil lamp succeeded the tallow candle; yet it is a vehicle of most common use, and is recognized as having the right to the use of our highways in common with all the other modes of travel, possessing the same general rights and subject to the same general rules as to the duties and liabilities owing to the public, and the occupants of the same should enjoy the same legal protection according to persons riding or traveling in other vehicles. We do not mean to hold that the legislature cannot enjoin upon motor vehicle operatives certain duties and restrictions not placed upon other vehicles of an inherently different nature and character, for the protection of the public. But the right to do this does not authorize the penalizing of people who ride in the same, by de-

cases imputes gross negligence to one who has intrusted himself to the driver.<sup>39</sup>

**Sec. 682. Imputation of driver's negligence to other occupant — when passenger and driver are engaged in common purpose.**

It may be stated as a general rule that when the driver and an occupant of a motor vehicle are engaged in common purpose or joint enterprise, the negligence of the driver may be imputed to the occupant.<sup>40</sup> If they are so engaged, and the driver is negligent, the occupant may be precluded from recovering for his injuries either from the driver or a third person.<sup>41</sup> The difficulty is in determining when such relation exists

priving them of a legal right enjoyed by persons riding in any other kind of vehicle, and such a discrimination cannot be justified upon the basis of a reasonable classification. Section 34 not only discriminates against persons riding in motor vehicles in favor of those riding in all other vehicles under similar conditions, but it discriminates between those who ride in motor vehicles for hire. In other words, if a person rides in a motor vehicle which is regularly used for hire, he is not responsible for the negligence of the driver or operator; yet if he rides in one for hire he is responsible, unless said vehicle is regularly operated for hire. The section denies an equal protection of the law to all persons similarly situated, and is an unwarranted discrimination."

39. See *McDonald v. Lewenson* (Mass.), 131 N. E. 160; *Morel v. New York, etc. R. Co.* (Mass.), 131 N. E. 175.

40. *California*.—*Bryant v. Pacific Elec. Ry. Co.*, 174 Cal. 737, 164 Pac. 385.

*Illinois*.—See *Van Orsdale v. Illinois Central R. Co.*, 210 Ill. App. 619.

*Kansas*.—*Kirkland v. Atchison, etc. Ry. Co.*, 179 Pac. 362.

*Michigan*.—*Hanser v. Youngs*, 180

N. W. 409.

*Minnesota*.—*Ward v. Meeds*, 114 Minn. 18, 130 N. W. 2; *Kokesh v. Price*, 136 Minn. 304, 161 N. W. 715.

*Missouri*.—*Tannehill v. Kansas City, etc. Ry. Co.*, 279 Mo. 158, 213 S. W. 818; *Gresman v. Atchison, etc. R. Co.*, 229 S. W. 167.

*North Carolina*.—*Pusey v. Atlantic Coast Line R. Co.*, 106 S. E. 452.

*Oregon*.—*Robinson v. Oregon-Washington R. & Nav. Co.*, 90 Ore. 490, 176 Pac. 594.

*Oklahoma*.—*Thrasher v. St. Louis, etc. Ry. Co.*, 198 Pac. 97.

*South Carolina*.—*Langley v. Southern Ry. Co.*, 101 S. E. 286.

*Tennessee*.—*Hurt v. Yazoo, etc. R. Co.*, 140 Tenn. 623, 205 S. W. 437.

*Utah*.—*Derrick v. Salt Lake, etc. R. Co.*, 50 Utah, 573, 168 Pac. 335; *Lawrence v. Denver, etc. R. Co.*, 52 Utah, 414, 174 Pac. 817.

*Virginia*.—*Washington & O. D. Ry. v. Zell's Adm'x* 118 Va. 755, 88 S. E. 309.

*Vermont*.—*Wentworth v. Waterbury*, 90 Vt. 60, 96 Atl. 334.

*Canada*.—*Dixon v. Grand Trunk Ry.*, 47 O. L. R. 115.

41. *Barnett v. Lucy*, 213 Ill. App. 129.

between the parties. In every case, it may be said that the parties are engaged in the common enterprise of "riding," but that is not sufficient to bring the passenger within the rule.<sup>42</sup> In such a case, the passenger may be merely a guest of the driver and will not be charged with the negligence of the driver. The negligence of the driver will not be attributed to the passenger, unless the latter undertakes to or has the right to exercise some control over the movement of the vehicle.<sup>43</sup> In order that there be such a joint undertaking, it is not sufficient merely that the passenger or occupant of the machine indicate to the driver or chauffeur the route he may wish to travel, or the places to which he wishes to go, even though in this respect there exists between them a common enterprise. The circumstances must be such as to show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession of it.<sup>44</sup> Parties cannot be said to be

42. *Indiana*.—Lake Erie & W. R. Co. v. Sams (Ind. App.), 566.

*Iowa*.—Lawrence v. Sioux City, 172 Iowa, 320, 154 N. W. 494; Wagner v. Kloster, 175 N. W. 840. "We reach the conclusion that, to warrant the denial of recovery by a guest invited to ride in an automobile on the ground that the negligence of the driver contributed to his injuries, it must appear that the guest was in some manner responsible for what the driver did. He must have either directed the operation of the car or have had the right so to do or have been engaged in some joint venture or common enterprise wherein each in what was done was acting for both. A person invited unconditionally to ride with the driver of an automobile as a guest to some place or on some trip or generally for pleasure, does not thereby enter upon such a joint venture or common enterprise as renders him responsible for the acts or omissions of the driver within the meaning of the law. Something more is essential to accomplish this; i. e., their relations

must be such that each in what he does in carrying on the common purpose may be said not only to act for himself, but for the other, and in no event is the negligence of the driver to be imputed to the guest or passenger, unless the guest or passenger has the right to direct or control in some manner the operation of the vehicle, or in fact does exercise some control in the management thereof." Wagner v. Kloster (Iowa), 175 N. W. 840.

*Louisiana*.—Jacobs v. Jacobs, 141 La. 272, 74 So. 992.

*Massachusetts*. — Chadbourne v. Springfield Ry. Co., 199 Mass. 574. 85 N. E. 737.

*North Carolina*.—Pusey v. Atlantic Coast Line R. Co., 106 S. E. 452.

*Oklahoma*.—St. Louis, etc. R. Co. v. Bell, 58 Okla. 84. 156 Pac. 336.

43. Barrett v. Chicago, etc. R. Co. (Iowa), 175 N. W. 950; Lawrence v. Sioux City, 172 Iowa, 320, 154 N. W. 494; Donlin v. Detroit United Ry., 198 Mich. 327, 164 N. W. 447.

44. Bryant v. Pacific Elec. Ry. Co., 174 Cal. 737, 164 Pac. 385. See also

engaged in a joint enterprise unless there is a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movement of each other with respect thereto. Each must have some voice and right to be held in its control and management.<sup>45</sup> If they are joint owners of the machine, it may be easy to decide that they are engaged in a common enterprise.<sup>46</sup> It is not necessary that he actually exercise his right of control, but it is sufficient if he has the right of control.<sup>47</sup> Where a district nurse was injured while being driven by a doctor in his automobile, it was held that the negligence of the doctor was not necessarily to be imputed to the nurse.<sup>48</sup> But where two travelers in an automobile each participate in the running of the machine, one owning it and the other preparing it for the trip, they may be said to be engaged in a common enterprise.<sup>49</sup> And where two persons start out on a trip with the car of one, each paying one-half of the expenses, they are deemed to be engaged in a common enterprise so that the negligence of the one driving is imputed to the other.<sup>50</sup> A joint enterprise in an automobile journey is more easily shown when the trip is for business affairs rather than for social purposes.<sup>51</sup> Where the plaintiff and his companion were engaged in hauling fodder with a team, and the plaintiff was injured while his companion was endeavoring to force the horses past an object causing their fright, the relation of master and servant, or joint undertaking, existed between the plaintiff and his companion, so that the plaintiff was chargeable with the negligence of the latter.<sup>52</sup> Where several men go on a "joy" ride and become intoxicated, an occupant who receives an injury on account of the negligence of a third person may easily be denied re-

Chicago, etc. R. Co. v. Johnson (Tex. Civ. App.), 224 S. W. 277.

45. Denver Tramway Co. v. Orbach, 64 Colo. 511, 172 Pac. 1063; Kokesh v. Price, 136 Minn. 304, 161 N. W. 715; St. Louis, etc. Ry. Co. v. Bell, 58 Okla. 84, 159 Pac. 336.

46. Tannehill v. Kansas City, etc. Ry. Co., 279 Mo. 158 213 S. W. 818.

47. Bryant v. Pacific Elec. Ry. Co., 174 Cal. 737, 164 Pac. 385.

48. Loftus v. Pelletier, 223 Mass. 63, 111 N. E. 712.

49. Washington & O. D. Ry. v. Zell's Adm'r, 118 Va. 755 88 S. E. 309.

50. Derrick v. Salt Lake, etc. R. Co., 50 Utah, 573, 168 Pac. 335.

51. Lawrence v. Denver, etc. R. Co., 52 Utah, 414, 174 Pac. 817.

52. Louisville & N. R. Co. v. Armstrong, 127 Ky. 367, 32 Ky. L. Rep. 252, 105 S. W. 473.



covery, either on the ground of the common nature of the enterprise or on the ground of contributory negligence in riding in a machine with a drunken driver.<sup>53</sup> The extreme limit to which the cases have gone has been to hold that two gentlemen taking two ladies for a pleasure trip are engaged in a common purpose and the contributory negligence of the gentleman driving the car can be imputed to the other gentleman.<sup>54</sup> But other decisions cast doubt on the correctness of such holding.<sup>55</sup>

**Sec. 683. Imputation of driver's negligence to other occupant — control by passenger of movement of machine.**

If a passenger in an automobile has the actual control over the operation thereof, he is liable for the negligent act of the driver,<sup>56</sup> and the driver's contributory negligence may bar a remedy for injuries sustained on account of the negligence of a third person.<sup>57</sup> Thus, if the driver is in the general employ of the occupant, the former's negligence will be imputed to the latter.<sup>58</sup>

**Sec. 684. Imputation of driver's negligence to other occupant — master and servant.**

Though negligence on the part of the driver of an automobile will not, as a general rule, be imputed to another occupant or passenger, unless such occupant is the owner or has some control over the driver,<sup>59</sup> the negligent failure of a driver of an automobile to avoid danger while he is driving his master, is imputable to the master.<sup>60</sup> But, where the person injured

53. *Winston's Adm'r v. City of Henderson*, 179 Ky. 220, 200 S. W. 330; *Kinne v. Town of Morristown*, 184 N. Y. App. Div. 408.

54. *Wentworth v. Waterbury*, 90 Vt. 60, 96 Atl. 334.

55. *Carter v. Brown*, 136 Ark. 23, 206 S. W. 71; *Bryant v. Pacific Elec. Ry. Co.*, 174 Cal. 737, 164 Pac. 385; *Donlin v. Detroit United Ry.*, 198 Mich. 327, 164 N. W. 447; *Ward v. Meeds*, 114 Minn. 18, 130 N. W. 2; *St.*

*Louis, etc. Ry. Co. v. Bell*, 58 Okla. 84, 159 Pac. 336.

56. Section 655.

57. *Bryant v. Pacific Elec. Ry. Co.*, 174 Cal. 737, 164 Pac. 385. See also *Clark v. Columbia, etc. Co. (S. Car.)*, 108 S. E. 178.

58. Section 684.

59. *Hunt v. North Carolina R. Co.*, 170 N. Car. 442, 87 S. E. 210.

60. *Lytle v. Hancock County*, 19 Ga. App. 193, 91 S. E. 219.

is a co-employee of the driver, the negligence of the latter is not generally to be imputed to the former.<sup>61</sup> And the negligence of the master driving the machine will not generally be imputed to the servant riding with him.<sup>62</sup> And where a party of policemen are called out to quell a riot, the fact that the city employee driving the conveyance is guilty of negligence, does not bar an action for injuries received by one of the party in case of a collision with a street car.<sup>63</sup>

### Sec. 685. Imputation of driver's negligence to other occupant — husband and wife.

It is clear that the mere relation of husband and wife does not charge the wife with the negligence of the husband in running a motor vehicle, though she is at the time of an accident riding in the vehicle.<sup>64</sup> Some fact other than the relation-

61. *Stoker v. Tri-City Ry. Co.*, 182 Iowa, 1090, 165 N. W. 30; *Peterson v. New Orleans Ry. & Light Co.*, 142 La. 835, 77 So. 647.

62. *County Comr's v. Wright (Md.)*, 114 Atl. 573.

63. *Denver Tramway Co. v. Orbach*, 64 Colo. 511 172 Pac. 1063.

64. *Arkansas*.—*Miller v. Ft. Smith Light & Tract. Co.*, 136 Ark. 355, 206 S. W. 329. See also *Ft. Smith, etc. R. Co. v. Pence*, 122 Ark. 611, 182 S. W. 568.

*Illinois*.—*Gaffney v. Dixon*, 157 Ill. App. 589.

*Iowa*.—*Fisher v. Ellston*, 174 Iowa, 364, 156 N. W. 422.

*Kansas*.—*Williams v. Withington* 88 Kans. 809, 129 Pac. 1148; *Denton v. Missouri. K. & T. Ry. Co.*, 97 Kans. 498, 155 Pac. 812.

*Kentucky*.—*Livingston & Co. v. Philley*, 155 Ky. 224, 159 S. W. 665.

*Maine*.—*Cobb v. Cumberland County Power & Light Co.*, 104 Atl. 844.

*Massachusetts*.—*McDonald v. Levenson*, 131 N. E. 160.

*Minnesota*.—*Kolesh v. Price*, 136 Minn. 304, 161 N. W. 715; *Bruce v. Ryan*, 138 Minn. 264, 164 N. W. 982.

*Missouri*.—*Byerley v. Metropolitan St. R. Co.*, 172 Mo. App. 470, 158 S. W. 413; *Ziegler v. United Rys. Co. of St. Louis (Mo. App.)*, 220 S. W. 1016; *Corn v. Kansas City, etc. Ry. Co. (Mo.)*, 228 S. W. 78.

*Nebraska*.—*Stevens v. Luther*, 180 N. W. 87.

*New York*.—*Ward v. Clark*, 189 App. Div. 344, 179 N. Y. Suppl. 466.

*Tennessee*.—*Knoxville Ry. & Light Co. v. Vangilden*, 132 Tenn. 487, 178 S. W. 1117. "We see no reason why the negligence of the husband should be attributable to the wife under the circumstances in this case. The reasoning applied in cases holding that the negligence of the driver will be imputed to the rider in some instances was that the driver was the servant of the one riding with him and under the control of the master. That is undoubtedly a sound distinction, where the one driving is under the control of another person and is only carrying out that person's orders, and the one riding in such case should be held chargeable with the negligence of his servant. This distinction, however, cannot apply as between husband and

ship must be shown in order that the negligence of one shall be imputed to the other. In case the wife is exercising control over the movements of the vehicle,<sup>65</sup> or if the husband can be said to be the servant or agent of the wife,<sup>66</sup> or if they are engaged in a common purpose or joint enterprise,<sup>67</sup> then there is ground for the doctrine of imputed negligence. But the additional circumstance that the wife is the real owner of the machine driven by her husband, does not impute his negligence to her.<sup>68</sup> The fact that they were moving to another city does not make them engaged in a joint enterprise.<sup>69</sup>

### Sec. 686. Imputation of driver's negligence to other occupant — parent and child.

The negligence of a father driving a vehicle with his child as a passenger is not generally imputed to such child.<sup>70</sup> When, however, the conditions are reversed and the child is the

wife, because the wife has not that direction and control, and is not chargeable with the manner of driving, or in directing how the driving shall be done, as appears in the case referred to. It is not supposed that the wife has charge over matters of this kind. She rather relies upon her husband, and trusts to his guidance and protection. If he blunders, why should she be chargeable, when she is without fault. Of course, if an adult, who while riding in a vehicle driven by another sees, or ought by due diligence to see, a danger not obvious to the driver, or who sees that the driver is incompetent or careless, or is not taking proper precautions, it is his duty to give some warning of danger, and a failure to do so is negligence. Ordinarily, however, a driver is intrusted with caring for the safety of a carriage and its occupants, and unless the danger is obvious, or is known to the passenger, he may rely upon the assumption that the driver will exercise proper care and caution." *Knoxville Ry. & Light Co. v. Vangilden*. 132

*Tenn.* 487, 178 S. W. 1117.

*Pennsylvania*.—*Senft v. Western Md. Ry. Co.*, 246 Pa. St. 446. 92 Atl. 553.

*Virginia*.—*Virginia Ry. & Power Co. v. Gorsuch*, 120 Va. 655. 91 S. E. 632.

*Wisconsin*.—*Brubaker v. Iowa County*, 183 N. W. 690.

*Canada*.—*Brooks v. B. C. El. Ry.*, 48 D. L. R. 90; *Hoffman v. H. G. & B. El. Ry.*, 18 O. W. N. 92.

65. Section 683.

66. *Standard Oil Co. of Kentucky v. Thompson (Ky.)*, 226 S. W. 368.

67. Section 682.

68. *Virginia Ry. & Power Co. v. Gorsuch*, 120 Va. 655, 91 S. E. 632.

69. *Brubaker v. Iowa County (Wis.)*, 183 N. W. 690.

70. *Burzio v. Joplin, etc. Ry. Co.*, 102 Kan. 287, 562, 171 Pac. 351; *Zalotuchin v. Metropolitan St. Ry. Co.*, 127 Mo. App. 577, 106 S. W. 548; *Howe v. Central Vermont Ry. Co.*, 91 Vt. 485. 101 Atl. 45; *Gulesarian v. Madison Rys. Co. (Wis.)*, 179 N. W. 573. See also *Hines v. Moore (Miss.)*, 87 So. 1.

operator of the machine, the legal situation may be different. A son may be deemed under the control of his father, or to be acting as the agent or servant for him, and under such circumstances, the negligence of the son would be imputed to the father.<sup>71</sup> But the mere relation of parent and child does not have this effect.<sup>72</sup> Thus, if a child is driving an automobile with a parent as his guest, the negligence of the child will not be attributed to the parent so as to defeat a recovery by the latter for injuries sustained through the negligence of a third person.<sup>73</sup> Nor do the facts that the son and the father are both employed by and interested in the same corporation and that such corporation is the owner of the machine, necessarily alter the situation.<sup>74</sup>

**Sec. 687. Imputation of driver's negligence to other occupant — passenger for hire.**

Where a driver is carrying a passenger for hire, it is reasonably clear that the negligence of the driver cannot be imputed to the passenger.<sup>75</sup> When, therefore, the machine collides with another conveyance, the negligence of his driver does not bar his action against the operator of the other conveyance; in fact, he may have a cause of action against both.<sup>76</sup> Thus, in case of a collision between a sight seeing automobile and a street car causing an injury to a passenger in the auto, the negligence of the driver is not imputed to such passen-

71. *Bryant v. Pacific Elec. Ry. Co.*, 174 Cal. 737, 164 Pac. 385. See also *Leopold v. Texas. etc. R. Co.*, 144 La. 1000, 81 So. 602.

72. *Bryant v. Pacific Elec. Ry. Co.*, 174 Cal. 737, 164 Pac. 385; *Lange v. New York etc. R. Co.*, 89 N. J. Law, 604, 99 Atl. 346. A question may be presented for the jury as to whether the child is under such control as to impute his negligence to the father. *Gustavson v. Hester*, 211 Ill. App. 439.

73. *Lange v. New York, etc. R. Co.*, 89 N. J. Law, 604, 99 Atl. 346.

74. *Bryant v. Pacific Elec. Ry. Co.*, 174 Cal. 737, 164 Pac. 385.

75. *Johnson v. Louisville & N. R. Co.*, 203 Ala. 86, 82 So. 100; *McDonald v. Messaba Ry. Co.*, 137 Minn. 275, 163 N. W. 298; *Harding v. City of New York*, 181 N. Y. App. Div. 251, 168 N. Y. Suppl. 265; *Hardie v. Barrett*, 257 Pa. 42, 101 Atl. 75; *Wanner v. Philadelphia, etc. Ry. Co.*, 261 Pa. 273, 104 Atl. 570; *Wolf v. Sweeney (Pa.)*, 112 Atl. 869. See also *Piper v. New York State Rys.*, 185 N. Y. App. Div. 184, 172 N. Y. Suppl. 838.

76. *Broussard v. Louisiana Western R. Co.*, 140 La. 517, 73 So. 606; *Bancroft v. Cote*, 90 Vt. 358, 98 Atl. 915.

ger.<sup>77</sup> The liability of one carrying another in an automobile for hire is further discussed in other places in this book.<sup>78</sup>

### Sec. 688. Contributory negligence of passenger — in general.

As a practical proposition, one who is merely a passenger in an automobile is not required to use many precautions to avoid injury from defects in the highway or from other conveyances. But, theoretically, though the negligence of the driver is not imputed to him,<sup>79</sup> he is required to exercise reasonable care under the circumstances.<sup>80</sup> That is, he must

77. *Thompson v. Los Angeles, etc. R. Co.*, 165 Cal. 748, 134 Pac. 709; *Rush v. Metropolitan St. R. Co.*, 157 Mo. App. 504, 137 S. W. 1029.

78. See sections 169, 170, 179.

79. Section 679.

80. *United States*.— *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924.

*Alabama*.—*McGeever v. O'Byrne*, 82 So. 508.

*Arkansas*.—*Carter v. Brown*, 136 Ark. 23, 206 S. W. 71.

*California*.—*Thompson v. Los Angeles, etc. R. Co.*, 165 Cal. 748, 134 Pac. 709; *Lynn v. Goodwin*, 170 Cal. 112, 148 Pac. 927; *Parmenter v. McDougall*, 173 Cal. 306, 156 Pac. 460; *Drouillard v. Southern Pac. Co.* (Cal. App.), 172 Pac. 405; *Wiley v. Young*, 178 Cal. 681, 174 Pac. 316; *Ellis v. Central California Tract. Co.*, 37 Cal. App. 390, 174 Pac. 407; *Stewart v. San Joaquin L. & P. Co.* (Cal. App.), 186 Pac. 160; *Carpenter v. Atchison, etc. Ry. Co.* (Cal. App.), 195 Pac. 1073.

*Connecticut*.—*Clarke v. Connecticut St. Ry. Co.*, 83 Conn. 219, 76 Atl. 523; *Weidlich v. New York, etc. R. Co.*, 93 Conn. 438, 106 Atl. 323.

*Illinois*.—*Sutton v. City of Chicago*, 195 Ill. App. 261; *Vanek v. Chicago City Ry. Co.*, 210 Ill. App. 148; *Fredericks v. Chicago Ry. Co.*, 208 Ill. App. 172.

*Indiana*.—*Union Traction Co. of Indiana v. Hlawworth*, 187 Ind. 451, 115 N. E. 753.

*Iowa*.—*Herdman v. Zwart*, 167 Iowa, 500, 149 N. W. 631; *Willis v. Schertz*, 175 N. W. 321; *Wagner v. Kloster*, 175 N. W. 840; *Glanville v. Chicago, etc. Ry. Co.*, 180 N. W. 152; *Bradley v. Interurban Ry. Co.*, 183 N. W. 493.

*Kansas*.—*Williams v. Eithington*, 88 Kans. 809, 129 Pac. 1148; *Denton v. Missouri, etc. R. Co.*, 97 Kans. 493, 155 Pac. 812; *Schaefer v. Arkansas Valley Interurban Ry. Co.*, 179 Pac. 323.

*Kentucky*.—*Winston's Adm'r v. City of Henderson*, 179 Ky. 220, 200 S. W. 330; *Graham's Adm'r v. Illinois Central R. Co.*, 185 Ky. 370, 215 S. W. 60; *Milner's Adm'r v. Evansville Ry. Co.*, 188 Ky. 14, 221 S. W. 207.

*Louisiana*.—*Jacobs v. Jacobs*, 141 La. 212, 74 So. 992.

*Maine*.—*Blanchard v. Maine Cent. R. Co.*, 116 Me. 179, 100 Atl. 666.

*Maryland*.—*Baltimore & O. R. Co. v. State to Use of McCabe*, 133 Md. 219, 104 Atl. 465; *County Com'rs v. Wright*, 114 Atl. 573.

*Massachusetts*.—*Chadbourne v. Springfield Ry. Co.*, 199 Mass. 574, 85 N. E. 737; *Fogg v. New York, etc. R. Co.*, 223 Mass. 444, 111 N. E. 960.

*Minnesota*.—*Carnegie v. Great Northern R. Co.*, 128 Minn. 14, 150 N. W. 164; *Zenner v. Great Northern Ry.*

use the same care that a reasonably prudent passenger would

Co., 135 Minn. 37, 159 N. W. 1087; *Kolesh v. Price*, 136 Minn. 304, 161 N. W. 715; *McDonald v. Messaba Ry. Co.*, 137 Minn. 275, 163 N. W. 298; *Praught v. Great Northern Ry. Co.*, 144 Minn. 309, 175 N. W. 998. "The negligence of the driver of a vehicle is not imputed to a mere passenger riding therein. Nevertheless a passenger is required to exercise a proper degree of care for his own safety, and any negligence on his part that contributes to his injury is fatal to his right to recover. He is obliged to exercise such care as a reasonably prudent person would, when riding with another under similar circumstances. A person of ordinary prudence riding with another, upon his invitation, will naturally put a certain trust in his judgment, and will rely in some measure on the assumption that he will use care to avoid the ordinary dangers of the road. In order to conclusively charge a mere passenger with contributory negligence in failing to see the approaching train, something more than ability to see and a failure to look must be shown. His failure to look is evidence to be considered on the question of his negligence, but it is not conclusive against him. In general, the primary duty of caring for the safety of the vehicle and its passengers rests upon the driver, and a mere gratuitous passenger should not be found guilty of contributory negligence as a matter of law, unless he in some way actively participates in the negligence of the driver, or is aware either that the driver is incompetent or careless, or unmindful of some danger known to or apparent to the passenger, or that the driver is not taking proper precautions in approaching a place of danger, and being so aware, fails to warn or admonish the driver, or to take proper steps to preserve his own safety."

*Carnegie v. Great Northern R. Co.*, 128 Minn. 14, 150 N. W. 164.

*Missouri*.—*Turney v. United Rys. of St. Louis*, 155 Mo. App. 513, 135 S. W. 93; *Rappaport v. Roberts* (Mo. App.), 203 S. W. 676; *Leopard v. Kansas City Rys. Co.* (Mo. App.), 214 S. W. 268; *Davis v. City L. & T. Co.* (Mo. App.), 222 S. W. 884.

*New York*.—*La Goy v. Director General*, 231 N. Y. 191; *Pouch v. Staten Island Midland Ry. Co.*, 142 App. Div. 16, 126 N. Y. Suppl. 738; *Terwilliger v. Long Island R. Co.*, 152 N. Y. App. Div. 168, 136 N. Y. Suppl. 733.

*Ohio*.—*Toledo Rys. & Light Co. v. Mayers*, 93 Ohio St. 304, 112 N. E. 1014.

*Oregon*.—*White v. Portland Gas & Coke Co.*, 84 Oreg. 643, 165 Pac. 1005; *Robison v. Oregon-Washington R. & Nav. Co.*, 90 Oreg. 490, 176 Pac. 594.

*Pennsylvania*.—*Wachsmith v. Baltimore & O. R. Co.*, 233 Pa. St. 465, 82 Atl. 755; *Senft v. Western Md. Ry. Co.*, 246 Pa. St. 446, 92 Atl. 553; *Dunlap v. Philadelphia Rapid Transit Co.*, 248 Pa. 130, 93 Atl. 873; *Hardie v. Barrett*, 257 Pa. St. 42, 101 Atl. 75; *Eline v. Western Maryland Ry. Co.*, 104 Atl. 857; *Azinger v. Pennsylvania R. Co.*, 262 Pa. 33, 105 Atl. 87; *Martin v. Pennsylvania R. Co.*, 265 Pa. St. 282, 108 Atl. 631.

*South Carolina*.—*Latimer v. Anderson County*, 95 S. Car. 187, 78 S. E. 879.

*Tennessee*.—*Knoxville Ry. & Light Co. v. Vangilden*, 132 Tenn. 487, 178 S. W. 1117; *Hurt v. Yazoo, etc. R. Co.*, 140 Tenn. 623, 205 S. W. 437.

*Texas*.—*Sellers v. Galveston, etc. Ry. Co.* (Civ. App.), 208 S. W. 397; *Chicago, etc. R. Co. v. Wentzel* (Civ. App.), 214 S. W. 710.

*Utah*.—*Lawrence v. Denver, etc. R. Co.*, 52 Utah. 414, 174 Pac. 817.

under the circumstances.<sup>81</sup> And this is true although he is intoxicated.<sup>82</sup> The fact that he is not the driver of the machine does not relieve him from the duty of exercising some care.<sup>83</sup> If he fails to use such care he is guilty of contributory negligence and will not generally be permitted to recover for injuries arising out of an automobile accident. But the precautions to be taken by the passenger are in any event much less than those required of the driver of the vehicle.<sup>84</sup> Whether a passenger has exercised the proper degree of care is almost always a question for the determination of the jury.<sup>85</sup> But

*Vermont.*—*Wentworth v. Waterbury*, 90 Vt. 60, 96 Atl. 334.

*Virginia.*—*Virginia & S. W. Ry. Co. v. Skinner*, 119 Va. 843, 89 S. E. 887; *Director-General v. Lucas*, 107 S. E. 675.

*Canada.*—*Miller v. County of Wentworth*, 5 O. W. N. 317.

**81.** *Birmingham Ry. L. & P. Co. v. Barranco*, 203 Ala. 639, 84 So. 839; *Drouillard v. Southern Pac. Co.* (Cal. App.), 172 Pac. 405; *Colorado Springs, etc. R. Co. v. Cohun*, 16 Colo. 142, 180 Pac. 307; *Clarke v. Connecticut St. Ry. Co.*, 83 Conn. 219, 76 Atl. 523; *Union Traction Co. of Indiana v. Hawthorth*, 187 Ind. 451, 115 N. E. 753; *Carnegie v. Great Northern R. Co.*, 128 Minn. 14, 150 N. W. 164; *Zenner v. Great Northern Ry. Co.*, 135 Minn. 37, 159 N. W. 1087; *White v. Portland Gas & Coke Co.*, 84 Oreg. 643, 165 Pac. 1005; *Texas, etc. R. Co. v. Peveto* (Tex. Civ. App.), 224 S. W. 552.

**82.** *Graham's Adm'r v. Illinois Cent. R. Co.*, 185 Ky. 370.

**83.** *Blanchard v. Maine Cent. R. Co.*, 116 Me. 179, 100 Atl. 666.

**84.** *Clarke v. Connecticut St. Ry. Co.*, 83 Conn. 219, 76 Atl. 523; *Thomas v. Illinois Cent. R. Co.*, 169 Iowa. 337, 151 N. W. 387; *Denton v. Missouri, etc. R. Co.*, 97 Kans. 498, 155 Pac. 812; *Kolsh v. Price*, 136 Minn. 304, 161 N. W. 715. "Manifestly, the conduct which reasonable care requires of such a passenger will not ordinarily, if in

any case, be the same as that which it would require of the driver. While the standard of duty is the same, the conduct required to fulfill that duty is ordinarily different, because their circumstances are different." *Clarke v. Connecticut St. Ry. Co.*, 83 Conn. 219, 76 Atl. 523.

**85.** *United States.*—*Fish v. Pennsylvania Co.*, 259 Fed. 201.

*Alabama.*—*Birmingham Ry. L. & P. Co. v. Barranco*, 203 Ala. 639, 84 So. 839.

*Arkansas.*—*Carter v. Brown*, 136 Ark. 36, 206 S. W. 71; *Pine Bluff Co. v. Whitelaw*, 227 S. W. 13.

*California.*—*Parmenter v. McDougall*, 172 Cal. 306, 156 Pac. 460; *Irwin v. Golden State Auto Tour Co.*, 178 Cal. 10, 171 Pac. 1059; *Drouillard v. Southern Pac. Co.* (Cal. App.), 172 Pac. 405; *Nichols v. Pacific Elec. Ry. Co.*, 178 Cal. 630, 174 Pac. 319.

*Colorado.*—*Colorado Springs, etc. R. Co. v. Cohen*, 16 Colo. 149, 180 Pac. 307.

*Connecticut.*—*Clarke v. Connecticut Co.*, 83 Conn. 219, 76 Atl. 523.

*Illinois.*—*Sutton v. City of Chicago*, 195 Ill. App. 261; *Ferry v. City of Waukegan*, 196 Ill. App. 81; *Fredericks v. Chicago Rys. Co.*, 208 Ill. App. 172.

*Iowa.*—*Stoker v. Tri-City Ry. Co.*, 182 Iowa, 1090, 165 N. W. 30; *Willis v. Schertz*, 175 N. W. 321; *Barrett v. Chicago, etc. R. Co.*, 175 N. W. 950; *Glanville v. Chicago, etc. R. Co.*, 180

a passenger in an unlicensed machine may, in some States, be barred of recovery for his injuries as a matter of law, though the rule is to the contrary in the great majority of States.<sup>86</sup> The fact that the chauffeur is not licensed as required by law is some evidence of negligence, but is not conclusive.<sup>87</sup> An occupant may be guilty of negligence if he takes a position of unnecessary danger.<sup>88</sup>

### Sec. 689. Contributory negligence of passenger — lookout for dangers.

A passenger cannot close his eyes to an obvious or well known danger,<sup>89</sup> but, as a general rule, he is not required, as a matter of law, to keep a continual lookout for approaching

N. W. 152; *Bradley v. Interurban Ry. Co.*, 183 N. W. 493.

*Maryland*.—*Baltimore & O. R. Co. v. State to Use of McCabe*, 133 Md. 219, 104 Atl. 465; *Washington v. State*, 111 Atl. 164; *McAdoo v. State*, 111 Atl. 476; *Chiswell v. Nichols*, 112 Atl. 363.

*Massachusetts*.—*Bailey v. Worcester Consol. St. Ry. Co.*, 228 Mass. 477, 117 N. E. 824; *Griffin v. Hustis*, 234 Mass. 95, 125 N. E. 387.

*Michigan*.—*Ommen v. Grand Trunk Western Ry.*, 204 Mich. 392, 169 N. W. 914; *Jewell v. Rogers, Tp.*, 208 Mich. 318, 175 N. W. 151.

*Minnesota*.—*Carnegie v. Great Northern R. Co.*, 128 Minn. 14, 150 N. W. 164; *Kolesh v. Price*, 136 Minn. 304, 161 N. W. 715, *Praught v. Great Northern Ry. Co.*, 144 Minn. 309, 175 N. W. 998.

*Missouri*.—*Zugler v. United Rys. Co. of St. Louis (Mo. App.)*, 220 S. W. 1016; *Corn v. Kansas City Ry. Co.*, 228 S. W. 78.

*New Hampshire*.—*Collins v. Hustis*, 111 Atl. 286.

*North Dakota*.—*Chambers v. Minneapolis, etc. Ry. Co.*, 37 N. Dak. 377, 163 N. W. 824.

*Ohio*.—*Board of Com'rs of Logan County v. Bicher*, 98 Ohio, 432, 121 N. E. 535.

*Oregon*.—*White v. Portland Gas & Coke Co.*, 84 Oreg. 643, 165 Pac. 1005.

*Pennsylvania*.—*Senft v. Western Md. Ry. Co.*, 246 Pa. St. 446, 92 Atl. 553; *Vocca v. Pennsylvania R. Co.*, 259 Pa. St. 42, 102 Atl. 283.

*Tennessee*.—*Hurt v. Yazoo, etc. R. Co.*, 140 Tenn. 623, 205 S. W. 437; *Stem v. Nashville Interurban Ry.*, 142 Tenn. 494, 221 S. W. 192; *Tennessee Cent. R. Co. v. Vanhoy*, 226 S. W. 225.

*Texas*.—*Texas, etc. R. Co. v. Pevelo (Civ. App.)*, 224 S. W. 552; *Baker v. Streater (Civ. App.)*, 221 S. W. 1039; *Hines v. Wilson (Civ. App.)*, 225 S. W. 275.

*Utah*.—*Lockhead v. Henson*, 42 Utah. 99, 129 Pac. 347; *Montague v. Salt Lake, etc. R. Co.*, 52 Utah, 368, 174 Pac. 871; *Cowan v. Salt Lake, etc. R. Co.*, 189 Pac. 599.

86. Sections 125-126.

87. *Griffin v. Hustis*, 234 Mass. 95, 125 N. E. 387.

88. *Crider v. Yolande Coal & Coke Co. (Ala.)*, 89 So. 285.

89. *Sherris v. Northern Pac. Ry. Co.*, 55 Mont. 189, 175 Pac. 269; *Terwilliger v. Long Island R. Co.*, 152 N. Y. App. Div. 168, 136 N. Y. Suppl. 733; *Virginia & S. W. Ry. Co. v. Skinner*, 119 Va. 843, 89 S. E. 887.



trains or other vehicles or for defects in the highway or other causes which might occasion an injury to the machine.<sup>90</sup> In other words, he may to some extent, though not completely, rely on the driver keeping a lookout for such dangers as might be encountered on the trip.<sup>91</sup> Thus, he is not necessarily charged with contributory negligence because at the time of crossing a railroad track he was engaged in conversation with another passenger.<sup>92</sup> If the passenger assumes the duty of looking out for trains and other dangers, the situation is entirely different.<sup>93</sup> And cases can be found where considerable diligence has been required of a passenger, and he has been condemned for failing to look and listen for approaching trains when passing over a crossing.<sup>94</sup> But little is required

**90. *United States*.—***Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924.

**Alabama.**—*Birmingham Ry. L. & P. Co. v. Barranco*, 203 Ala. 639, 84 So. 839.

**Arkansas.**—*Pine Bluff Co. v. White-law*, 227 S. W. 13.

**Connecticut.**—*Clarke v. Connecticut St. Ry. Co.*, 83 Conn. 219, 76 Atl. 523.

**Iowa.**—*Willis v. Schertz*, 175 N. W. 321.

**Louisiana.**—*Broussard v. Louisiana Western R. Co.*, 140 La. 517, 73 So. 606.

**Minnesota.**—*Carnegie v. Great Northern R. Co.*, 128 Minn. 14, 150 N. W. 164; *Johnson v. Evans*, 141 Minn. 356, 170 N. W. 220, 2 A. L. R. 891.

**New York.**—*Terwilliger v. Long Island R. Co.*, 152 App. Div. 168, 136 N. Y. Suppl. 733. But see *Noakos v. New York Central, etc. R. Co.*, 121 App. Div. 716, 106 N. Y. Suppl. 522, affirmed 195 N. Y. 543, 88 N. E. 1126.

**Oregon.**—*Rogers v. Portland, etc. R. Co.*, 66 Oreg. 244, 134 Pac. 9.

**Utah.**—*Montague v. Salt Lake, etc. R. Co.*, 52 Utah, 368, 174 Pac. 871.

**Washington.**—*Dillabough v. Okanogan County*, 105 Wash. 609, 178 Pac. 802.

**Wisconsin.**—*Brubaker v. Iowa County*, 183 N. W. 690.

The duty to look and listen before crossing railroad tracks does not rest upon the passenger as on the driver. *Thomas v. Illinois Cent. R. Co.*, 169 Iowa, 337, 151 N. W. 387.

**91. *Carpenter v. Atchison, etc. Ry. Co.*** (Cal. App.), 195 Pac. 1073.

**92. *Clarke v. Connecticut St. Ry. Co.***, 83 Conn. 219, 76 Atl. 523; *Terwilliger v. Long Island R. Co.*, 152 App. Div. 168, 136 N. Y. Suppl. 722; *Wanner v. Philadelphia, etc. Ry. Co.*, 261 Pa. 273, 104 Atl. 570.

**93. *Fluckey v. Southern Ry. Co.***, 242 Fed. 469; *Rogers v. Portland, etc. P. Co.*, 66 Oreg. 244, 134 Pac. 9.

**94. *United States*.—***Brommer v. Pennsylvania R. Co.*, 179 Fed. 580, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; *Hall v. West Jersey & Seashore R. Co.*, 244 Fed. 104.

**Illinois.**—*Opp v. Pryor*, 128 N. E. 580.

**Kansas.**—*Kirby v. Kansas, etc. R. Co.*, 106 Kans. 163, 186 Pac. 744; *Gilbert v. Kansas City Rys. Co.*, 197 Pac. 872.

**Kentucky.**—*Milner's Adm'r v. Evansville R. Co.*, 188 Ky. 14, 221 S. W. 207.

of a passenger riding in the rear seat;<sup>95</sup> but one riding in the front seat with the driver is frequently required to keep a vigilant outlook when approaching a place of danger such as a railroad track.<sup>96</sup>

### Sec. 690. Contributory negligence of passenger — reliance on driver.

As a general proposition, one who is merely a guest or passenger in an automobile may, to some extent, though not absolutely, rely that the driver will exercise reasonable care to avoid danger.<sup>97</sup> And, in the absence of unusual circumstances.

*Louisiana.*—Leopold v. Texas. etc. R. Co., 144 La. 1000. 81 So. 602.

*Massachusetts.*—Pigeon v. Massachusetts, etc. St. Ry. Co., 119 N. E. 762.

*Nebraska.*—Morris v. Chicago. etc. R. Co., 101 Neb. 479, 163 N. W. 799.

*Pennsylvania.*—Bell v. Jacobs, 261 Pa. 204, 104 Atl. 587; Martin v. Pennsylvania R. Co., 265 Pa. St. 282, 108 Atl. 634.

*Utah.*—Lawrence v. Denver. etc. R. Co., 105 Wash. 652, 178 Pac. 810.

*Washington.*—Hoyle v. Northern Pac. R. Co., 105 Wash. 652, 178 Pac. 810.

95. Weidlech v. New York, etc. R. Co., 93 Conn. 438, 106 Atl. 323; Marion & B. Traction Co. v. Reese (Ind. App.), 124 N. E. 500; Marion & B. Tract. Co. v. Reese (Ind. App.), 127 N. E. 568; Glenville v. Chicago, etc. Co. (Iowa), 180 N. W. 152; Beall v. Kansas City Rys. Co. (Mo. App.), 228 S. W. 834; Tennessee Cent. R. Co. v. Vanhoy (Tenn.), 226 S. W. 225; Cowan v. Salt Lake, etc. R. Co. (Utah), 189 Pac. 599.

96. Barrett v. Chicago. etc. R. Co. (Iowa), 175 N. W. 950; Leopard v. Kansas City Rys. Co. (Mo. App.), 214 S. W. 268.

97. *United States.*—Lehigh Valley R. Co. v. Emens, 231 Fed. 636, 145 C. C. A. 522.

*Alabama.*—Birmingham Ry. L. & P. Co. v. Barranco. 203 Ala. 639, 84 So. 839.

*California.*—Ellis v. Central California Tract. Co., 37 Cal. App. 390; Carpenter v. Atchison, etc. Ry. Co. (Cal. App.), 195 Pac. 1073.

*Illinois.*—Johnson v. Chicago Surface Lines, 209 Ill. App. 26.

*Iowa.*—Bradley v. Interurban Ry. Co., 183 N. W. 493.

*Kansas.*—Williams v. Withington, 88 Kans. 809, 129 Pac. 1148; Denton v. Missouri, etc. Ry. Co., 97 Kans. 498, 155 Pac. 812.

*Maine.*—Avery v. Thompson, 117 Me. 120, 103 Atl. 4.

*Massachusetts.*—Chadbourne v. Springfield Ry. Co., 199 Mass. 574, 85 N. E. 737; Pigeon v. Massachusetts, etc. St. Ry. Co., 119 N. E. 762; Griffin v. Hustis, 234 Mass. 99, 125 N. E. 387; Fahy v. Director General. 126 N. E. 784.

*Minnesota.*—Kolesh v. Price, 136 Minn. 304, 161 N. W. 715.

*Missouri.*—Corn v. Kansas City, etc. Ry. Co., 228 S. W. 78.

*New York.*—Terwilliger v. Long Island R. Co., 152 App. Div. 168, 136 N. Y. Suppl. 733. "He had a right to assume that Mr. Welsh, his friend, would exercise reasonable care in the operation of his car, and unless he was aware of the railroad crossing and had reason to apprehend that Mr. Welsh would run his car into a position of danger, the jury might properly find that he was in the exercise of that rea-

he is not guilty of contributory negligence if he relies on the skill of the driver and does not take active steps to see that

sonable degree of care which an ordinarily prudent man would exercise under like circumstances by merely sitting still in his seat and talking with a fellow-passenger. That is probably what seventy-five per cent. of the persons who go out for a drive with their friends do under the circumstances. They have no power over the car, no authority over the driver, and, while they would not be free to ride with a reckless driver, knowing the fact, and charge their misfortunes upon others, we do not think it can be said that there is a failure to produce evidence of a lack of contributory negligence where it appears, as it does here, that the plaintiff's intestate was sitting in his seat engaged in a conversation with a fellow-passenger who was occupying the seat behind him, and who was leaning forward for the purpose of carrying on the conversation, leaving the driver free to manage the car. Of course if the passenger was familiar with a known danger, if he was better informed of the circumstances than the driver, it might be his duty to watch and point out the danger, but here the car was being driven upon a flat land in broad daylight, and at an angle with the railroad track, which had been crossed some distance back, and which was to be crossed again at grade. It was an open country, and, assuming that the plaintiff's intestate was familiar with the country—which is the most favorable view for the defendant—it cannot be said as a matter of law that he was bound to anticipate that Mr. Welsh would drive upon the crossing without observing the situation and taking the necessary precautions." *Terwilliger v. Long Island R. Co.*, 152 App. Div. 168, 136 N. Y. Suppl. 733.

*Oregon*.—*Rogers v. Portland, etc. R.*

*Co.*, 66 Oreg. 244, 134 Pac. 9.

*Pennsylvania*.—*Vocca v. Pennsylvania R. Co.*, 259 Pa. St. 42, 102 Atl. 283; *Carbaugh v. Philadelphia, etc. Ry. Co.*, 262 Pa. 25, 104 Atl. 860.

*Tennessee*.—*Knoxville Ry. & Light Co. v. Vangilden*, 132 Tenn. 487, 178 S. W. 1117; *Stem v. Nashville Inter-urban Ry.*, 142 Tenn. 494, 221 S. W. 192.

*Utah*.—*Montague v. Salt Lake, etc. R. Co.*, 52 Utah. 368, 174 Pac. 871.

**Husband and wife.**—It has been held that, where a husband and wife, traveling together in an automobile which the husband is driving, the wife cannot rely entirely on the husband, but she is bound to exercise the same degree of care as he. *Beemer v. Chicago, etc. R. Co. (Iowa)*, 162 N. W. 43.

**Reliance of wife on husband.**—In *Denton v. Missouri, etc. R. Co.*, 97 Kans. 498, 155 Pac. 812, the court, discussing the right of a wife to rely on her husband's management of the automobile, said: "The plaintiff was required to take the precautions which a reasonably prudent person, not in the situation of the automobile driver, but in her situation would have taken. The argument is that she should have stopped the automobile, or should have called her husband's attention to the conditions and requested him to exercise reasonable care. Why should the plaintiff have called her husband's attention to the conditions and exhorted him to use due care? She had confidence in his ability as a driver. The conditions were just as obvious to him as to her. He could hear and see all she could see and hear. He was responsible for the operation of the automobile, not she, and she had no reason to doubt that he was exercising his faculties with diligence. Besides this, there was another observer in the front

the machine is properly propelled. Ordinarily it is not the province, or even proper for a guest to attempt to direct the

seat with the driver, who was in fact familiar with the crossing. His safety and his wife's safety were at stake, and there is no evidence of any fact indicating to the plaintiff that he soon was not exercising his faculties of observation with diligence. Why ought the plaintiff to have arrogated to herself control over the automobile and commanded it to stop? The finding is that she saw a track beyond the obstructions to her vision and knew engines and cars were likely to pass over it at any time. There is no finding and no evidence that from her place in the back seat she could see this track was so close to the one on which the coal car stood that the automobile would be in danger before her husband on the front seat could see toward the north. Her opportunities of observation were not equal to those of her husband. She knew his ability as a driver and trusted him, and, what is more, she had the right to trust him." See also *Ward v. Clark*, 189 N. Y. App. Div. 344, 179 N. Y. Suppl. 466.

**Passenger in auto bus.**—A passenger in an auto bus is not negligent in taking such a means for transportation, nor is he negligent in relying on the driver of the car to avoid dangers and in not keeping a lookout for dangers. *McDonald v. Messaba Ry. Co.*, 137 Minn. 275, 163 N. W. 298, where in it was said: "The plaintiff was not negligent in taking passage in the bus. She was not wanting in care in what she did or failed to do at the precise moment of the collision. She did not actually anticipate it. If negligent at all it was because she did not look and listen, or hearing, did nothing to prevent the accident. It appears nearly conclusively that she did not hear. Considering that she did not hear, vexance, her position in it shut in

as she was, the difficulty and impracticability of her maintaining a lookout, the lack of any reason for her distrusting the skill or diligence of the driver, the readiness with which he could control his machine, his superior position for observing danger, the active and continuous duty which rested upon him of watching, the absence of actual notice to her of impending danger, and the want of apparent need of supervising the conduct of the driver or disturbing him with suggestions or warnings, a jury should not be permitted to find that she was guilty of negligence in caring for her own safety. It is hardly to be thought that the conduct of a very careful person would have been different from that of the plaintiff. We make no attempt to frame a general rule solving all cases. The facts in particular cases must determine whether the ultimate question is for the jury."

**Wagon.**—"Common sense would dictate that when a wife goes riding with her children in a rig driven by her husband she rightfully relies on him not to drive so as to imperil those in his charge. The law does not depart from common sense by requiring her, under the circumstances shown here, to impugn her husband's ability to drive and assume the prerogative to dictate to him the manner of driving. With one child on her lap and another sitting next to look after she might with human and legal fairness and propriety leave the driving in the exclusive care of the husband and father, at least until she actually saw some danger calling for warning or advice from her, which was not the case in this instance. She frankly testified that she was 'scrooched down' holding her baby and 'gawking around at things' but not paying attention to the

movements of the driver.<sup>98</sup> The situation may be different, when he knows that the driver is operating the machine in a careless manner, or if he has knowledge of some danger which is not known or obvious to the driver. Then a duty devolves on him of taking measures for his own protection.<sup>99</sup> The extent to which the passenger or guest may rely upon the driver, and the steps he should take for his own safety, must depend upon the circumstances of the particular case.<sup>1</sup> Negligence

situation or circumstances surrounding the place at the time. So far as imputed negligence is concerned she had a right to trust her husband to so conduct the ride that she could 'scrootch down' and 'gawk around' and rest, for very likely she was taken on the drive for real rest and relaxation." *Williams v. Withington*, 88 Kans. 809, 129 Pac. 1148.

98. *Bradley v. Interurban Ry. Co.* (Iowa), 183 N. W. 493; *Latimer v. Anderson County*, 95 S. Car. 187, 78 S. E. 879; *Hunter v. City of Saskatoon*, 48 D. L. R. (Canada) 68. "A gratuitous passenger, in no matter what vehicle, is not expected, ordinarily, to give advice or direction as to its control and management. To do so might be harmful rather than helpful. *Clarke v. Connecticut Co.*, 83 Conn. 219, 76 Atl. 523.

99. *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; *Thompson v. Los Angeles, etc. R. Co.*, 165 Cal. 748, 134 Pac. 709; *Beall v. Kansas City Ry. Co.* (Mo. App.), 228 S. W. 834; *White v. Portland Gas & Coke Co.*, 84 Oreg. 643, 165 Pac. 1005; *Azinger v. Pennsylvania R. Co.*, 262 Pa. 242, 105 Atl. 87; *Martin v. Pennsylvania R. Co.*, 265 Pa. St. 282, 108 Atl. 631; *Hill v. Philadelphia Rapid Transit Co.*, 114 Atl. 634. "Assuming for the sake of argument, but not conceding, that plaintiff was merely the guest of Bird, and was in no sense responsible for the manner in which Bird operated and

managed the automobile while making the trip in question, it nevertheless was incumbent upon him to exercise ordinary care and prudence by making diligent use of his senses of sight and hearing, by looking and listening for trains as the automobile approached the crossing, and to heed the warnings and signals of the approach of the train, and to suggest to Bird that they stop until the danger was over, and to protest if that was not done." *Lawrence v. Denver, etc. R. Co.*, 52 Utah, 414, 174 Pac. 817.

1. "Negligence may be grounded in action or refusal to act, in speaking or failing to speak, all with reference to duty in the premises. We can easily conceive of cases where a clamor of direction by the guest would confuse a driver or chauffeur and increase the danger in a manner amounting to contributory negligence of the passenger. In others the duty to utter warning might be imperative. In some instances it would be rank folly to wrest the reins or the wheel from the hands of the one in charge of the vehicle. In others it might be highly necessary to do that very thing. The court cannot lay down a mathematical precept as a rule of law enjoining in detail what should be said or done or omitted in every juncture of danger. It is plain, however, that an invited guest is not to be supine and inert as mere freight. Accepting the hospitality of his friend does not excuse him from the duty of acting for his own safety as a rea-

is not necessarily charged against a passenger because he intrusts himself to a driver who he has reason to believe is careless, but such fact is to be considered in determining whether he has exercised the proper conduct in the face of danger.<sup>2</sup> But, if one intrusts himself to a driver whom he knows to be intoxicated to the extent that he cannot drive the car with the care of an ordinarily prudent person, he may be unable to recover for his injuries.<sup>3</sup>

### **Sec. 691. Contributory negligence of passenger — riding with intoxicated driver.**

One may be negligent if he commits his safety to the intoxicated driver of an automobile. While it is true in general that the negligence of the driver of a vehicle is not imputable to a passenger so as to bar that passenger's right of recovery, yet the conduct of one in riding in and continuing to ride in an automobile when he must have known that the driver was intoxicated establishes independent negligence on his part.<sup>4</sup> "Even while prosecuting a journey, if the driver becomes intoxicated so as to lose control of the vehicle, or is reckless, and this is known to the passenger, ordinary care requires the passenger to call upon the driver to stop and allow him to alight, or turn the management of the vehicle over to another capable of properly directing it, and if the passenger fails to exercise such care and is injured as a result of the negligence or recklessness of the driver and a third person, he may not have recourse of such third person, this being denied

sonably prudent person would under like conditions. Whether he does so or not must be decided by the 12 who declare the facts embodied in the verdict." *White v. Portland Gas & Coke Co.*, 84 Oreg. 643, 165 Pac. 1005.

2. *Wiley v. Young*, 178 Cal. 681, 174 Pac. 316.

**Driver with injured hand.**—To charge a wife with the negligence of her husband driving the car on the theory that she knew he had an injured hand, it must also be found that she knew that on account of the injury

he was unable to manage the automobile with ordinary safety. *Gaffney v. Dixon*, 157 Ill. App. 589.

3. Section 691.

4. *McGeever v. O'Byrne* (Ala.), 82 So. 508; *Lynn v. Goodwin*, 170 Cal. 112, 148 Pac. 927; *Kirmse v. Chicago, etc. R. Co.* (Ind.), 127 N. E. 837; *Winston's Adm'r v. City of Henderson*, 179 Ky. 220, 200 S. W. 330. See also *Brannen v. Kokomo, etc. Co.*, 115 Ind. 115, 17 N. E. 202, 7 Am. St. Rep. 411; *Meenagh v. Buckmaster*, 26 N. Y. App. Div. 451, 50 N. Y. Suppl. 85

him because of his own negligence rather than upon the ground that the negligence of the driver is imputed to him."<sup>5</sup> If the driver from intoxication is in a condition which renders him incapable of operating the machine with proper diligence and skill, and this is known or is palpably apparent to one entering the car, this is a fact which may be proved for the consideration of the jury, along with the other facts in the case, to throw light on the question whether such person exercised ordinary care in entering the car or in remaining therein. So, if the guest took drinks of liquor with the owner and driver of the car, some of the liquor being furnished by the owner and some by the guest, this may be shown for the purpose of aiding in the determination of whether the guest was negligent.<sup>6</sup> Where it is shown that a party of eight persons, including the operator of the automobile, had been drinking for about six hours before the accident, the contributory negligence of one of such persons in remaining in the vehicle, is a question for the jury.<sup>7</sup>

**Sec. 692. Contributory negligence of passenger — failure to warn driver of dangers.**

If a passenger sees that the driver is guilty of negligence in his operation of the machine or that he is running into danger which is known to the passenger but of which the driver is oblivious, reasonable care would require that the passenger give some warning to the driver or take some steps for the avoidance of injury.<sup>8</sup> Or, if the driver is taking no steps to avoid a threatened danger which is apparent to the passenger, the jury may properly charge him with contribu-

5. *Winston's Adm'r v. City of Henderson*, 179 Ky. 220, 200 S. W. 330.

6. *Powell v. Berry*, 145 Ga. 696, 89 S. E. 753.

7. *Sutton v. City of Chicago*, 195 Ill. App. 261. See also *McKeen v. Iverson* (N. Dak.), 180 N. W. 805.

8. *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 103 C. C. A 135. 29 L. R. A. (N. S.) 924; *Weidlich v. New York, etc. R. Co.*, 93 Conn. 438, 106

Atl. 323; *Jacobs v. Jacobs*, 141 La. 272, 74 So. 992; *Carnegie v. Great Northern R. Co.*, 128 Minn. 14, 150 N. W. 164; *Terwilliger v. Long Island R. Co.*, 152 N. Y. App. Div. 168. 136 N. Y. Suppl. 733; *Rogers v. Portland, etc. R. Co.*, 66 Oreg. 244. 134 Pac. 9; *Eline v. Western Maryland R. Co.*, 262 Pa. 33, 104 Atl. 857; *Knoxville Ry. & Light Co. v. Vangilden*, 132 Tenn. 487. 178 S. W. 1117.

tory negligence, unless he attempts to avoid the danger.<sup>9</sup> In such a case, he cannot passively sit still and then charge his misfortunes to others. If a passenger sees a train approaching at a crossing and the driver is taking no steps to avoid the danger, the passenger should give warning, and a failure to give such warning may afford ground for a charge of contributory negligence.<sup>10</sup> But if the passenger is not aware of the driver's intention to cross the track without stopping, contributory negligence as a matter of law is necessarily charged.<sup>11</sup> And it cannot be said as a matter of law that a

9. *Christison v. St. Paul City Ry. Co.*, 138 Minn. 456, 165 N. W. 273; *Morris v. Chicago, etc. R. Co.*, 101 Neb. 479, 163 N. W. 799; *Hill v. Philadelphia Rapid Transit Co. (Pa.)*, 114 Atl. 634; *Wentworth v. Waterbury*, 90 Vt. 60, 96 Atl. 334.

10. *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; *Lyon v. Phillips (Tex. Civ. App.)*, 196 S. W. 995.

**Husband and wife.**—Where in an action by a woman of mature years to recover for injuries received in a collision at a grade crossing between an automobile in which she was riding, and which was driven by her husband, and one of defendant's trolley cars, the plaintiff testifies that at the time of the accident the automobile was going down a steep hill; that she was familiar with the road and vicinity; that when the automobile was 400 or 500 feet from defendant's tracks, which ran along an intersecting road, she could have seen the wires and the trolley pole of the approaching car had she looked, although the car itself was hidden by the walls and shdubbery on the sides of the road, but that she did not look nor pay any attention to the driving of the automobile, and it appears that her husband had the automobile under control and could easily have stopped it, had she warned him, she was guilty of contributory negligence barring a recovery. *Pouch v. Staten*

*Island Midland Ry. Co.*, 142 N. Y. App. Div. 16, 126 N. Y. Suppl. 738.

11. *Birmingham So. R. Co. v. Harrison*, 203 Ala. 284, 82 So. 534. "There is no duty on such guest to anticipate that the independent driver of the vehicle in which such guest is riding will enter the sphere of danger or peril ahead, or will omit to exercise commensurate care to sense the approach or the probable approach of other agencies of transportation with reference to which the ordinarily prudent driver should, in due observance of his duty, govern the movement of the vehicle he controls. Where, however, such guest knows of the danger or peril into or toward which the vehicle is being driven, or the circumstances of realized speed of the vehicle and known location and its surroundings ahead are such as to suggest, to a reasonably prudent person likewise situated, the probability that a sphere of danger or peril may be created thereby or may be entered in course of the vehicle's movement, it is the duty of such guest to warn the driver in the premises and to protest a continuance of a movement so actually or probably fraught with danger or peril to such occupant of the vehicle. In other words, the duty imposed upon such person, whatever his seat in the vehicle, is created by either known dangers or perils that the attendant circumstances reasonably suggest or



girl of 19, riding in the rear seat of a carriage driven by her brother-in-law, is bound to advise him with respect to the management of the team on approaching at night a railroad crossing where obstructions prevent a view of the track from a greater distance than about fifteen feet, although she is familiar with the surroundings and he is not.<sup>12</sup> A train may appear so suddenly and the entire transaction take such a short time that there is no opportunity for even the most prudent passenger to apprehend the danger and give warning thereof to the driver.<sup>13</sup> When the passenger actually gives a warning of the danger to the chauffeur, but the latter disregards the warning, ordinarily there is no basis upon which negligence can be charged to the passenger.<sup>14</sup>

**Sec. 693. Contributory negligence of passenger — remaining in machine.**

When a passenger sees the machine approaching in a position of danger, it may be that his best recourse to escape injury would be to jump from the machine. But, in a sudden emergency, his conduct is not closely scrutinized and he is not charged with contributory negligence as a matter of law because he remains in the machine.<sup>15</sup> On the other hand, if he leaves a moving machine and thereby receives an injury, it may be proved subsequently that he would have escaped injury had he remained with the machine, but he is not neces-

foreshadow. The duty is therefore not original with respect to the operation of the vehicle, but resultant, and that only from known and appreciated circumstances capable of bringing it into effect. Otherwise, the law would be held to sanction this irrational result: Such person would be allowed to close his senses to known dangers or to perils reasonably suggested by the attendant circumstances indicated, in blind reliance upon the unaided care of another, independent of such person's control though that other is, without assuming the consequences of the omission of such ordinary care as the attendant circumstances or known

perils create." *Birmingham Ry. L & P. Co. v. Barranco*, 203 Ala. 639, 84 S. O. 839.

12. *Angell v. Chicago, R. I. & P. Ry. Co.*, 97 Kans. 688, 156 Pac. 763, rehearing denied 98 Kans. 268, 157 Pac. 1196.

13. *Drouillard v. Southern Pac. Co.* (Cal. App.). 172 Pac. 405; *Schaefer v. Arkansas Valley Interurban Ry. Co.* (Kans.), 179 Pac. 323

14. *Avery v. Thompson*, 117 Me. 120, 103 Atl. 4.

15. *Ellis v. Central California Tract. Co.*, 37 Cal. App. 390, 174 Pac. 407. See also *Hensley v. Kansas City Rys. Co.* (Mo. App.), 214 S. W. 287.

sarily charged with negligence because he took the wrong course in the emergency.<sup>16</sup> The circumstances, however, may be such as to charge the occupant with negligence as a matter of law, where he unreasonably remains in the machine when adequate time is allowed for escaping.<sup>17</sup> The fact that one remains in a machine while it is traveling over a muddy and slippery road in the night, is not necessarily negligence.<sup>18</sup>

**Sec. 694. Contributory negligence of passenger — permitting driver to run at excessive speed.**

One riding in a motor vehicle may be properly charged with negligence if he encourages or permits the driver to proceed at an unreasonable speed without remonstrance.<sup>19</sup> Thus, where one rode in an automobile at a rate of over fifty miles an hour in a city street for a distance of 1,500 feet, without remonstrance or even suggestion to the driver that he stop the car or slacken its speed, renders him guilty of contributory negligence, and he cannot recover for injuries sustained by the machine striking a bundle of newspapers in the street.<sup>20</sup> It has been held, however, that one who is merely a guest of persons hiring a car is not ordinarily in a position to object to the speed with which the machine is operated.<sup>21</sup> The violation of the speed limit, is not necessarily negligence in those States where the violation constitutes merely *prima facie* evidence of negligence.<sup>22</sup> And, where the guest remonstrates against the speed, but the accident occurs before he

16. Fahey v. Director General (Mass.), 126 N. E. 784; Parker v. Seaboard Air Line Co. (N. C.), 106 S. F. 755.

17. Krouse v. Southern Mich. Ry. Co. (Mich.), 183 N. W. 768.

18. Dillabough v. Okanogan County, 105 Wash. 609, 178 Pac. 802.

19. McGeever v. O'Byrne (Ala.), 82 So. 508; Stewart v. San Joaquin L. & P. Co. (Cal. App.), 186 Pac. 160; Fair v. Union Tract. Co., 102 Kans. 611, 171 Pac. 649; Jefson v. Crosstown St. Ry., 72 Misc. 103, 129 N. Y. Suppl.

233; Hardie v. Barrett, 257 Pa. St. 42, 101 Atl. 75; Langley v. Southern Ry. Co. (S. C.), 101 S. E. 286; Howe v. Corey (Wis.), 179 N. W. 791. See also Ferry v. City of Waukegan, 196 Ill. App. 81.

20. Jefson v. Crosstown St. Ry. Co., 72 Misc. 103, 129 N. Y. Suppl. 233.

21. Routledge v. Rambler Auto Co. (Tex.), 95 S. W. 749.

22. Holland v. Yellow Cab Co., 144 Minn. 475, 175 N. W. 536. And see section 322.

has time to take other steps for his safety, he is not negligent as a matter of law.<sup>23</sup>

### **Sec. 695. Contributory negligence of passenger — defective machine.**

One who rides as a passenger or guest in a motor vehicle which he knows to be in a defective condition so that injury will likely ensue, may be found guilty of contributory negligence, for such conduct may be deemed by the jury to be inconsistent with the care which would be exercised by a reasonably careful person. If the passenger knows that the machine is not properly equipped with lights, and he continues the trip, he may be charged with negligence in that respect.<sup>24</sup> But where the lights fail in the night while on a trip, and the car proceeds with the use of an oil lamp, and reasonable precautions are taken for the safety of the travelers in view of the circumstances, the passengers are not necessarily to be charged with negligence because they continued their trip and did not refuse to proceed when the difficulty arose.<sup>25</sup>

23. *Rappaport v. Roberts* (Mo. App.), 203 S. W. 676. See also *Masten v. Cousins*, 216 Ill. App. 268.

24. *Rebillard v. Railroad Co.* 216 Fed. 503. The court said: "In *Little v. Hackett*, 116 U. S. 366, which is the leading American case on this subject, and which has been followed by the American courts generally, the rule was established that the contributory negligence of the driver of a public conveyance would not be imputed to a passenger. And this court in *Union Pacific Ry. Co. v. Lapsley*, 51 Fed. 174, 2 C. C. A. 149, and *City of Winona v. Botzet*, 169 Fed. 321, has extended this rule to a person who accepts a gratuitous invitation of the owner and driver of a vehicle to ride with him, even if it is not a public

conveyance. But an examination of the many cases on that question shows that the writers of the opinions are careful to except a passenger or guest who with knowledge of the danger remains in such dangerous position. . . . The plaintiff, as a reasonably prudent person, must have known of the danger incident to riding in a motor car on a dark night, without lights, over roads with which neither the driver of the car, nor any of the persons with him in the car, were familiar. When with full knowledge of that fact the plaintiff remained in the car he was as guilty of negligence as the driver himself."

25. *Chambers v. Minneapolis, etc. Ry. Co.*, 37 N. Dak. 377, 163 N. W. 324.

## CHAPTER XXV.

## SAFETY OF ROADS FOR AUTOMOBILES.

SECTION 696. In general.

- 697. Municipalities not insurers against injuries from defective highways.
- 698. Obstructions.
- 699. Obstructions placed in streets by others.
- 700. Holes or excavations.
- 701. Guarding.
- 702. Slippery surface.
- 703. Width of road.
- 704. Bridges.
- 705. Proximate cause.
- 706. Knowledge of defect.
- 707. Notice of injury.
- 708. Liability of abutting owners and others for defects in streets.
- 709. Joint wrongdoers.
- 710. Contributory negligence of traveler—in general.
- 711. Contributory negligence of traveler—right to assume safety of highway.
- 712. Contributory negligence of traveler—violation of statute or law of road.
- 713. Contributory negligence of traveler—assumption of danger.
- 714. Contributory negligence of traveler—lookout.
- 715. Contributory negligence of traveler—speed.
- 716. Contributory negligence of traveler—negligence of passenger.

### Sec. 696. In general.

Automobiles have an equal right to the use of the public highways in common with other vehicles.<sup>1</sup> With the growth of the use of the highways for motor vehicle travel, a corresponding duty is imposed upon cities, villages, towns, counties, or other municipal divisions charged with the maintenance of the highways, to exercise due care in keeping the roads reasonably safe for such traffic.<sup>2</sup> And, ordinarily, the

1. Section 49.

2. *United States*—City of Baltimore v. State of Maryland, 166 Fed. 641. "The court by the first instruction in effect informed the jury that the obligation upon the city was to keep its highway reasonably safe for public travel by day or night, and to provide

such guards, lights, or barriers or other safeguards as would be ordinarily and reasonably sufficient to protect persons lawfully using such highway in the exercise of proper care. This instruction properly propounds the law, and carefully safeguarded the city's rights, as settled certainly by authori-

question whether a highway was reasonably safe for automobilists is a question left for the jury.<sup>3</sup> The fact that the

ties of the state of Maryland, and the Supreme Court of the United States." *City of Baltimore v. State of Maryland*, 166 Fed. 641.

*District of Columbia*.—Burke v. District of Columbia, 42 App. D. C. 438.

*Georgia*.—Holiday v. Athens, 10 Ga. App. 709, 74 S. E. 67.

*Illinois*.—Gaffney v. Dixon, 157 Ill. App. 589; Ferry v. City of Waukegan, 196 Ill. App. 81.

*Indiana*.—City of Indianapolis v. Moss (Ind App.), 128 N. E. 857.

*Iowa*.—Wolford v. City of Grinnell, 179 Iowa, 689, 161 N. W. 686.

*Kansas*.—Super v. Modell Twp., 88 Kans. 698, 129 Pac. 1162.

*Kentucky*.—City of Lancaster v. Broddus, 186 Ky. 226, 216 S. W. 373.

*Maryland*.—Charles v. City of Baltimore, 114 Atl. 565.

*Massachusetts*.—Baker v. City of Fall River, 187 Mass. 53, 72 S. E. 336; Kelleher v. City of Newburyport, 227 Mass. 462, 116 N. E. 807; Bond v. Inhabitants of Billerica (Mass.), 126 N. E. 281. "Cities and towns are not required by the law to make special provisions in order to keep all their public ways at all times in condition for the safe passage of automobiles, bicycles and other mechanisms for travel newly devised and unthought of at the time when the statute imposing the general duty as to repairs of ways and liability for defects therein was enacted. But they are obliged to keep their ways reasonably safe and convenient for travel generally, having regard to all the circumstances. Automobiles are recognized by the law as a legal method of travel. Elaborate statutory provisions are made for their registration for the licensing of those who operate them, and for their management upon public ways. It is common knowledge that at present in this

commonwealth a vastly larger number of people travel upon the highways in automobiles than in horse-drawn vehicles. The care as to the repair of ways cast upon municipalities by the statutes has reference to all kinds of legitimate travel, including that rightly undertaken in automobiles. Although special provisions for their safety are not demanded, their presence cannot be ignored." *Kelleher v. City of Newburyport*, 227 Mass. 462, 116 N. E. 807.

*Michigan*.—Cone v. City of Detroit, 191 Mich. 198, 157 N. W. 417; Loose v. Deerfield Twp., 187 Mich. 206, 153 N. W. 913.

*Missouri*.—Bethel v. City of St. Joseph, 184 Mo. App. 388, 171 S. W. 42.

*Nebraska*.—Reidellhuber v. Douglas County, 100 Neb. 687, 161 N. W. 174.

*New Hampshire*.—Richmond v. Town of Bethlehem, 104 Atl. 773.

*New York*.—Coreoran v. City of New York, 188 N. Y. 131, 80 N. E. 660.

*North Carolina*.—Hardy v. West Coast Constr. Co., 174 N. Car. 320, 93 S. E. 841.

*Oklahoma*.—City of Sapulpa v. Deason, 196 Pac. 544.

*Rhode Island*.—Smith v. Howard, 105 Atl. 648.

*South Carolina*.—Latimer v. Anderson County, 95 S. Car. 187, 78 S. E. 879.

*Utah*.—Sweet v. Salt Lake City, 43 Utah. 306, 134 Pac. 1167.

*Washington*.—Wessels v. Stevens County, 188 Pac. 490.

*Canada*.—Connor v. Tp. of Brant, 31 O. L. R. 274; Raymond v. Tp. of Bosenquith, 43 O. L. R. 434.

3. *Smith v. Village of Sidell*, 205 Ill. App. 66; *Ferry v. City of Waukegan*, 205 Ill. App. 109; *Smith v. Howard (R. I.)*, 105 Atl. 648; *Walters v. City of Seattle*, 97 Wash. 657, 167 Pac. 124;

highway, if maintained in a similar condition before the advent of the automobile, would have then been considered sufficient, does not necessarily determine its sufficiency at the present period.<sup>4</sup> It would have been, perhaps, unreasonable to have expected municipalities and their officials to have placed the streets and highways in proper condition for auto travel immediately after the advent of their popularity.<sup>5</sup> But a failure to conform the highways to the changed methods of travels within a reasonable time, justifies a finding of negligence.<sup>6</sup> Expert evidence is not generally admissible on the question whether the highway in question is reasonably safe for automobiles at the time of an accident.<sup>7</sup> If a municipality

*Kadolph v. Town of Herman*, 166 Wis. 577, 166 N. W. 433.

4. *Cone v. City of Detroit*, 191 Mich. 198, 157 N. W. 417; *Davis v. Township of Usborne*, 28 D. L. R. (Canada) 397, 36 O. L. R. 148, 9 O. W. N. 484. *Compare Doherty v. Inhabitants of Ayer*, 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 816. "It is also argued by counsel for the city that the statute which imposes the obligation upon the municipality to keep and maintain its highways in a condition reasonably safe and fit for public travel should be construed so as to refer only to ordinary vehicles which were in use at the time of the passage of the statute, which at that time were wagons or carriages drawn by horses and should not be held to apply to automobiles. It cannot now well be disputed that automobiles and automobile trucks are ordinary vehicles. In fact, they have become so ordinary that it is rather unusual to see vehicles which were in use at the time the statute was passed on the streets of a large city like Detroit. It would be a strange conclusion to say that the municipality should not be bound to keep its highways in condition reasonably fit for travel for vehicles which become from time to time the ordinary vehicles of

travel." *Cone v. City of Detroit*, 191 Mich. 198, 157 N. W. 417.

5. *Davis v. Township of Usborne*, 28 D. L. R. (Canada) 397, 36 O. L. R. 148, 9 O. W. N. 484.

6. *Davis v. Township of Usborne*, 28 D. L. R. (Canada) 397, 36 O. L. R. 148, 9 O. W. N. 484; *Walker v. Tp. of Southwold*, 46 O. L. R. (Canada) 265. *Compare Bond v. Inhabitants of Billerica (Mass.)*, 126 N. E. 281. "It is true of course that the ordinary needs of travel change with changed conditions, and road officers must keep in mind the new uses of travel in the construction and maintenance of highways. In this connection it has been held that bridges must be of sufficient strength to carry traction engines when they are in common use in the community and are ordinarily propelled upon the public roads." *Wasser v. Northampton County*, 249 Pa. St. 25, 94 Atl. 444.

7. *Loose v. Deerfield Twp.*, 187 Mich. 206, 153 N. W. 913.

**Evidence as to precautions which should have been taken.**—In an action for damages arising out of injuries sustained from an automobile running into an excavation in a city street, it is a question for the jury as to what precautions the city should have taken to have guarded against accident, and the

fails to perform its duty with respect to the proper condition of its highways, liability for pecuniary damages is generally imposed on it. With respect to towns and counties, the liability is usually a matter of statutory regulation.<sup>8</sup> Where a statute provides that highways shall be kept in a reasonably safe condition for travelers with horses, teams and carriages, the word "carriages" is construed to include motor cars or automobiles.<sup>9</sup> A State may waive its immunity from suit and assume liability for defects in a State highway.<sup>10</sup>

### **Sec. 697. Municipalities not insurers against injuries from defective highways.**

A municipality upon which is imposed the duty of the maintenance of the streets and highways, does not insure travelers against injury from defects therein.<sup>11</sup> It is liable, only when negligence is shown on the part of its officers or employees.<sup>12</sup> And the burden is placed on the plaintiff to show the negligence of the municipality.<sup>13</sup> Moreover, the duty of a municipality to keep its highways in a reasonably safe condition does not include the providing against insufficiency caused by extraordinary events.<sup>14</sup>

### **Sec. 698. Obstructions.**

Municipalities do not insure travelers in motor vehicles against accidents from striking objects within the street

plaintiff should not be allowed to give his opinion as an expert on that question. *Sweet v. Salt Lake City*, 43 Utah, 306, 134 Pac. 1167.

8. *Dubourdieu v. Delaware Tp.*, 106 Kans. 650, 189 Pac. 386; *Buckalew v. Middlesex County*, 91 N. J. Law, 517, 104 Atl. 308; *Raymond v. Sauk County*, 167 Wis. 125, 166 N. W. 29. See also *Irvin v. Finney County*, 106 Kans. 171, 186 Pac. 975; *Renner v. Buchanan Co. (Iowa)*, 183 N. W. 320.

9. *Baker v. Fall River*, 187 Mass. 53, 72 N. E. 336.

10. *Best v. State*, 114 Misc. (N. Y.) 272.

11. *Sharot v. City of New York*, 177 N. Y. App. Div. 869, 164 N. Y. Suppl. 804; *Wasser v. Northampton County*, 249 Pa. St. 25, 94 Atl. 444; *Swain v. City of Spokane*, 94 Wash. 616, 162 Pac. 991; *Thompson v. City of Bellingham (Wash.)*, 192 Pac. 952.

12. *Zorn v. City of New York*, 85 Misc. (N. Y.) 45, 147 N. Y. Suppl. 70; *Camp v. Alleghany County*, 263 Pa. St. 276, 106 Atl. 314.

13. *McDonald v. City of Philadelphia*, 248 Pa. St. 145, 93 Atl. 959.

14. *Schrunk v. St. Joseph*, 120 Wis. 223, 97 N. W. 946.

lines.<sup>15</sup> But reasonable care on the part of those officers charged with the repair of highways, requires that *unreasonable* obstructions in the streets shall be avoided, and liability may be imposed on the officer, or, in some cases, on the municipality, for injuries received by an automobilist from such an obstruction.<sup>16</sup> A temporary obstruction may be justified, but, if so, reasonable care requires that warning of the danger be given to travelers.<sup>17</sup> Thus a municipality may be liable

**15. Section 697.**

**Stump in sidewalk line.**—Wheeler v. Flatonio (Tex. Civ. App.), 155 S. W. 951.

**16. Connecticut.**—Baldwin v. City of Norwalk, 112 Atl. 660.

**District of Columbia.**—Burke v. District of Columbia, 42 App. D. C. 438.

**Georgia.**—Holliday v. Athens, 10 Ga. App. 709, 74 S. E. 67.

**Illinois.**—Gaffney v. Dixon, 157 Ill. App. 589; Ferry v. City of Waukegan, 196 Ill. App. 81; Ferry v. City of Waukegan, 205 Ill. App. 109.

**Iowa.**—Wolford v. City of Grinnell, 179 Iowa, 689, 161 N. W. 686. "It is settled law of this State that cities must keep their streets free from obstructions and nuisances which interfere with ordinary public travel, and this duty applies to automobiles as well as other vehicles." Kendall v. City of Des Moines, 183 Iowa, 866, 167 N. W. 684. "The street upon which the accident occurred was open to public travel, and it was the defendant's duty to keep the same free from obstructions and from nuisances, which would interfere with ordinary public travel, and this includes travel by automobiles as well as other vehicles." Wolford v. City of Grinnell, 179 Iowa, 689, 161 N. W. 686.

**South Carolina.**—Latimer v. Anderson County, 95 S. Car. 487, 78 S. E. 879.

**Wisconsin.**—Kadolph v. Town of Herman, 166 Wis. 577, 166 N. W. 433.

**Canada.**—Freedman v. City of Winnipeg, 43 D. L. R. 126.

**Snow drift.** It is not negligence nor does it constitute an actionable "defect" under section 74 of the Highway Law of the State of New York for a town superintendent, when clearing a country highway from drifted snow, to cut a passage which does not lie precisely in the line of the middle of the macadam road, but is partly on the macadam and partly on the dirt surface, where he cleared sufficient room for two wagons to pass. Hence, the town cannot be held liable for damages where the plaintiff's husband, while driving an automobile after dark on a foggy evening at a speed of from twelve to fifteen miles an hour, ran into the drift by keeping to the middle of the road. Robinson v. Town of Somers, 189 N. Y. App. Div. 792, 179 N. Y. Suppl. 107.

**17. Gaffney v. Dixon, 157 Ill. App. 589.** "It was for the jury to decide whether the obstruction was in any way dangerous to public travel, as ordinarily and reasonably conducted, and whether appellee, in the exercise of ordinary care in providing a reasonably safe street for public travel, should have placed danger signals at that point at night." Gaffney v. Dixon, 157 Ill. App. 589.

**Presumption of continuance of warning.**—Where the existence at any one time of a certain condition of things of a continuing nature is shown, it is presumed that such condition continues to exist until the contrary is shown by circumstantial or direct evidence. Thus,



for negligence, where a rope was tied across the highway with nothing, other than the rope, to indicate its presence.<sup>18</sup> Granting that a city, town or other municipal unit for the maintenance of highways has the right to close a street temporarily by the use of the rope stretched across it, reasonable prudence would seem to require that some notice of the obstruction be afforded to travelers.<sup>19</sup> And it may be held to be negligence to deposit a pile of sand, crushed stone or other material on a city street and to allow it to remain there over night without guarding it with red-light signal or any other warning of danger.<sup>20</sup> But the construction of a bridge over a street with a girder and a truss in the middle of the carriageway does not impose a duty on the municipality of lighting the obstruction at night in order to give notice thereof to travelers.<sup>21</sup>

#### **Sec. 699. Obstructions placed in streets by others.**

A municipality is not necessarily relieved from responsibility for an accident to an automobilist, merely because the obstruction which was the primary cause of the accident had been placed in the street by a person other than a municipal employee. Negligence may be charged upon the theory that

in an action to recover against a city for injury to an automobile which collided with a sand pile in the street in the night time, it will be presumed that there was a red light burning at the point at which the plaintiff approached the sand, if it be shown that such light was burning earlier in the evening and immediately after the accident, though extinguished, was found to be warm. *Carlson v. City of New York*, 150 N. Y. App. Div. 264, 134 N. Y. Suppl. 661.

**Manhole.**—When plaintiff's automobile was injured at night through driving against a manhole standing above the level of a street which was being graded, he must show, in order to recover against the municipality, that the city had actual notice of the fact that a light previously placed on the manhole by a foreman had been removed.

*Gedroice v. City of New York*, 109 N. Y. App. Div. 176, 95 N. Y. Suppl. 645.

18. *Holliday v. Athens*, 10 Ga. App. 709, 74 S. E. 67; *Latimer v. Anderson County*, 95 S. Car. 187, 78 S. E. 879. See also *Wallower v. Webb City*, 171 Mo. App. 214, 156 S. W. 48.

19. *Holliday v. Athens*, 10 Ga. App. 709, 74 S. E. 67.

20. *Roy v. Kansas City* (Mo. App.), 224 S. W. 132; *Martin v. Kansas City* (Mo. App.), 224 S. W. 141; *Britt v. Omaha Concrete Stone Co.*, 99 Neb. 300, 156 N. W. 497; *Brengman v. King County*, 107 Wash. 306, 181 Pac. 861. See also *Hardy v. West Coast Constr. Co.*, 174 N. Car. 320, 93 S. E. 841.

21. *Gaines v. City of New York*, 156 N. Y. App. Div. 789, 142 N. Y. Suppl. 401.

the municipality negligently permitted the obstruction to continue.<sup>22</sup>

### Sec. 700. Holes or excavations.

An excavation or hole in a street or highway may form the basis for charging a municipality for liability to one riding in a motor vehicle and receiving injuries from such defective condition.<sup>23</sup> The size of the excavation or hole in the road is one of the principal elements in determining the liability of the municipality. Municipalities are not held liable, as for negligence, by reason of slight depressions or differences of grade in the highway, for to hold otherwise would subject them to an unreasonable burden.<sup>24</sup> If for any reason, a dan-

22. *Wolford v. City of Grinnell*, 179 Iowa, 689, 161 N. W. 686; *Shafir v. Sieben (Mo.)*, 233 S. W. 419.

**Pole placed in street by electric company.**—In an action for damages for personal injuries sustained by an automobile passenger in a collision between the machine in which he was riding and a trolley pole maintained in the middle of a street by the company, with the acquiescence of the city, *held*, that the maintenance of such trolley pole did not constitute negligence either on the part of the company or of the city, where it appeared that the street in which the poles were maintained was 143 feet wide, and a span from side to side would necessarily be 120 feet; that it would be impracticable and dangerous to suspend high power feed wires across a street where the span was so great, without supports; and that the poles in question were plainly marked by a white stripe 4 feet wide, painted around them 5 feet from the ground.

Under such circumstances, no obligation rested either on the railway company or the city to maintain grass plots around trolley poles legitimately placed in the center of a street. *Wegmann v. City of New York*, 195 App. Div. 540.

23. *City of Baltimore v. State of Maryland*, 166 Fed. 641; *Burke v. District of Columbia*, 42 App. D. C. 438; *City of Lancaster v. Broadbus*, 186 Ky. 226, 216 S. W. 373; *Loose v. Deerfield Twp.*, 187 Mich. 206, 153 N. W. 913; *Cone v. City of Detroit*, 191 Mich. 198, 157 N. W. 417; *Howell v. Burchville Twp. (Mich.)*, 179 N. W. 279; *Sweet v. Salt Lake City*, 43 Utah, 306, 134 Pac. 1167; *Kaufman v. Township of Korah*, 46 O. L. R. (Canada) 412. See also *St. Louis, etc., R. Co. v. Bell*, 58 Okla. 84, 159 Pac. 336.

**Assault by employee of company making excavation.**—Where a street railway company made an excavation in a street and the plaintiff ran his automobile in the excavation, whereupon he was tortiously assaulted by an employee of the company while he was endeavoring to extricate his machine, it was held that the company was liable for exemplary damages. *Memphis St. Ry. Co. v. Stratton*, 131 Tenn. 620, 176 S. W. 105.

24. *Faber v. City of New York*, 161 N. Y. App. Div. 203, 146 N. Y. Suppl. 295; *Morris v. Interurban St. Ry. Co.*, 100 N. Y. App. Div. 295, 91 N. Y. Suppl. 479.

**Three inch depression.**—Where, in

gerous excavation exists in the street, it is the duty of the municipality to exercise ordinary care and diligence to apprise travelers of the dangerous conditions by placing a barrier or some other efficient means of pointing out the danger.<sup>25</sup> An excavation hidden by weeds is particularly dangerous.<sup>26</sup> If lights are used as a warning, reasonable precautions must be made to the end that they will inform travelers of the point of danger and not mislead them to the injury.<sup>27</sup> For example, where a city had made an excavation along a highway for a considerable distance about which red lights were placed at night, but there was evidence that the lights were so placed as to mislead a person driving along the highway in that there appeared to be a continuous row of lights on one side of the street and a separate light on the opposite side and the driver of an automobile ran his machine between such lights, it was held that the questions of the exercise of due care in providing safeguards necessary to overcome the danger, whether the barriers and lights were sufficient and whether the lights were properly arranged, were for the jury.<sup>28</sup> And, where in the night time an automobile ran through a fence and guard at the end of a street forming a *cul de sac*, and fell into a pit, and it appeared that the machine was running at a reasonable rate at the time of the accident and that a similar accident had happened at the same

an action for the death of a truck driver, in consequence of a fall from a truck occasioned by a hole or depression in the street, the evidence as to the depth of the hole varied, some witnesses testifying that it was nine inches, resulting as it was claimed from the sinking of the stone blocks underlying the asphalt, and there was no evidence as to how long it had existed, but an officer of the city who actually measured the hole and a street sweeper who assisted him, testified that it was not more than three inches deep, and about two feet square, and that it had been formed by the gradual wearing away of the asphalt, and it appeared that the city had not been notified of the de-

fect, and that no previous accident had happened at this point, the complaint should be dismissed. *Faber v. City of New York*, 161 N. Y. App. Div. 203, 146 N. Y. Suppl. 295.

25. *City of Baltimore v. State of Maryland*, 166 Fed. 641; *Hardy v. West Coast Constr. Co.*, 174 N. Car. 320, 93 S. E. 841; *Sweet v. Salt Lake City*, 43 Utah, 306, 134 Pac. 1167.

26. *City of Lancaster v. Broadbus*, 189 Ky. 226, 216 S. W. 373.

27. *City of Baltimore v. State of Maryland*, 166 Fed. 641.

28. *City of Baltimore v. State of Maryland*, 166 Fed. 641, 92 C. C. A. 335.

place and had been reported to the city officials, it was held that the negligence of the city was a question for the jury.<sup>29</sup> No formula of care is pronounced by the law as to how an excavation shall be guarded; the law does not say that lights shall be used or that barriers shall be used; nor does it say that it is sufficient if but one of such precautions is used to warn travelers. It is a question for the jury what precautions are reasonably necessary in a particular case.<sup>30</sup>

### Sec. 701. Guarding.

Reasonable care on the part of highway officials may require the maintenance of barriers or guard rails at dangerous places along a road.<sup>31</sup> This precaution should be designed, not only as a protection for injuries to automobilists, but also

29. *Corcoran v. City of New York*, 188 N. Y. 131, 80 N. E. 660, wherein it was said: "The streets of a city may be as freely used by those who ride in automobiles as by pedestrians or travelers, and if this *cul de sac* was likely to be a dangerous place in the night to any class of wayfarers who might be misled into thinking that it would be a continuation of the highway, it should have been so well lighted as to give fair warning that it was merely a *cul de sac*, or so well guarded as to prevent entrance to the point of danger, for a public highway may be used in the darkest night; a night so dark that the keenest and clearest vision may not be able to detect obstructions and defects.' "

30. *City of Baltimore v. State of Maryland*, 166 Fed. 641. See also *Carlson v. City of New York*, 150 N. Y. App. Div. 264, 134 N. Y. Suppl. 661.

31. *Indiana*.—*City of Indianapolis v. Moss* (Ind. App.), 128 N. E. 857.

*Massachusetts*.—*Bond v. Inhabitants of Billenca*, 126 N. E. 281.

*Michigan*.—*Jewell v. Rogers Tp.*, 208 Mich. 318, 175 N. W. 151.

*New Hampshire*.—*Miner v. Franklin*,

78 N. H. 240, 99 Atl. 647; *Richmond v. Town of Bethlehem*, 104 Atl. 773.

*New York*.—*Johnson v. State of New York*, 186 N. Y. App. Div. 389, 173 N. Y. Suppl. 701; *Johnson v. State of New York*, 104 Misc. (N. Y.) 395; *Lendrum v. Village of Cobleskill*, 192 N. Y. App. Div. 828, 183 N. Y. Suppl. 215.

*North Dakota*.—See *Chambers v. Minneapolis, etc., Ry. Co.*, 37 N. Dak. 377, 163 N. W. 824.

*Ohio*.—*Board of Com'rs of Logan County v. Bicher*, 98 Ohio, 432, 121 N. E. 535.

*Oregon*.—*West v. Marion County*, 95 Oreg. 529, 188 Pac. 184.

*Vermont*.—*Bancroft v. Town of E. Montpelier*, 109 Atl. 39.

*Washington*.—*Wessels v. Stevens Co.*, 188 Pac. 490.

*West Virginia*.—*Pollock v. Wheeling Tract Co.*, 83 W. Va. 768, 99 S. E. 267.

*Wisconsin*.—*Raymond v. Saunk Co.*, 167 Wis. 125, 166 N. W. 29; *Branegan v. Town of Winona*, 170 Wis. 137, 174 N. W. 468.

*Canada*.—*Ackerville v. County of Perth*, 32 O. L. R. (Canada) 423, 33 O. L. R. 598.

as a guard against injuries to one riding in a horse-drawn conveyance in case the horse becomes frightened on the approach of a motor vehicle. One riding in such a carriage may recover from the municipality in case the road is not properly protected and the horse shys from fright of the machine, and goes over an embankment or excavation which should have been protected with a guard.<sup>32</sup> Some guard rail or other protection may be necessary as a matter of law at a particularly dangerous point, but, when a barrier has been constructed, the municipality does not insure its sufficiency against all accidents. It is, of course, not reasonable to require a municipality to construct a barrier which will stop a heavy motor vehicle traveling at a high rate of speed.<sup>33</sup> Thus, it has been held that a county is not required to construct a barrier which

**Negligence a question for jury.**—Plaintiff's intestate was driving an automobile after dark along a much-traveled highway. At the point where the accident occurred the roadway rapidly narrowed, and the adjacent land from being level with the roadway turned into a sharp descending slope of several feet from the edge of the highway. There was no barrier or guard of any kind to mark the edge of the highway, but instead thereof weeds had been allowed to grow up which obscured and concealed such edge. The free space left for the passage of an automobile and a vehicle was very small. Intestate applied the brakes to his car, and, clearing a tree which stood close to the roadway, pulled to the side of the road so as to allow a horse and wagon to pass him, and brought his car to a stop. He was so near the edge of the bank that, as he stopped, the car slipped down and over the bank, turning over and killing him. Plaintiff gave evidence for the purpose of showing that other accidents had happened at this place, and no issue was presented on the trial concerning the possession by the highway commissioner of ample funds with

which to construct a barrier and of which the expense would have been trivial. *Held*, that the issue of defendant's freedom from negligence should be submitted to a jury. *Nicholson v. Stillwater*, 208 N. Y. 203, 101 N. E. 858.

**Change of highway.**—If a highway is discontinued or altered, it is the duty of the municipality to erect and maintain suitable signals or barriers to warn travelers of the fact. *Raymond v. Sauk County*, 167 Wis. 125, 166 N. W. 29.

**32.** *Upton v. Windham*, 75 Conn. 288, 53 Atl. 660; *Maynard v. Westfield*, 87 Vt. 532, 90 Atl. 504; *Davis v. Township of Osborne*, 28 D. L. R. (Canada) 397, 36 O. L. R. 148, 9 O. W. N. 484. "The passing of an automobile driven with ordinary care and at a reasonable speed, and the fright and shying of a gentle horse, constitute one of those events in the proper use of the highway calling for its maintenance in a safe condition . . ." *Upton v. Windham*, 75 Conn. 288, 53 Atl. 660.

**33.** *Dorrier v. Town of Callicoon*, 183 N. Y. App. Div. 186, 170 N. Y. Suppl. 676. See also *Bond v. Inhabitants of Billerica* (Mass.), 126 N. E. 281.

is strong enough to stop an automobile running twenty-five miles an hour.<sup>34</sup> Nor is a municipality required to anticipate that a vehicle will, after locking wheels with another, attempt to cross the road at right angles, and it is not required to construct a guard rail to protect the traveler against such a contingency.<sup>35</sup> There is no hard and fast rule as to the kind and character of a guard rail or barrier to be erected so that the highway may be deemed reasonably safe for the ordinary needs of travel. Public roads are intended for ordinary travel; if they meet the requirements which their ordinary uses demand, the authorities in charge of them have performed their duty under the law, and cannot be made answerable in damages for extraordinary accidents occurring on them.<sup>36</sup>

### Sec. 702. Slippery surface.

Municipalities have been successfully charged with negligence where they have spread oil upon the streets so that a motor vehicle was thereby caused to skid and cause injury.<sup>37</sup>

34. *Wasser v. Northampton County*, 249 Pa. St. 25, 94 Atl. 444, wherein it was said: "It has never been declared to be the law in this State that a township must erect guard rails or barriers, at points where the public highway runs near an embankment, so strong as to stop an automobile running at the rate of 25 miles an hour. To do this would require the building of solid walls of masonry, the expense of which would be a very onerous burden for any township to bear in a rural community. The law does not contemplate the building of such a barrier or guard by counties, or townships, in county districts, and the proper and ordinary uses of the highways in such community do not demand this extraordinary protection to the traveling public. We, therefore, agree with the learned court below that the evidence in the present case does not disclose any negligence by the county upon which to base a recovery." *Wasser v. Northampton County*, 249

Pa. St. 25, 94 Atl. 444.

35. *Dorrer v. Town of Callicoon*, 183 N. Y. App. Div. 186, 170 N. Y. Suppl. 676.

36. *Wasser v. Northampton County*, 249 Pa. St. 25, 94 Atl. 444; *Camp v. Alleghany County*, 263 Pa. St. 276, 106 Atl. 314.

"Proximity to a precipice or dangerous embankment requires a degree of care not necessary under ordinary circumstances, but it is only that care, which common prudence dictates, in view of an unusual danger, as necessary to reasonable safety in the ordinary use of the highway at that point." *Wasser v. Northampton County*, 249 Pa. St. 25, 94 Atl. 444.

37. *Kelleher v. City of Newburyport*, 227 Mass. 462, 116 N. E. 807. See also *Laut v. City of Albany*, 191 N. Y. App. Div. 753, 182 N. Y. Suppl. 183; *Pemberton v. City of Albany*, 196 App. Div. 831.

If tarvia is being spread upon a highway so that it is temporarily dangerous, reasonable prudence may require that warning of the condition be given to automobilists.<sup>38</sup> On the other hand, it has been held that a charge of negligence is unjustified in a case where clay marl had been used for the resurfacing of a highway and had been rendered slippery by reason of a rain.<sup>39</sup> And, when the driver of a motor vehicle, in broad daylight, knowingly drives his machine over a highway which is in a slippery condition by reason of the application of tar and oil, he takes the responsibility of accident from such condition.<sup>40</sup>

### Sec. 703. Width of road.

Negligence is not necessarily charged against a municipality because a highway is, for a short distance, so narrow that two automobiles cannot safely pass each other.<sup>41</sup>

### Sec. 704. Bridges.

Where a motor vehicle or a person riding therein is injured by reason of a defective bridge or viaduct, speaking in general terms, a recovery may be had, in the absence of contributory negligence, as against the town or municipal division or the public officials charged with the maintenance of the bridge.<sup>42</sup> A defective culvert may create a similar liability.<sup>43</sup> But, it has been held that a municipality is not liable for the negligence of the tender of a drawbridge, the reason for the decision being that the municipality was engaged in a governmental rather than proprietary function.<sup>44</sup> It is not to be

38. *Zegeer v. Barrett Mfg. Co.*, 226 Mass. 146, 115 N. E. 291.

39. *Kinne v. Town of Morristown*, 184 N. Y. App. Div. 408.

40. *Raymond v. Sauk County*, 167 Wis. 125, 166 N. W. 29.

41. *Miner v. Town of Rolling*, 167 Wis. 213, 167 N. W. 242.

42. *Ham v. Los Angeles County* (Cal. App.), 189 Pac. 462; *Dubourdieu v. Delaware Tp.*, 106 Kans. 650, 189 Pac. 386; *Welcome v. State of New York*,

105 Misc. (N. Y.) 115, 175 N. Y. Suppl. 314; *City of Sapulpa v. Deason* (Okla.), 196 Pac. 544; *Coates v. Marion County*, 96 Oreg. 334, 189 Pac. 903; *Smith v. Howard* (R. I.), 105 Atl. 648.

43. *Goodwin v. City of Concord* (N. H.), 111 Atl. 304; *Dillabough v. Okanogan County*, 105 Wash. 609, 178 Pac. 802; *Roeser v. Sauk County*, 166 Wis. 417, 165 N. W. 1086.

44. *Bremer v. City of Milwaukee*.

expected that a temporary bridge, or even a public highway, will be kept as smooth or free from obstructions or defects as the floors of places of business usually are.<sup>45</sup> A village may be liable for the care of a bridge within its territorial limits, where it is a part of its system of highways and is in general use by the public, although the bridge in question was constructed by the State and tendered to the village but not formally accepted.<sup>46</sup> A county may be liable for an injury caused by an unsafe and defective condition of a county bridge, notwithstanding the fact that no actual notice of the condition of the bridge had previously been given to any county officer, where the defects were of such a nature or had existed for such a length of time that by the exercise of ordinary care they might have been discovered and repaired.<sup>47</sup> The law requires the maintenance of a structure with sufficient strength to sustain an ordinary vehicle with a load of reasonable weight. Whether a weight of ten tons is reasonable, may be a question for the jury.<sup>48</sup>

### Sec. 705. Proximate cause.

It is a fundamental rule in the law of negligence that the failure to exercise a proper degree of care renders one liable only for those results which proximately follow from the neglect.<sup>49</sup> Like other general rules of the law of negligence, this rule is applicable to cases where automobilists have sustained an injury from the defective condition of a highway. The burden is on the plaintiff to show that the injuries of which he complains are the proximate result of the negligence

166 Wis. 164, 164 N. W. 840. See *Drennan v. State*, 109 Misc. (N. Y.) 107, 178 N. Y. Suppl. 278, as to the liability of the State for negligence of watchman at a bridge maintained by the State.

**Opening in drawbridge.**—See *County Com'rs v. Wright* (Md.), 114 Atl. 573.

**Bridge company.**—A corporation maintaining a bridge may be liable for the negligence of an employee who negligently lowers a gate arm so as to strike and injure the driver of an au-

tomobile. *Louisville Bridge Co. v. Irving*, 180 Ky. 729, 203 S. W. 531.

45. *Creitz v. Wolverine Engineering Co.* (Mich.), 181 N. W. 966.

46. *Lawrence v. Channahon*, 157 Ill. App. 560.

47. *Reudelhuber v. Douglas County*, 100 Neb. 687, 161 N. W. 174.

48. *Smith v. Howard* (R. I.), 105 Atl. 648.

49. *Gones v. Illinois Printing Co.*, 205 Ill. App. 5.



charged against the defendant.<sup>50</sup> The fact that no warning, either by sign or otherwise, is given of a defect in a highway is not the proximate cause of an injury to an automobilist, where it appears that he had actual knowledge of the defect.<sup>51</sup> And, where an automobilist collided with girder and truss in the street supporting an overhead structure, it was held that the failure of the municipality to light the obstruction could not be deemed the proximate cause of the collision, where it appeared that the chauffeur could have seen the danger in time to avoid it had it not been for exhaust steam from an engine passing under the bridge.<sup>52</sup> In some States, when horses have become beyond the control of the driver, the defective condition of a highway is not considered the proximate cause of an injury sustained by the driver, but they are not considered beyond control when they merely shy or start and for a moment have their own way.<sup>53</sup> But, where a traveler's horse, upon becoming frightened by a motor vehicle, jumped over the unprotected side of a culvert on the highway and was thereby injured, but would not have jumped had the culvert been protected by a suitable railing, it was held that the absence of the railing could be considered the proximate cause of the accident.<sup>54</sup> And one who collided with a telephone pole along the highway while attempting to avoid an automobile, was denied recovery from the town for his injuries.<sup>55</sup> But, where a wagon was struck by an automobile which skidded on account of defects in the street, it was held that the owner of the wagon could recover against the municipality.<sup>56</sup> Where one riding in an automobile running at the rate of fifty miles an hour or faster was thrown from the machine by a collision with a bundle of newspapers placed in

50. *McDonald v. City of Philadelphia*, 248 Pa. St. 145, 93 Atl. 959; *Camp v. Allegheny County*, 263 Pa. St. 276, 106 Atl. 314; *Davis v. Mellen* (Utah), 182 Pac. 920.

51. *Raymond v. Sank County*, 167 Wis. 125, 166 N. W. 29.

52. *Gaines v. City of New York*, 156 N. Y. App. Div. 789, 142 N. Y. Suppl. 401.

53. *Johnson v. City of Marquette*, 154 Mich. 50, 117 N. W. 658.

54. *Maynard v. Westfield*, 87 Vt. 532, 90 Atl. 504.

55. *Seofield v. Town of Poughkeepsie*, 122 N. Y. App. Div. 868, 107 N. Y. Suppl. 767.

56. *Kelleher v. City of Newburyport*, 227 Mass. 462, 116 N. E. 807.

the street, it was held that he could not recover for his personal injuries, as the proximate cause of the accident was not the nuisance in the highway, but the reckless and unreasonable use thereof by the plaintiff.<sup>57</sup> If by reason of the defective condition of the steering gear of an automobile and the insufficiency of a board fence maintained by a city at the side of a bridge, the automobile crashes through the bridge, the proximate cause of the accident is the defect in the steering gear, not the negligence of the city.<sup>58</sup>

### Sec. 706. Knowledge of defect.

In many States, a municipal corporation is not liable for injuries received by one from defects in its streets or highways, unless it has knowledge, either actual or implied, of the defect before the injury.<sup>59</sup> Thus, where it was claimed in an action for injuries arising from an automobile striking a man-hole standing above the level of the street that a lantern previously placed on the obstruction had been removed before the accident, it must be shown that the city had knowledge of the removal.<sup>60</sup> Moreover, in some jurisdictions, the notice of the defect must be an actual notice or knowledge by some official, implied notice arising from former accidents or duration of the defect not being sufficient.<sup>61</sup> If the chairman of the

57. *Jefson v. Crosstown St. Ry.*, 72 Misc. (N. Y.) 103, 129 N. Y. Suppl. 233.

58. *Swain v. City of Spokane*, 94 Wash. 616, 162 Pac. 991, wherein the court said: "In the case before us it is clear that for all ordinary uses of the street reasonably to be anticipated, it was kept in a safe condition, and that if appellant's car had been equally fit for its intended purpose the accident would not have happened. The defect in the car itself was plainly the proximate cause of the injury. The breaking of the railing was a mere condition. It could not reasonably be anticipated that a car, by reason of its own defects, would be driven over the curb, across the walk for pedestrians,

and through the wooden railing at the side of the street."

59. *Dobbins v. City of Arcadia* (Cal. App.), 186 Pac. 190; *Gedroice v. City of New York*, 109 N. Y. App. Div. 176, 95 N. Y. Suppl. 645; *McDonald v. City of Philadelphia*, 248 Pa. St. 145, 93 Atl. 959; *Strang v. City of Kenosha* (Wis.), 182 N. W. 741. See also *Laut v. City of Albany*, 191 N. Y. App. Div. 753, 182 N. Y. Suppl. 183.

60. *Gedroice v. City of New York*, 109 N. Y. App. Div. 176, 95 N. Y. Suppl. 645.

61. *Hari v. Ohio Tp.*, 62 Kans. 315, 62 Pac. 1010, construing Gen. Sts., 1899, ch. 16, sec. 3171. See also *Dubourdieu v. Delaware Tp.*, 106 Kans. 650, 189 Pac. 386.

selectmen of a town and superintendent of streets has knowledge of the defect, it is proper to find that the town was charged with notice.<sup>62</sup> But knowledge of firemen and policemen of an obstruction in the highway, is not deemed knowledge of the municipality.<sup>63</sup> And knowledge of a city alderman, when he is not a member of some committee having authority over the city streets, is not imputed to the city.<sup>64</sup>

### Sec. 707. Notice of injury.

In many municipalities, before commencing an action for the recovery of damages sustained from a defective highway, it is necessary that the injured person file a claim with some officer of the municipality, so as to give notice of the injury.<sup>65</sup> Ignorance of the law is no excuse for a failure to give the proper notice.<sup>66</sup> The purpose of a regulation requiring a claimant to file a claim giving notice of the place where the injury is alleged to have occurred and the nature of the defect or omission causing the same, is to enable the city's agents to accurately locate the place of injury, and the alleged defects or omissions, and so be informed whether to adjust the claim or prepare its defense thereto.<sup>67</sup> The law may require the notice to specify the nature of the injuries sustained by the claimant, as well as the facts showing the liability of the municipality.<sup>68</sup> A provision requiring the presentation of a notice of claim within twenty days after an injury, does not apply in a case where the injury results in death.<sup>69</sup> And a statute requiring notice of an injury from a

62. *Pratt v. Inhabitants of Cohasset*, 177 Mass. 488, 59 N. E. 79.

63. *Huyler v. City of New York*, 160 N. Y. App. Div. 415, 145 N. Y. Suppl. 650.

64. *Gaffney v. Dixon*, 157 Ill. App. 589.

65. *Dean v. Sharon*, 72 Conn. 667, 45 Atl. 963; *Joy v. Inhabitants of York*, 99 Me. 237, 58 Atl. 1059. *Garsko v. Ridgeville*, 123 Wis. 503, 102 N. W. 22, 3 Ann. Cas. 747; *Young v. Township of Bruce*, 24 O. L. R. (Canada)

546.

66. *Egan v. Township of Saltfleet*, 29 O. L. R. (Canada) 116.

A verbal notice is not sufficient. *Egan v. Township of Saltfleet*, 29 O. L. R. (Canada) 116.

67. *Walters v. City of Seattle*, 97 Wash. 657, 167 Pac. 124; *Greedon v. Town of Kittery (Me.)*, 105 Atl. 124.

68. *Creedon v. Town of Kittery*, 117 Me. 541, 105 Atl. 124.

69. *Bigelow v. Town of St. Johnsbury*, 92 Vt. 423, 105 Atl. 34.

defect in a highway in a city, does not require a notice when the injury was without its territorial limits.<sup>70</sup>

**Sec. 708. Liability of abutting owners and others for defects in streets.**

An abutting owner or one working in a street is guilty of negligence if he leaves an obstruction therein at night without guarding the same with a light or in some other manner as to furnish information of the danger to travelers.<sup>71</sup> Thus, where an automobile collided with an abandoned car partially destroyed by fire a few hours earlier, the liability of the owner of the abandoned car was sustained, but the city was excused on the ground that it was not chargeable with notice of the obstruction before the accident.<sup>72</sup> Certain obstructions in a highway are, of themselves, nuisances, so that the liability of the wrongdoer is determined by the law of nuisances. Other obstructions are not necessarily nuisances, and the liability of the person placing them in the road is controlled by the law of negligence. Of this latter class are stones which have been used in the road for the purpose of blocking the wheels of a wagon; and, if they are not removed after their use, the liability of the person using them is based on negligence in the removal.<sup>73</sup> And a tool cart and can of gasoline left in the

70. *Roy v. Kansas City* (Mo. App.), 224 S. W. 132.

71. *Helber v. Harkness* (Mich.), 178 N. W. 46; *Britt v. Concrete Stone Co.*, 99 Neb. 300, 156 N. W. 497; *Davis v. Mellen* (Utah), 182 Pac. 920.

72. *Huyler v. City of New York*, 160 N. Y. App. Div. 415, 145 N. Y. Suppl. 650.

73. *Francis v. Gaffey*, 211 N. Y. 47, 105 N. E. 96, wherein it was said: "A readily removable object of this character carelessly left in the road may render the person who left it there liable for negligence to the drivers of ordinary vehicles moving at a reasonable rate of speed; but the law should not deem its presence a nuisance simply because it may become dangerous

to reckless riders of motorcycles driving their machines at a speed which is perilous in itself. The fundamental mistake made in this case was in trying it as an action for nuisance instead of an action for negligence. The act of the defendant's agents in placing the stones in the road for the purpose of blocking the wheels of the wagons did not involve any unlawful use of the highway. So long as the wagons remained there the presence of the stones cannot in any reasonable view, as it seems to me, be regarded as having constituted an unlawful obstruction. When the wagons were removed, it is true that the stones which had been used for blocking the wheels ought to have been removed also. In

highway do not necessarily constitute a nuisance.<sup>74</sup> But a pole left by an electric company lying on the ground in such a position that it is struck by a motor vehicle, may be found to be a nuisance.<sup>75</sup> A railroad company may be liable if it permits an obstruction to extend from one of its cars into the traveled part of a street.<sup>76</sup>

### Sec. 709. Joint wrongdoers.

As a general proposition, there is no contribution between wrongdoers.<sup>77</sup> When a plaintiff sues two wrongdoers, neither of them can in that action file a cross-petition against the other, when he was paid nothing, for the plaintiff is entitled to try out his action without its being incumbered with the controversy between the two defendants. If one of them who is not primarily liable has anything to pay under the judgment, he may, after paying it, bring his action against the other to recover what he has paid; but he cannot sue until he has paid the judgment. Until he has suffered a loss, he has

other words, the duty to remove the stones was imposed by law upon the defendant's agents. The failure to discharge this duty, however, merely made the defendant negligent; it did not constitute him, as it seems to me, the creator of a nuisance."

74. *Cuilo v. New York Edison Co.*, 85 Misc. 6, 147 N. Y. Suppl. 14, wherein the court expressed its views as follows: "The rule has always been applied that when an obstruction of a street serves some public necessity, is temporary in its nature, and reasonable in degree, it does not constitute a nuisance, and that, unless the surrounding circumstances show conclusively that the obstruction was either unnecessary or unreasonable, the question of whether it constitutes a nuisance is a question of fact. In this case the evidence shows that even with the cart in the street, room was left for traffic to pass in single file; that the defendant was lawfully doing work at the

time on the street for the convenience and necessities of the abutting owners and that in the prosecution of such work it required tools and gasoline, and upon this evidence it seems to me quite clear that the court could not say that the present obstruction during the pendency of the work constituted a nuisance as a matter of law."

Street railway pole falling on automobile. See *North Alabama Tract. Co. v. McNeil* (Ala. App.), 85 So. 568; *Ex parte McNeil* (Ala. App.), 85 So. 569.

Rotten pole of power company breaking on collision with automobile and causing electric wire to fall on one in automobile. *Stewart v. San Joaquin L. & P. Co.* (Cal. App.), 186 Pac. 160.

75. *Reed v. Edison Elec. Illuminating Co.*, 225 Mass. 163, 114 N. E. 289.

76. *St. Louis Southwestern Ry. Co. v. Ristine* (Tex. Civ. App.), 219 S. W. 515.

77. *Livingston & Co. v. Philley*, 155 Ky. 224, 159 S. W. 665.

no cause of action which a common law court can enforce.<sup>78</sup> Thus, where an action is brought against a city and the owner of a motor truck for injuries occasioned by the horse becoming frightened at the truck and breaking through an insufficient guard rail maintained by the city, the owner of the truck cannot file a cross-petition against the city on the claim that the negligence of the city in failing to maintain a proper guard was the proximate cause of the accident.<sup>79</sup> Where a street is obstructed by building operations so that a pedestrian is required to go into the street where he is struck by a vehicle negligently driven, the driver and the persons creating the obstruction may be liable as joint tort-feasors.<sup>80</sup>

### Sec. 710. Contributory negligence of traveler—in general.

A person in charge of a motor vehicle must exercise ordinary care to avoid injury from defective conditions in the highway; and, if guilty of want of such care contributing to an injury, he will be precluded from recovery.<sup>81</sup> Ordinary care is such care as prudent men ordinarily use in like circumstances, taking into consideration the time, place, condition of the highway, possible dangers, known obstructions, and the damage likely to result from driving carelessly at that particular time and place.<sup>82</sup> Whether the proper degree of care has been exercised by the driver of the machine, is, speaking

78. *Livingston & Co. v. Philley*, 155 Ky. 224, 159 S. W. 665.

79. *Livingston & Co. v. Philley*, 155 Ky. 224, 159 S. W. 665.

80. *Shafir v. Sieben* (Mo.), 233 S. W. 419.

81. *Ford v. Whiteman*, 2 Penn. (Del.) 355, 45 Atl. 543; *Smith v. Village of Sidell*, 205 Ill. App. 66; *Louisville Bridge Co. v. Irving*, 180 Ky. 729, 203 S. W. 531; *Loose v. Deerfield Tp.*, 187 Mich. 206, 153 N. W. 913; *Creitz v. Wolverine Engineering Co.* (Mich.), 181 N. W. 966; *Short v. State*, 109 Misc. (N. Y.) 617, 179 N. Y. Supp. 539; *Thompson v. City of Bellingham* (Wash.), 192 Pac. 952; *Raymond v.*

*Sauk County*, 167 Wis. 125, 166 N. W. 29; *Freedman v. City of Winnepeg*, 43 D. L. R. (Canada) 126.

Statutes may require the auto driver to exercise the "highest degree of care." *Jackson v. Southwestern Bell Telep. Co.* (Mo.), 219 S. W. 655.

82. *Ford v. Whiteman*, 2 Penn. (Del.) 355, 45 Atl. 543; *Kendall v. City of Des Moines* (Iowa), 167 N. W. 684; *Loose v. Deerfield Tp.*, 187 Mich. 206, 153 N. W. 913; *Miner v. Franklin*, 78 N. H. 240, 99 Atl. 647; *Goodwin v. City of Concord* (N. H.), 111 Atl. 304; *Rohan v. American Sugar Refining Co.* (N. J.), 109 Atl. 346.

in general terms, a jury question.<sup>83</sup> Under the common law system, the absence of contributory negligence was required to be shown by the plaintiff,<sup>84</sup> but this rule has been changed in many jurisdictions so as to place the burden of proof on the issue of contributory negligence upon the defendant.<sup>85</sup>

### **Sec. 711. Contributory negligence of traveler — right to assume safety of highway.**

As a general proposition, every man is presumed to have obeyed the law and to have exercised proper care for the safety of others. And, generally, other persons have a right to rely on such presumption and are not guilty of contributory negligence merely because of their faith. Thus, the driver of a motor vehicle is not necessarily guilty of contributory negligence because he proceeds along a highway on the assumption that it is in a reasonably safe condition.<sup>86</sup> Bridges, as well as the other parts of the traveled highway, are ordinarily safe, and the traveler, in the absence of some

**83.** *Philipps v. City of Perry*, 178 Iowa, 173, 159 N. W. 653; *Wolford v. City of Grinnell*, 179 Iowa, 689, 161 N. W. 686; *Owens v. Iowa County*, 186 Iowa, 408, 169 N. W. 388; *Loose v. Deerfield Tp.*, 187 Mich. 206, 153 N. W. 913; *Helber v. Harkness (Mich.)*, 178 N. W. 46; *Howell v. Burchville Tp. (Mich.)*, 179 N. W. 279; *Johnson v. State of New York*, 186 N. Y. App. Div. 389, 173 N. Y. Suppl. 701; *Chambers v. Minneapolis, etc., Ry. Co.*, 37 N. Dak. 377, 163 N. W. 824; *Bigelow v. Town of St. Johnsbury*, 92 Vt. 423, 105 Atl. 34; *Walters v. City of Seattle*, 97 Wash. 657, 167 Pac. 124; *Kadolph v. Town of Herman*, 166 Wis. 577, 166 N. W. 423.

**84.** *Ham v. Los Angeles County (Cal. App.)*, 189 Pac. 462; *Orr v. Oldtown*, 99 Me. 190, 58 Atl. 914; *Jewell v. Rogers Tp.*, 208 Mich. 318, 175 N. W. 151.

**85.** *Wallower v. Webb City*, 171 Mo. App. 214, 156 S. W. 48. "The authori-

ties all hold that, while contributory negligence is an affirmative defense, and as a general rule must be alleged in order to be available, yet in cases where the plaintiff's own evidence shows or tends to show that he was guilty of contributory negligence which defeats his right of recovery, the defendant may take advantage thereof, although the answer contains no plea of such contributory negligence." *Wallower v. Webb City*, 171 Mo. App. 214, 156 S. W. 48.

**86.** *Burke v. District of Columbia*, 42 App. D. C. 438; *Wolford v. City of Grinnell*, 179 Iowa, 689, 161 N. W. 686; *Kendall v. City of Des Moines (Iowa)*, 167 N. W. 684; *Owens v. Iowa County*, 186 Iowa, 408, 169 N. W. 388; *Klopfenstein v. Union Tract. Co. (Kans.)*, 198 Pac. 930; *Jacobs v. Jacobs*, 141 La. 272, 74 So. 992; *Raymond v. Sauk County*, 167 Wis. 125, 166 N. W. 29.

warning of danger, may proceed upon the belief that they are safe for ordinary use by one observing due caution.<sup>87</sup> But this right to assume that others have exercised due care does not excuse the driver of a machine from failure to use a proper care on his part. It remains, nevertheless, his duty to exercise reasonable care to discover and avoid defects or obstructions in the highway.<sup>88</sup>

## **Sec. 712. Contributory negligence of traveler — violation of statute or law of road.**

A violation of law by the driver of an automobile generally constitutes negligence, and, if such violation is a proximate cause of the injury in question, he will be precluded from recovery for his injuries. Thus, if the driver of the machine fails to have his lights turned on at night as required by statute, and he strikes an obstruction in the road, he cannot recover, unless it can be found that the absence of lights was not a proximate cause of the collision.<sup>89</sup> But the violation of a statute requiring the maintenance of a red light at the rear of the machine, does not forbid a recovery, for ordinarily such failure is not a contributing cause to an accident from a defective highway.<sup>90</sup> And, in the great majority of States, the failure to comply with the statutes relating to the registration of automobiles, does not render the occupants trespassers and forbid their recovery for injuries sustained from a defective highway.<sup>91</sup> A different rule, however, is in force in *Massachusetts*,<sup>92</sup> and in a few other States.<sup>93</sup> In considering the question of due care it has been held that the jury may

87. *Super v. Modell Tp.*, 88 Kans. 698, 129 Pac. 1162.

88. *Wolford v. City of Grinnell*, 179 Iowa, 689, 161 N. W. 686; *Kendall v. City of Des Moines (Iowa)*, 167 N. W. 684; *Wallower v. Webb City*, 171 Mo. App. 214, 156 S. W. 48.

89. *Ferry v. City of Waukegan*, 196 Ill. App. 81; *Ferry v. City of Waukegan*, 205 Ill. App. 109.

90. *Lawrence v. Channahon*, 157 Ill. App. 560.

91. *Phillips v. City of Perry*, 178

Iowa, 173, 159 N. W. 653; *Wolford v. City of Grinnell*, 179 Iowa, 689, 161 N. W. 686; *Chambers v. Minneapolis, etc., Ry. Co.*, 37 N. Dak. 377, 163 N. W. 824. See also *West v. Marion County*, 95 Ore. 529, 188 Pac. 184. And see section 126.

92. *Holland v. City of Boston*, 213 Mass. 560, 100 N. E. 1009.

93. *McCarthy v. Town of Leeds (Me.)*, 101 Atl. 448; *Blanchard v. City of Portland (Me.)*, 113 Atl. 18. And see section 125.



keep in mind the "Law of the Road" it appearing that the plaintiff went to the right side of the road to avoid some workmen, when the left side afforded a better way, and this although there was no other vehicle in the immediate vicinity.<sup>94</sup>

### **Sec. 713. Contributory negligence of traveler — assumption of danger.**

Mere knowledge on the part of an automobilist that the road is defective does not necessarily bar him from recovering for his injuries. He may use the highway though he knows of defects therein, but his duty in such a case is to use due care according to the dangers of which he has knowledge.<sup>95</sup> But it is held that where the driver knows that the road is under reconstruction and is unfit for travel and he could have used another road with comparative safety, his negligence may be found as a matter of law.<sup>96</sup> But it is held that when a highway is of reasonable width and smoothness, a person who drives outside of the traveled way assumes the risk.<sup>97</sup> And when the driver has knowledge of a dangerous place in the road and he runs his machine at such a rate that it is difficult to avoid the danger, it is not difficult to charge him with contributory negligence.<sup>98</sup>

### **Sec. 714. Contributory negligence of traveler — lookout.**

It is the duty of the driver of a motor vehicle to keep a reasonably careful lookout for other travelers and dangers which may be encountered along the highway.<sup>99</sup> If a danger

94. *Baker v. Fall River*, 187 Mass. 53, 72 N. E. 336. See also *Kadolph v. Town of Herman*, 166 Wis. 577, 166 N. W. 433.

95. *Gardner v. Wasco County*, 37 Oreg. 392, 61 Pac. 834; *Walters v. City of Seattle*, 97 Wash. 657, 167 Pac. 124; *Raymond v. Sauk County*, 167 Wis. 125, 166 N. W. 29. Compare *Miller v. County of Wentworth*, 5 O. W. N. (Canada) 317, affirmed 5 O. W. N. 891.

96. *Buckingham v. Commarv-Peter-*

*son Co.* (Cal. App.), 178 Pac. 318.

97. *Orr v. Oldtown*, 99 Me. 190, 58 Atl. 914; *McChesney v. Dane County* (Wis.), 177 N. W. 12.

**Automobile running into ditch.**—Contributory negligence held to be for jury. *Sweetman v. City of Green Bay*, 147 Wis. 586, 132 N. W. 1111.

98. *Morris v. Interurban St. Ry. Co.*, 100 N. Y. App. Div. 295, 91 N. Y. Suppl. 479.

99. *Super v. Modell Tp.*, 88 Kans. 698, 129 Pac. 1162; *Wallower v. Webb*

is obvious at a considerable distance, the driver may be negligent in failing to see and avoid it.<sup>1</sup> But the fact that a driver, coming up behind a horse-drawn vehicle and being compelled to go around it was looking in the direction of the obstruction, does not preclude his recovery, for he had a right to assume that the street was reasonably safe for travel.<sup>2</sup> Yet it cannot be laid down as an inflexible rule of law that he must keep his eyes constantly fixed on the roadbed and must be charged with notice of every defect thereon, great or small, which might be detected by such a precaution.<sup>3</sup> The general duty of keeping a lookout is extended by statute so as to require the maintenance of lights on the machines, and a failure to have lights properly working may constitute contributory negligence.<sup>4</sup> One approaching a draw bridge is bound to exercise reasonable care to discover whether the arms of the gate are down and whether they are being lowered at the time of his approach.<sup>5</sup> Where there was evidence tending to show that in the center of a traveled side track of a country road there was an oak stump ten inches high partially concealed by green oak sprouts about two feet high and by weeds, but visible to one approaching from the west for a distance of fifty to seventy-five feet, and the plaintiff going east in an automobile at the rate of twelve miles per hour left the main traveled track and took this side track, and the under part of his automobile struck this stump and was damaged, it was held that a verdict finding plaintiff guilty of contributory negligence was not without evidence to support it.<sup>6</sup>

City, 171 Mo. App. 214, 156 S. W. 48;  
Short v. State, 109 Misc. (N. Y.) 617,  
179 N. Y. Suppl. 539.

1. Kaufman Beef Co. v. United Rys.  
& Elec. Co., 135 Md. 524, 109 Atl. 191.

2. Klopfenstein v. Union Tract. Co.  
(Kans.), 198 Pac. 930.

3. Smith v. Jackson Tp., 26 Pa.  
Super. Ct. 234. See also Goodwin v.  
City of Concord (N. H.), 111 Atl.  
304.

4. Baldwin v. City of Norwalk  
(Conn.), 112 Atl. 660; Sweet v. Salt  
Lake City, 43 Utah, 306, 134 Pac.  
1167. And see section 297 *et seq.*

5. Louisville Bridge Co. v. Irving.  
180 Ky. 729, 203 S. W. 531.

**Traveling on bridges.**—It is the duty  
of one approaching a drawbridge to  
stop, look, and listen. In an action  
against a county for the death of de-  
cedent through driving off an open  
drawbridge at night, the evidence was  
held to show that the deceased was  
guilty of contributory negligence. Com-  
missioners v. State, 107 Md. 210, 68  
Atl. 602, 14 L. R. A. (N. S.) 452.

6. Olmstead v. Town of Greenfield,  
155 Wis. 452, 144 N. W. 987.

**Sec. 715. Contributory negligence of traveler — speed.**

Independently of statutory regulations fixing the speed limit for automobiles, it is held that automobilists must not exceed a reasonable speed under the circumstances.<sup>7</sup> Whether the speed on a particular occasion was reasonable, is generally a question for the jury.<sup>8</sup> If unreasonable, the driver is guilty of such negligence that he will be precluded from recovery for his injuries to him or to the car, though negligence on the part of the municipal officials in the maintenance of the highway is shown.<sup>9</sup> Of course, a question of proximate cause may remain for the determination of the jury.<sup>10</sup> When traveling in the night time, the rate of speed depends to some extent on the lighting of the machine. It should not be operated so fast that it cannot be stopped within the distance that the lights would disclose obstructions or defects in the highway.<sup>11</sup> One is not necessarily guilty of contributory negligence because he is proceeding in a fog which does not permit him to look far ahead, but he should measure his speed by his vision.<sup>12</sup> A passenger permitting an excessive speed without remonstrance to the driver, may also be charged with contributory negligence.<sup>13</sup>

7. Section 305.

8. *Warren Co. v. Whitt*, 19 Ariz. 104, 165 Pac. 1097; *Ferry v. City of Waukegan*, 196 Ill. App. 81; *Ferry v. City of Waukegan*, 205 Ill. App. 109; *Phipps v. City of Perry*, 178 Iowa, 173, 159 N. W. 653; *Abbott v. Board of County Com'rs*, 94 Kans. 553, 146 Pac. 998; *Rockett v. Philadelphia*, 256 Pa. St. 347, 100 Atl. 826.

9. *Gilbert v. Southern Bell Telep. & Teleg. Co.*, 200 Ala. 3, 75 So. 315; *Lytle v. Hancock County*, 19 Ga. App. 193, 91 S. E. 219; *Wasser v. Northampton*, 249 Pa. St. 25, 94 Atl. 444; *Wentworth v. Waterbury*, 90 Vt. 60, 96 Atl. 334.

10. *Hardy v. West Coast Constr. Co.*, 174 N. Car. 320, 93 S. E. 841.

11. *Ham v. Los Angeles County* (Cal. App.), 189 Pac. 462; *West Con-*

*str. Co. v. White*, 130 Tenn. 520, 172 S. W. 301; *Knoxville Ry. & Light Co. v. Vangilden*, 132 Tenn. 487, 178 S. W. 1117; *Raymond v. Saux County*, 167 Wis. 125, 166 N. W. 29.

**Not contributory negligence as matter of law.**—It has been held not contributory negligence as a matter of law for an automobilist to assume that the road is in safe condition and to run at a speed which precludes him from stopping within the scope of his lights. *Owens v. Iowa County*, 186 Iowa, 408, 169 N. W. 388. See also *Kendall v. City of Des Moines (Iowa)*, 167 N. W. 684.

12. *Johnson v. State of New York*, 104 Misc. (N. Y.) 395.

13. *Jefson v. Crosstown St. Ry.*, 72 Misc. (N. Y.) 103, 129 N. Y. Suppl. 233. And see section 716.

### Sec. 716. Contributory negligence of traveler — negligence of passenger.

Though a contrary rule has been adopted in a few jurisdictions, the general rule is that the negligence of the driver of an automobile is not imputed to a passenger riding therein.<sup>14</sup> But, though the negligence of the driver is not imputed to other persons in the machine, there remains the question whether the injury was the "proximate" or "sole" result of the negligence of the defendant, and the negligence of the driver may be considered on that issue.<sup>15</sup> This is a question of proximate cause rather than of contributory negligence. It is one proposition to charge the passenger with the negligence of the driver and quite another to exonerate a defending third party therefrom. Confining the discussion strictly so the doctrine of contributory negligence, it may be said, that, as a general rule, the negligence of the plaintiff is decided on his own conduct,<sup>16</sup> and the question is left to the jury.<sup>17</sup> If he acts as a reasonably prudent man would act under similar circumstances, he fulfills the duty cast on him, and he may be permitted to recover for injuries received from

14. Section 679.

15. *Feeley v. City of Melrose*, 205 Mass. 329, 91 N. E. 306. 27 L. R. A. (N. S.) 1156; *White v. Portland Gas & Coke Co.*, 84 Oreg. 643, 165 Pac. 1005. See also *Lauson v. Town of Fond du Lac*, 141 Wis. 57, 123 N. W. 629, 25 L. R. A. (N. S.) 40.

**Rule in Massachusetts.**—In a recent case in *Massachusetts*, where an action was brought by occupants of an automobile to recover for injuries from defects in the highway, the rule was laid down that if the injury to the plaintiffs was due in part to the negligence of the driver of the automobile, then it could not be said that the defect in the highway was the sole cause of their injury within the meaning of the decisions of that State requiring that such defect must be the sole cause of the injury. *Feeley v. City of Mel-*

*rose*, 205 Mass. 329, 91 N. E. 306, 27 L. R. A. (N. S.) 1156.

**Imputed to chauffeur's master.**—The negligence of a chauffeur, in failing to avoid danger while driving his master in an automobile, is imputable to the master. *Lytlo v. Hancock County*, 19 Ga. App. 193, 91 S. E. 219.

16. *Stewart v. San Joaquin L. & P. Co.* (Cal. App.), 186 Pac. 160; *Gaffney v. Dixon*, 157 Ill. App. 589; *Reudelhuber v. Douglas County*, 100 Neb. 687, 161 N. W. 174; *White v. Portland Gas & Coke Co.*, 84 Oreg. 643, 165 Pac. 1005; *Camp v. Alleghany County*, 263 Pa. St. 276, 106 Atl. 314; *Latimer v. Anderson County*, 95 S. Car. 187, 78 S. E. 879; *Knoxville Ry. & Light Co. v. Vangilden*, 132 Tenn. 487, 178 S. W. 1117.

17. *Com'rs of Logan County v. Bicher*, 98 Ohio. 432, 121 N. E. 535.

the negligent condition of the highway.<sup>18</sup> One riding in a machine, however, may be charged as a matter of law with contributory negligence where he rides a distance of 1,500 feet at the rate of about fifty miles an hour in a city street without remonstrance or even suggestion to the driver that he stop the car or slacken its speed.<sup>19</sup> But the fact that a wife riding in an automobile driven by her husband knows that he has an injured hand, does not charge her with negligence *per se*, but it must also appear that she knew that he was unable to manage the automobile with ordinary safety.<sup>20</sup> And, whether one who is on "joy" ride with a chauffeur more or less intoxicated is guilty of negligence, may be a question within the province of the jury.<sup>21</sup> A passenger who sees, or by the exercise of proper care should see, a danger not obvious to the driver, or who sees that the driver is incompetent or careless, or is not taking proper precautions, should give some warning of the danger, and a failure to do so may be negligence.<sup>22</sup> But, ordinarily, a driver is intrusted with the caring for the safety of a carriage and its occupants, and, unless the danger is obvious or is known to the passenger, he may rely upon the assumption that the driver will exercise proper care and caution.<sup>23</sup> In the case of a guest, unless he knows, or, in the exercise of proper care, should know, that the driver is running the machine in a negligent manner, it is not his duty ordinarily to give instructions or even suggestions.<sup>24</sup> A guest is not necessarily guilty of negligence because he rides in a machine which is not properly equipped with lights,<sup>25</sup> or because the road is muddy and slippery.<sup>26</sup>

18. *White v. Portland Gas & Coke Co.*, 84 Oreg. 643, 165 Pac. 1005.

19. *Jefson v. Crosstown St. Ry.*, 72 Misc. (N. Y.) 103, 129 N. Y. Suppl. 233.

20. *Gaffney v. Dixon*, 157 Ill. App. 589.

21. *Sutton v. City of Chicago*, 195 Ill. App. 261. See also *Kinne v. Town of Morristown*, 184 N. Y. App. Div. 408.

22. *Knoxville Ry. & Light Co. v. Vangilden*, 132 Tenn. 487, 178 S. W. 1117.

23. *Knoxville Ry. & Light Co. v. Vangilden*, 132 Tenn. 487, 178 S. W. 1117.

24. *Latimer v. Anderson County*, 95 S. Car. 187, 78 S. E. 879.

25. *Chambers v. Minneapolis, etc., Ry. Co.*, 37 N. Dak. 377, 163 N. W. 824.

26. *Dillabough v. Okanogan County*, 105 Wash. 609, 178 Pac. 802.

## CHAPTER XXVI.

## MEASURE OF DAMAGES FOR INJURY TO AUTOMOBILE.

## SECTION 717. In general.

718. Market value.

719. Difference between value before and after injury.

720. Cost of repairs.

721. Expenses of preserving car from further injury.

722. Usable value for period of repairs—in general.

723. Usable value for period of repairs—rental value.

724. Payments to chauffeur during repairs.

## Sec. 717. In general.

The general rule for the determination of damages to personal property is that the owner shall receive fair and reasonable compensation for the injuries sustained by him.<sup>1</sup> The presiding judge on a trial should not, however, merely instruct that the jury should find a fair and reasonable compensation for the injury, but should inform them how this compensation is to be found. The jurors should not be left each to his individual idea as to how to fix the sum which would reasonably and fairly compensate the owner of the machine.<sup>2</sup> A verdict for nominal damages will be set aside when substantial damages are proved.<sup>3</sup> There are authorities which

1. Indianapolis, etc., Traction Co. v. Sherry, 65 Ind. App. 1, 116 N. E. 594; F. & B. Livery Co. v. Indianapolis Tract. & Terminal Co. (Ind. App.), 124 N. E. 493; Gilwee v. Pabst Brewing Co., 195 Mo. App. 487, 193 S. W. 886.

"While the rule for determining the amount of damages to personal property varies in some degree in different jurisdictions, and is affected by existing circumstances, it is manifest that just compensation in money, for the actual loss sustained is the basic principle which should control. This principle is applicable to damages to automobile as well as to other personal property." Indianapolis, etc., Traction Co. v. Sherry, 65 Ind. App. 1, 116

N. E. 594. "In a case like the one before us, in measuring the damages to an automobile, the basic rule is just compensation for the actual loss sustained." Gilwee v. Pabst Brewing Co., 195 Mo. App. 487.

California Code.—Under section 3333 of the Civil Code of California, the measure of damages for the breach of an obligation not arising from contract is the amount which will compensate for all of the detriment proximately caused. Kincaid v. Dunn, 26 Cal. App. 686, 148 Pac. 235.

2. Southern Ry. Co. v. Kentucky Grocery Co., 166 Ky. 94, 178 S. W. 1162.

3. F. & B. Livery Co. v. Indian-

permit the calculation of damages upon the basis of the difference between the value before the injury and the value after the accident.<sup>4</sup> And other authorities take the view that the damages are the reasonable value of the repairs made necessary by the injury.<sup>5</sup> But the damages must be figured on one or the other theory; to allow both would constitute double damages.<sup>6</sup> And, in an action between the manufacturer and purchaser of an automobile arising from alleged defects in the car as delivered, it is improper to allow as damages, not only the difference between the value of the automobile in its condition when delivered and what its value would have been had it been delivered in the condition contracted for, but also such sums as might have been necessarily expended by the plaintiff in procuring parts and making repairs thereon and the value of the plaintiff's time lost in attempting to make repairs so that it would run properly.<sup>7</sup> Evidence of insurance on the machine is not admissible for the purpose of reducing the damages.<sup>8</sup>

### Sec. 718. Market value.

Where personal property is totally destroyed or converted by the wrongful act of another, in general, the measure of damages is the market value of the property at the time of the wrongful act.<sup>9</sup> This rule is applied to motor vehicles.<sup>10</sup>

apolis Tract. & Terminal Co. (Ind. App.). 124 N. E. 493; Merriman v. City of Chillicothe (Mo. App.), 217 S. W. 637.

4. Section 719.

5. Section 720.

6. Barshfield v. Vucklich (Kans.). 197 Pac. 205; Gilwee v. Pabst Brewing Co., 195 Mo. App. 487, 193 S. W. 886.

7. Studebaker Corporation of America v. Miller, 169 Ky. 90, 183 S. W. 256.

8. Loughced v. Collingwood Co., 16 O. L. R. (Canada) 64; Hyndman v. Stephens, 19 Man. L. R. (Canada) 187.

9. "If the destruction of personal

property is so complete that it is not susceptible of repair, the measure of damages is its reasonable market value immediately before its destruction." Cincinnati, etc., Ry. Co. v. Sweeney, 166 Ky. 360, 179 S. W. 214.

Personal property in motor vehicle. —Where personal property carried in a motor vehicle is destroyed at the time of an injury to the machine, its fair market value at the time and place of the injury, is the measure of damages. Southern Ry. v. Kentucky Grocery Co., 166 Ky. 94, 178 S. W. 1162.

10. Monson v. Chicago, etc., Ry. Co. (Iowa), 159 N. W. 679; Southern Ry. v. Kentucky Grocery Co., 166 Ky. 94,

If not totally destroyed, the value after the occurrence is deducted from the market value so as to leave the measure of damages the difference between the values.<sup>11</sup> But, it is held that the damages cannot exceed the value before the commission of the tort.<sup>12</sup> The cost of the machine is not a criterion of its market value, yet the price paid therefor shortly before the injury may be admissible as evidence of its market value.<sup>13</sup> As bearing upon the question of the value of a car, a person will not be permitted to introduce in evidence a personal property tax schedule containing a declaration as to its value,<sup>14</sup> or a compromise agreement between the plaintiff and an insurance company regarding an adjustment of the damage.<sup>15</sup>

### Sec. 719. Difference between value before and after injury.

Where, by the wrongful act of the defendant, the plaintiff's automobile is injured, but is not totally destroyed, the measure of damages usually adopted is the difference between the market value before the injury and market value thereafter.<sup>16</sup> In many cases, as a practical proposition, the

178 S. W. 1162; Cincinnati, etc., Ry. Co. v. Sweeney, 166 Ky. 360, 179 S. W. 214; Seaboard Air Line Ry. v. Abernathy, 121 Va. 173, 92 S. E. 913.

11. Section 719.

12. Southern Ry. v. Kentucky Grocery Co., 166 Ky. 94, 178 S. W. 1162.

13. Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357; Bonert v. Long Island R. Co., 145 N. Y. App. Div. 552, 130 N. Y. Suppl. 271. See also Sanders v. Austin, 180 Cal. 664, 182 Pac. 449.

14. Burdick v. Valerius, 172 Ill. App. 267. See in this connection, 5 Chamberlayne's Modern Law of Evidence, § 3455.

15. Burdick v. Valerius, 172 Ill. App. 267.

16. Alabama.—Birmingham Ry., L. & P. Co. v. Sprague, 196 Ala. 148, 72 So. 96; Mobile L. & P. Co. v. Harris (Ala. App.), 84 So. 857.

California.—Kincaid v. Dunn, 26

Cal. App. 686, 148 Pac. 235; Rhodes v. Firestone Tire & Rubber Co. (Cal. App.), 197 Pac. 392.

Connecticut.—Hawkins v. Garford Trucking Co., 114 Atl. 94.

Delaware.—Morgan Millwork Co. v. Dover Garage Co., 7 Boyce's (30 Del.) 383.

Iowa.—Lonnecker v. Van Patten, 179 N. W. 432. See also Gay v. Shadle, 176 N. W. 635.

Kansas.—Barsfield v. Vucklich, 197 Pac. 205.

Kentucky.—Southern Ry. v. Kentucky Grocery Co., 166 Ky. 94, 178 S. W. 1162; Cincinnati, etc., Ry. Co. v. Sweeney, 166 Ky. 360, 179 S. W. 214. "Where an injury to personal property does not effect its destruction—that is, where it is susceptible of repair—the measure of damages is the difference between the reasonable market value of the property immediately before the injury at the place thereof,



difference in value may be the cost of repairing the machine.<sup>17</sup> And, as a general proposition, the reasonable value of repairs necessitated is admissible as evidence bearing upon the depreciation in value through the injury.<sup>18</sup> But the cost of repairs may be unsatisfactory as evidence of depreciation in value, for after the repairs the machine may not be of the same value as before the injury, and it is possible that it be of greater value.<sup>19</sup> Hence, the owner is sometimes allowed the

and its reasonable market value immediately after the injury at the place thereof." *Southern Ry. Co. v. Kentucky Grocery Co.*, 166 Ky. 94, 178 S. W. 1162. "It is a matter of common knowledge that automobiles in all stages of use and repair are being daily exchanged in barter and sales. If an automobile is totally destroyed, or if an automobile suffers injuries, the damages to the owner from the destruction or injury of the machine alone, cannot be more than his loss, which in the first instance is its value immediately before its destruction, and, in the second instance, is the difference between its value in its injured condition and its value before the injuries. To fix these values, the law refuses to leave it to the imagination of the owner of the injured property, or to the opinion which a jury may set up as the criterion of value, and which may vary in different cases and with each jury, but has adopted the market value, as the most tangible and the one which can be most easily and certainly laid hold of." *Cincinnati, etc., Ry. Co. v. Sweeney*, 166 Ky. 360, 179 S. W. 214.

*Minnesota*.—*Egelvist v. Minnetonka & White Bear Nav. Co.*, 178 N. W. 238.

*Missouri*.—*Jackels v. Kansas City Rys. Co.* (Mo. App.), 231 S. W. 1023; *Gilwee v. Pabst Brewing Co.*, 195 Mo. App. 487, 193 S. W. 886.

*New Jersey*.—*Van Seiver v. Public Service Ry. Co.*, 114 Atl. 146; *Taylor v. Brewer*, 110 Atl. 693.

*North Carolina*.—*Farrell v. Universal Garage Co.*, 179 S. Car. 389, 102 S. E. 617.

*South Carolina*.—*Johnson Motor Co. v. Payne*, 107 S. E. 252.

*Texas*.—*Beaumont, etc., R. Co. v. Myrich* (Tex. Civ. App.), 208 S. W. 935; *Kansas City, etc., R. Co. v. O'Connell* (Tex. Civ. App.), 210 S. W. 757.

*Utah*.—*Metcalf v. Mellen*, 192 Pac. 676.

*Washington*.—*Kane v. Nakamoto*, 194 Pac. 381; *Alexander v. Amusement Co.*, 105 Wash. 346.

**Trover**.—Where an automobile is returned after its conversion, the return goes only in mitigation of the damages, and the owner in an action of trover may recover the difference between the value when taken and the value when returned. *Lyman v. James*, 87 Vt. 486, 89 Atl. 932. Interest may be added from the date of the conversion. *Taylor v. Brewer* (N. J.), 110 Atl. 693.

**Attachment**.—The measure of damages sustained through the attachment of a motor vehicle, may be the depreciation in value during the time the machine was under attachment. *Morneault v. National Surety Co.*, 37 Cal. App. 285, 174 Pac. 81.

17. Section 720.

18. *Southern Ry. v. Kentucky Grocery Co.*, 166 Ky. 94, 178 S. W. 1162; *Farrell v. Universal Garage Co.*, 179 N. C. 389, 102 S. E. 617.

19. "Evidence of the reasonable value of such repairs, made necessary

cost of repairs together with the difference between the value before the accident and the value after repairs are made.<sup>20</sup> In some jurisdictions, the rule seems to have been adopted that, in case the property can be repaired, the measure of damages is the reasonable value of the repairs and the value of the use of the machine while undergoing repairs; but, if the property cannot be so repaired, the measure of damages is the difference between the value before the accident and the value of the wreckage.<sup>21</sup>

### Sec. 720. Cost of repairs.

The reasonable value of repairs to an injured automobile is frequently considered as the proper measure of damages for the injury.<sup>22</sup> If so, only those repairs which are attributable as resulting from the accident in question are to be considered.<sup>23</sup> In at least one jurisdiction, it seems that the value

by the injury, as were required to place the property in usable condition, as well as evidence of its reasonable market value when repaired, is competent, as bearing on the reasonable market value of the machine immediately after the injury. But if the property should be rendered, by reason of the repairs, more valuable than it was before the injury, then, of course, the full expenditure for repairs should not be at the expense of the defendant. On the other hand, if by reason of the injury the property has been rendered incapable of being made, by repairing it, as valuable as it was immediately before the injury, the plaintiff should not be required to lose this deterioration." *Southern Ry. v. Kentucky Grocery Co.*, 166 Ky. 94, 178 S. W. 1162.

20. *Yawitz Dyeing & Cleaning Co. v. Erlendbach* (Mo. App.), 221 S. W. 411; *Jackels v. Kansas City Rys. Co.* (Mo. App.), 231 S. W. 1023; *Cooper v. Knight* (Tex. Civ. App.), 147 S. W. 349; *Metcalf v. Mellen* (Utah), 192 Pac. 676.

21. *Crosson v. Chicago, etc. Co.*, 158 Ill. App. 42; *Latham v. Cleveland, etc. Co.*, 164 Ill. App. 559; *McDonell v. Lake Erie & Western Ry. Co.*, 208 Ill. App. 442; *Fisher v. City Dairy Co.* (Md.), 113 Atl. 95.

22. *Hawkins v. Garford Trucking Co.* (Conn.), 114 Atl. 94; *Lonnecker v. Van Patten* (Iowa), 179 N. W. 432, citing *Huddy on Automobiles* (5th Ed.), p. 943; *Coggin v. Shreveport Rys. Co.*, 147 La. —, 84 So. 902; *Donnelly v. Poliakoff*, 79 Misc. (N. Y.) 250, 139 N. Y. Suppl. 999; *Peters v. Streep*, 138 N. Y. Suppl. 146; *Stubbs v. Molberget*, 108 Wash. 89, 182 Pac. 936, 6 A. L. R. 318; *Chotem v. Porteous*, 51 D. L. R. (Canada) 507. See also *Walker v. Hilland*, 205 Ill. App. 243; *W. S. Conrad Co. v. St. Paul City Ry.*, 130 Minn. 128, 153 N. W. 256.

23. *Coyne v. Cleveland, etc. R. Co.*, 208 Ill. App. 425; *Indiarapolis, etc. Traction Co. v. Sherry*, 65 Ind. App. 1, 116 N. E. 594; *Murphy v. New York City R. Co.*, 108 N. Y. Suppl. 1021, 58 Misc. 237. See also *Reda v. Hammond Co.*, 187 Ill. App. 182.

of the repairs is considered the proper measure of damage when the machine can be repaired, but if not susceptible of repair, the measure is the difference between the value before the accident and afterwards.<sup>24</sup> And it has been held that the damages are not limited to repairs that are apparent but that they include also the expense of a thorough examination of the machine.<sup>25</sup> It is the *value*, not the *cost*, of the repairs which is essential; if for some reason the repairs cost an excessive sum, the excess is borne by the owner.<sup>26</sup> The reasonable cost of repair is what an automobile repair man would, in accordance with the market and usual rates, charge for the work and material necessary.<sup>27</sup> Mere proof of receipted bills for repairs is not sufficient to prove the plaintiff's case, but he must go farther and show that the sums paid represent the reasonable value of the repairs.<sup>28</sup> It is not necessary, however, that the owner should have actually expended the money for the repairs; the obligation to pay more may be sufficient to sustain the collection thereof from the defendant.<sup>29</sup> The owner is not permitted to speculate at the expense of the defendant in repairing the machine, and after repairing it once, tearing it to pieces and rebuilding it because of his own mistake. Nor can he make repairs at an expense greater than the value of the machine after it has been repaired.<sup>30</sup> In some jurisdictions, the cost of the repairs is permitted as the measure of damages, but not to exceed the difference between the value before the accident and afterwards. In such a case, when the cost of repairs is found, the burden is on the defendant to show that such sum is greater than the

24. *Crosson v. Chicago, etc. Co.*, 158 Ill. App. 42; *Latham v. Cleveland, etc. R. Co.*, 164 Ill. App. 559; *Peabody v. Lynch*, 184 Ill. App. 78.

25. *Sears v. Gowvre*, 52 Que. S. C. (Canada) 186.

26. *Crosson v. Chicago, etc. Co.*, 158 Ill. App. 42; *Offner v. Wilke*, 208 Ill. App. 463; *W. S. Conrad Co. v. St. Paul City Ry.*, 130 Minn. 128, 153 N. W. 256; *Galveston, etc. El. R. Co. v. English (Tex. Civ. App.)*, 178 S. W. 666.

27. *Peabody v. Lynch*, 184 Ill. App. 78.

28. *Galveston, etc. El. R. Co. v. English (Tex. Civ. App.)*, 178 S. W. 666. See also *Indianapolis, etc. Traction Co. v. Sherry (Ind. App.)*, 116 N. E. 594.

29. *Kineaid v. Dunn*, 26 Cal. App. 686, 148 Pac. 235. See also *Bonert v. Long Island R. Co.*, 145 N. Y. App. Div. 552, 130 N. Y. Suppl. 271.

30. *Crosson v. Chicago, etc. Co.*, 158 Ill. App. 42.

depreciated value.<sup>31</sup> The value of repairs may be a very unsatisfactory method of reaching the damages sustained by the owner of an injured motor vehicle. After the repairs have been made, the car may still be worth less than before the injury; and, on the other hand, the repairs may actually enhance its value.<sup>32</sup> A sum must be added to or taken from the value of the repairs to harmonize with the increased or decreased value of the machine after the repairs are made.<sup>33</sup>

### **Sec. 721. Expenses of preserving car from further injury.**

After an injury to an automobile has been occasioned by the negligence of another, it is the duty of the owner to use reasonable diligence in an effort to protect the property so as not to aggravate the damage, and he is entitled to recover from the wrongdoer the reasonable expenses incurred in such preservation.<sup>34</sup> Thus, it has been held that the expense of assembling the parts after a collision with another automobile and towing the car to a garage and expense of storage in the garage for a reasonable time while attempting to dispose of the machine are proper elements of damage.<sup>35</sup>

### **Sec. 722. Usable value for period of repairs — in general.**

When, by reason of an injury to plaintiff's automobile, he is deprived of the use thereof for some time, a troublesome question has arisen as to the damages which shall be allowed to compensate him for such loss.<sup>36</sup> Conflicting decisions have

31. *Kincaid v. Dunn*. 26 Cal. App. 686, 148 Pac. 235; *Rhodes v. Firestone Tire & Rubber Co.* (Cal. App.), 197 Pac. 392.

32. See *Southern Ry. Co. v. Kentucky Grocery Co.*, 166 Ky. 94. 178 S. W. 1162; *Gilwee v. Pabst Brewing Co.*, 195 Mo. App. 487, 193 S. W. 886; *Cooper v. Knight* (Tex. Civ. App.), 147 S. W. 349.

33. *Jackals v. Kansas City Rys. Co.* (Mo. App.), 231 S. W. 1023.

34. *Gilwee v. Pabst Brewing Co.*, 195 Mo. App. 487, 93 S. W. 886

Expenses of transporting machine to

place where it was afterwards sold is not allowed, where there is no evidence that such transportation enabled the owner to get a better price. *Luttenton v. Detroit, etc. Ry.* (Mich.), 176 N. W. 558.

35. *Gilwee v. Pabst Brewing Co.*, 195 Mo. App. 487. 193 S. W. 886.

36. *Trover*.—In an action of trover for the conversion of an automobile, the owner may be entitled to special damages such as the loss of rental and the opportunity to sell. *Lyman v. James*, 87 Vt. 486. 89 Atl. 932.

Pleading special damage.—Damages

been made in different jurisdictions. As a general proposition the owner of a commercial truck or business machine is entitled to recover, as an element of his compensatory damages, the usable value of the machine during the time it is receiving repairs and he is unable to use the same.<sup>37</sup> If so, it is his duty to make the repairs as soon as reasonably possible so that the damages will be minimized.<sup>38</sup> In some jurisdictions, a distinction is drawn between the use of a business and the use of a pleasure car, and it is held that the owner is entitled to the usable value of a business machine as an element of damage, but is not entitled to recover damages for the loss of the use of an automobile which is used purely for pleasure purposes.<sup>39</sup> In other jurisdictions, the usable value of the machine is allowed as an element of damage,

accruing from the loss of the use of a motor vehicle are special damages, and the owner must plead the same in order to have them considered as an element of damage. *Hunter v. Quaintance* (Colo.), 168 Pac. 918; *Offner v. Wilke*, 208 Ill. App. 463. A contrary decision has also been made. *Ralph N. Blakeslee Co. v. Rigo* (Conn.), 109 Atl. 173.

**Attachment.**—The damages sustained under an attachment include the depreciation in the value of the machine, but, where the machine is kept only for purposes of sale, rental value should not be considered. *Morneault v. National Surety Co.*, 37 Cal. App. 285, 174 Pac. 81.

**Certainty of evidence.**—The evidence should with reasonable certainty furnish a basis for the computation of loss of profits, or they will not be allowed. *Adams v. Hardin Motor Co.*, 111 S. Car. 493, 98 S. E. 381.

**37.** *Ralph N. Blakeslee Co. v. Rigo* (Conn.), 109 Atl. 173; *Southern Ry. v. Kentucky Grocery Co.*, 166 Ky. 94, 178 S. W. 1162; *Washington, etc. Ry. Co. v. Fingles*, 135 Md. 574, 109 Atl. 431; *Bergstrom v. Mellen* (Utah), 192 Pac. 679. See also *Morgan v. Wil-*

*liams*, 179 Ky. 428, 200 S. W. 650.

**Physician's car.**—In an action for damages to the automobile of a physician used in his business, he being required to hire another car until the completion of repairs to his own machine, it was held to be proper to introduce evidence of the expense of hiring the substitute car, the cost of new parts and repairs, and also the depreciation on the machine due to the accident. *Hollander v. Dawson Construction Co.*, 66 Pitts. Leg. Jour. (Pa.) 97.

**Evidence of owner as to usable value.**—The owner of a motor vehicle has been permitted to testify what the value of the use of his machine would be during the time he was deprived of it. *Andries v. Everett, etc.*, *Flanders Co.*, 177 Mich. 110, 142 N. W. 1067.

**Estimated future profits cannot be recovered.**—*Jimenez v. San Juan Light & Transit Co.*, 3 Porto Rico Rep. 178; *Louisville, etc. R. Co. v. Schuester*, 183 Ky. 504, 209 S. W. 542, 4 A. L. R. 1344.

**38.** *Rosenstein v. Bernhard & Turner Automobile Co.* (Iowa), 180 N. W. 282

**39.** *Hunter v. Quaintance* (Colo.), 168 Pac. 918.

regardless of the purpose for which it is used.<sup>40</sup> In such a case, the fact that it is difficult to fix the amount of damages an owner has sustained through the loss of a pleasure vehicle does not bar the damages or require that they be placed at a nominal amount.<sup>41</sup> And, in some jurisdictions the right to

40. *Cook v. Packard Motor Car Co.*, 88 Conn. 590, 92 Atl. 413, L. R. A. 1915C, 319; *Hawkins v. Garford Trucking Co.* (Conn.), 114 Atl. 94; *Lonnecker v. Van Patten* (Iowa), 179 N. W. 432; *Gilwee v. Pabst Brewing Co.*, 195 Mo. App. 487, 193 S. W. 886; *Perkins v. Brown*, 132 Tenn. 294, 177 S. W. 1158. "On this appeal the question arises on an exception to the exclusion of evidence of the rental value of the plaintiff's car, on the ground that the plaintiff used and intended to use his car for pleasure only, and not for rent or profit. Stated more generally, the question is whether the right to recover substantial damages for being deprived of the use and possession of a chattel as a result of a tortious injury to the chattel itself depends on the character of the use which the owner intended to make of it. during the period of the detention. We fail to see why the character of the intended use should determine the right to a recovery, although it will, of course, affect the amount of recoverable damages." *Cook v. Packard Motor Car Co.*, 88 Conn. 590, 92 Atl. 413, L. R. A. (1915C, 319. "Nor may it be held, under the authorities, that the right to recover substantial damages, as distinguished from nominal damages, depends upon the precedent use of the car for profit. Compensation for injury being the rule, there can be no just reason for the allowance of the usable value in the one case and its disallowance in the other. As pointed out by Mr. Sedgwick (section 243a), the value of the use of personal property is not the mere value of its intended use. but of its present poten-

tial use, whether availed of or not by its owner. His right of user, whether for business or pleasure, is absolute, and whoever injures him in the exercise of that right cannot complain when held to respond on the basis." *Perkins v. Brown*, 132 Tenn. 294, 177 S. W. 1158.

41. *Cook v. Packard Motor Car Co.*, 88 Conn. 590, 92 Atl. 413, L. R. A. 1915C, 319. "An automobile owner, who expects to use his car for pleasure only, has the same legal right to its continued use and possession as an owner who expects to rent his car for profit; and the legal basis for a substantial recovery, in case of a deprivation of the use of the car, is the same in one case as in the other. Such an invasion of property right calls for an award of substantial, as distinguished from nominal, damages, and the only difficulty in applying the rule of compensatory damages to cases of this character is the very practical difficulty of estimating the actual damages in money. But the law does not deny substantial damages to one who has suffered a substantial injury, solely on the ground that the injury has not produced or will not produce a pecuniary loss. For example, no one would contend that only those plaintiffs whose incomes depended on their earning capacity could recover substantial damages for injuries to person or character. So in this case the fact that the plaintiff has suffered no pecuniary loss ought not to prevent a recovery proportionate to the actual extent of his injury." *Cook v. Packard Motor Car Co.*, 88 Conn. 590, 92 Atl. 413, L. R. A. 1915C, 319.

recover the usable value of an injured pleasure vehicle, does not depend upon whether the owner has rented a substitute machine during the procurement of repairs to his own machine.<sup>42</sup> In at least one jurisdiction the rules seem to be that, when the injured machine can be repaired, the owner is entitled to the value of the repairs together with the value of the use of the machine while the repairs are being made; but, if the machine cannot be repaired, the measure of damages is only the difference between the value before and after the injury.<sup>43</sup> In *New York*, the loss of the use of the machine is not allowed unless the machine was used for business purposes, or unless the owner procured another to take its place during the time it was out of order.<sup>44</sup>

### Sec. 723. Usable value for period of repairs — rental value.

The rental value of similar machines is not a fair criterion of the usable value of an automobile which the owner has lost through an injury thereto.<sup>45</sup> In the first place, the rental

42. *Perkins v. Brown*, 132 Tenn. 294, 177 S. W. 1158, wherein it was said: "It is next urged that a disallowance of the usable value of the car must result, because the plaintiff did not actually expend money in hiring a substitute car for recreation purposes. This insistence also is not tenable. . . . Two recent decisions of the House of Lords of England have ruled the point. In *The Gretna Holme* (1897), A. C. 597, a recovery was allowed for the loss of the use of a dredger, injured in a collision, although the owner was out of pocket no definite sum for a substitute during the period necessary for repairs; and in *The Mediana* (1900). A. C. 112, where there was a lightship substituted for the lightship damaged, and it was argued that, as nothing was paid for the hire of the substitute, no damages were consequent or allowable. Lord Chancellor Halsbury gave his opinion, and the judgment was, in opposition to that argument."

43. *Crosson v. Chicago, etc. Co.*, 158 Ill. App. 42; *Latham v. Cleveland, etc. R. Co.*, 164 Ill. App. 559.

44. *Foley v. Forty-second St., etc. R. Co.*, 52 Misc. (N. Y.) 183, 101 N. Y. Suppl. 780; *Donnelly v. Poliakoff*, 79 Misc. (N. Y.) 250, 139 N. Y. Suppl. 999; *Cardozo v. Bloomingdale*, 79 Misc. (N. Y.) 605, 104 N. Y. Suppl. 377; *Murphy v. New York City R. Co.*, 108 N. Y. Suppl. 1021, 58 Misc. 237; *Peters v. Streep*, 138 N. Y. Suppl. 146. See also *Renault v. Simpson-Crawford Co.*, 108 N. Y. Suppl. 700. Compare *Dettmar v. Burns Bros.*, 111 Misc. (N. Y.) 189, 181 N. Y. Suppl. 146.

Evidence of profits derived from use of machine.—In the absence of proof that the owner of an injured machine could not hire another as a substitute, evidence of the profits he would have derived from the use of his machine is not admissible. *Universal Taximeter Cab Co. v. Blumenthal*, 143 N. Y. Suppl. 1056.

45. *Cook v. Packard Motor Car Co.*,

value of a motor vehicle necessarily includes a substantial allowance for depreciation and repairs, to which the owner's car while undergoing repairs is not being subjected. Moreover, the rental value may include a substantial allowance for overhead expenses and a profit on the business of renting cars.<sup>46</sup> Again, these additional items entering into the rental value of a vehicle cannot be deducted so as to leave the usable value, for it does not necessarily follow, without evidence proving the fact, that the car would probably have been rented every day or for any given number of days.<sup>47</sup> But, in some States, when the property injured is a commercial truck, the damages may be computed from the reasonable net rental value of the truck in question, or of similar trucks, the lessee furnishing the driver and bearing all the other expenses which the owner would bear in the operation of his own car.<sup>48</sup> But evidence of the rental value of a pleasure car, though not

88 Conn. 590, 92 Atl. 413. L. R. A. 1915C, 319; *Hawkins v. Garford Trucking Co.* (Conn.), 114 Atl. 94.

**Delay in shipment.**—The rental value of the machine has been allowed as the measure of damages in an action against a railroad for delay in shipping an automobile. *McCabe v. Chicago, etc. R. Co.*, 215 Ill. App. 99.

**46** *Cook v. Packard Motor Car Co.*, 88 Conn. 590, 92 Atl. 413, L. R. A. 1915. 319. "It is clear, for example, that the plaintiff cannot recover the rental value of his car during the period of detention, for such rental value includes a substantial allowance for depreciation and repairs, to which the plaintiff's car has not, in the meantime, been subjected. It also includes a substantial allowance for the overhead expenses and the profits of carrying on the business of renting motor cars; and the plaintiff was not engaged in that business. Neither is the plaintiff entitled to the rental value of his car less deductions for these items, for, even if he had been engaged in the business of renting motor cars, it

would not follow, without evidence to that effect, that the car would probably have been rented every day, or for any given number of days." *Cook v. Packard Motor Car Co.*, 88 Conn. 590. 92 Atl. 413.

**47.** *Cook v. Packard Motor Car Co.*, 88 Conn. 590, 92 Atl. 413. L. R. A. 1915C, 319.

**48.** *Southern Ry. v. Kentucky Grocery Co.*, 166 Ky. 94. 178 S. W. 1162. "While the amount to be allowed is to be determined according to the market value of the use of the property, it is the net usable value, less the expense of keeping up the property which may be recovered. In determining the value of the use under the above rule, care should be taken not to permit the fixing of an amount out of all proportion to the value of the thing itself: otherwise the result is not for compensation for use, but punishment for a wrong in a case where exemplary damages as such would not be allowed." *Mutch v. Long Beach Imp. Co.* (Cal. App.), 190 Pac. 638.



furnishing a measure of damages, should be received as a fact proper to be considered in determining the usable value.<sup>49</sup> However, in *New York*, it is held that evidence as to the rental value of the machine is inadmissible when it is not shown that the owner used or had need of the use of another machine during the period of his own was receiving repairs.<sup>50</sup> And where it appears that the machine was used only for purposes of health and pleasure, it is held in *New York* that proof of its rental value is improper.<sup>51</sup> If rental value be allowed as the measure of damage, the aggregate rental for the full period should be the basis of computation, not a price based on a daily or weekly rental.<sup>52</sup>

#### Sec. 724. Payments to chauffeur during repairs.

One whose automobile has been injured through the conduct of another is generally entitled, as a part of his damages, to such reasonable obligatory expenses as have been rendered fruitless as the natural consequence of the wrongful act. Thus, when the owner is compelled to pay the salary of the chauffeur and the owner has no use for his services owing to the car being laid up for repairs, this expense may be charged against the tort-feasor.<sup>53</sup>

49. *Cook v. Packard Motor Car Co.*, 88 Conn. 590, 92 Atl. 413, L. R. A. 1915, 319.

50. *Murphy v. New York City R. Co.*, 58 Misc. (N. Y.) 237, 108 N. Y. Suppl. 1021.

**Taxicab.**—One engaged in the taxicab business, using a number of cars, in case of injury to one, may recover the rental value of similar machines while it is undergoing repairs. The owner cannot recover the estimated profits the machine would have made. *Naughton Mulgrew Motor Co. v.*

*Westchester Fish Co.*, 105 Misc. (N. Y.) 595, 173 N. Y. Suppl. 437.

51. *Bondy v. New York City R. Co.*, 56 Misc. (N. Y.) 602, 107 N. Y. Suppl.

31. See also *Dettmar v. Burns Bros.*, 111 Misc. (N. Y.) 198, 181 N. Y. Suppl. 146; *Bernheim v. Roth*, 157 N. Y. Suppl. 902.

52. *Perkins v. Brown*, 132 Tenn. 294, 177 S. W. 1158.

53. *Cook v. Packard Motor Car Co.*, 88 Conn. 590, 92 Atl. 413, L. R. A. 1915C, 319.

## CHAPTER XXVII.

## CRIMINAL OFFENSES.

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### Sec. 725. Criminal responsibility for acts of chauffeur—owner.

Reckless driving on the part of the operator of a motor vehicle which results in the death of another traveler may, in some cases, furnish a basis for a charge of manslaughter.<sup>1</sup> Of course, criminal responsibility cannot be urged unless the conduct of the operator was such as to make him civilly liable for damages arising therefrom.<sup>2</sup> But the owner of the machine is not generally liable to a criminal prosecution for the neglect of the chauffeur merely because he was riding in the machine at the time the offense was committed.<sup>3</sup> In case of a prosecution for homicide arising from a collision between an automobile and a buggy, the owner of the machine is not to be convicted, though riding in the machine at the time, where he was not running the machine at the time and could not have done anything to have avoided the accident, and there was no evidence that it was the habit of the driver to

1. Section 757, *et seq.*

3 Commonwealth v. Druschell, 66

2. Reg. v. Birchall, 4 F. & F. (Eng.) Pitts. Leg. Jour. (Pa.) 520, 1087.

run dangerously close to other vehicles to the knowledge of the owner without correction.<sup>4</sup> So, too, the owner is not liable, though riding in the machine, where he gave no orders to the chauffeur, and it appears that the chauffeur acted on his own volition with reference to the reckless conduct under consideration.<sup>5</sup> Clearly, the owner of the motor vehicle is not liable, if he was not riding in the machine at the time of the offense and the machine was used without his knowledge or consent.<sup>6</sup> Liability may, however, be imposed, when the owner is controlling the operation of the machine, or he may be liable on the theory that he was an accessory to the commission of the offense. Thus in an English case, an automobilist was convicted of unlawfully driving his motor car at a speed dangerous to the public. At the hearing of the case on appeal there was a conflict of evidence as to whether the car was being driven by the appellant or by a lady seated by his side in the car; but the court, without deciding who was driving the car, dismissed the appeal, at the same time finding in fact that if the lady was driving she was doing so with the consent and approval of the appellant, who must have known that the speed was dangerous, and who, being in control of the car, could and ought to have prevented it. The court found that there was evidence on which the appellant could be convicted of aiding and abetting the commission of a crime.<sup>7</sup> And in a case in *Massachusetts* arising from the operation of an automobile at an excessive rate of speed, it was held that proof that the machine was registered with the Massachusetts Highway Commission by the defendant in his own name and was run by the operator at an illegal speed while the defendant was in the tonneau, established *prima facie* that the defendant, having power to control the machine, either knew or allowed it to be illegally run, and he was therefore guilty.<sup>8</sup> And where the regulation expressly prohibits the owner riding therein from permitting a certain conduct on

4. *People v. Seanton*, 132 N. Y. App. Div. 528, 117 N. Y. Suppl. 57

5. *Commonwealth v. Druschell*, 66 Pitts. Leg. Jour. (Pa.) 520.

6. *Commonwealth v. Bacon*, 24

Montg. L. Rep. (Pa.) 197.

7. *Du Cros v. Lambourne* (1907), L. J. (K. B.) 50.

8. *Commonwealth v. Sherman*, 191 Mass. 439, 78 N. E. 98.

the part of the operator of the machine, the courts have no difficulty in sustaining a criminal prosecution against the owner.<sup>9</sup> Thus, under a statute forbidding the owner riding in a machine from causing or permitting the vehicle to be operated at a dangerous speed, the owner may be criminally liable for a violation, though he was engaged in conversation with his wife in the rear seat and was not conscious that the machine was driven at an excessive speed.<sup>10</sup>

**Sec. 726. Criminal responsibility for acts of chauffeur—passenger.**

If the owner of a motor vehicle is not criminally responsible for the reckless driving of his chauffeur,<sup>11</sup> *a fortiori*, one who is a mere guest or passenger in the car is not liable to criminal prosecution. If, however, a motor vehicle is operated so as to violate the law concerning speed while a guest is in it, he may be said to be a "user" of the machine, although he is not actually driving. Some of the State automobile acts in this country provide that no motor vehicle shall be driven beyond a certain rate of speed at certain places. This prohibition means, not only that the person who has his hands upon the wheel shall not drive beyond the speed limit, but no one shall, who has it in his power to prevent it, allow the machine to be driven faster than the maximum rate. A glaring instance of the statutory criminal liability of a guest is illustrated by an enactment such as the following:

"No person or persons shall be allowed to *use*, operate or drive any motor vehicle . . . at a greater speed than a mile in six minutes, etc."

It will be seen that persons are thus prohibited from using automobiles which are being driven at a higher rate than the law prescribes. In another section of the same act it was provided that,

"Any person using or operating a motor vehicle . . .

9. See *People v. Colon*, 85 Misc. Harrison, 183 N. Y. App. Div. 812, 170 (N. Y.) 229, 148 N. Y. Suppl. 321. N. Y. Suppl. 876. reversing *People v.*

10. *People v. Morosini*, N. Y. Law Harrison, 102 Misc. 151.  
Journal, April 18, 1918; *People v.* 11. Section 725.

shall have displayed in a conspicuous place on the front and back of said vehicle tags furnished by the State Highway Department, etc.”

These two sections might be construed to apply to guests. A guest might also be considered as a principal violator of the law, even though he did not actually drive the machine at the time, if the machine was under his control and guidance and he was acting in the capacity of director of its movements.

**Sec. 727. Criminal responsibility for acts of chauffeur — accessory to violation of law.**

A person who is prosecuted for driving an automobile at a speed dangerous to the public may be convicted, although it may appear that he was not actually driving at the time, if he was in fact aiding and abetting the commission of the offense.<sup>12</sup>

**Sec. 728. Speed regulations — common law misdemeanor.**

To operate a vehicle along a public road or street, greatly to the danger and inconvenience of all persons traveling along said highway, is such a wrong as injuriously affects the rights of the public, who are entitled to travel along such public thoroughfare, laid out and kept up by the public for their convenience and accommodation, without exposure to such danger and inconvenience. While any person may drive his vehicle at such speed as he may please, yet, in enjoying the privilege of free use of his property, he has no right to expose others to injury or to infringe upon the rights of the general public. Running and racing a vehicle along a public road, no necessity being shown for such speed, is not the ordinary and proper mode in which such roads are used by prudent

12. *Buford v. Sims*, 67 L. J. K. B. 655; [1898] 2 K. B. 641; *Du Cros v. Lambourne* (1907), L. J. (K. B.) 50.

Conviction of owner of car as principal for aiding and abetting in unlawfully driving motor car at a speed dangerous to the public held proper under section 5 of English Summary Jurisdiction Act of 1848 providing that

any person who aids and abets the commission of an offense punishable on summary conviction may be convicted on an information charging him with the offense as principal. In this case the owner was in control and sitting beside the driver. *Du Cros v. Lambourne* (1907), L. J. (K. B.) 50.

men. They were not intended, by the very purpose for which they are opened and kept up, for any such use, but for the ordinary and usual travel of the public. Speeding and racing on the public highways are well calculated to disturb public order and the public rights are violated. To run a race on a public highway or to excessively speed a vehicle, to the danger and inconvenience of people, is a common-law misdemeanor. It is proper to add, that there may be necessity for riding at high speed along even the public road, as in cases of sickness, or to give a neighbor notice of great personal danger to his property. Such necessity is a matter of defense.<sup>13</sup>

### Sec. 729. Speed regulations — power of State.

Under its police power, it is well settled that the State may enact regulations prescribing the maximum speed at which motor vehicles shall be driven along the public highways of the State.<sup>14</sup> A speed regulation is not unconstitutional as

**13. Speeding misdemeanor under common law.**—*State v. Battery*, 6 Baxt. (Tenn.) 545. See also *Redman v. State*, 33 Ala. 428. A right of highway does not include a right of racing, and a person who had been a party to a hurdle race is jointly liable for putting the hurdles on the ground, although he took no actual part in the race. *Sowerby v. Wadsworth*, 3 F. & F. (Eng.) 734.

**That horse racing is illegal, see** *State v. Burgett, Smith*, 340; *Watson v. State*, 3 Ind. 123; *Robb v. State*, 52 Ind. 218; *State v. Fleetwood*, 16 Mo. 448; *State v. Wagston*, 75 Mo. 107; *Goldsmith v. State*, 38 Tenn. (1 Head) 154; *State v. Catchings*, 43 Tex. 654. It is an offense for a person to permit his vehicle to be run in a race on a public highway, and a separate offense for a person to act as a driver in such a race. *State v. Ness*, 1 Ind. (1 Cart.) 64; see also *Watson v. State*, 3 Ind. 123; *State v. Fidler*, 26 Tenn. (7 Hump.) 502; *Goldsmith v. State*, 38 Tenn. (1 Head) 154, holding that a bet or a wager is immaterial.

Speed contests on the public highways are illegal indictable nuisances and all participants may be prosecuted together with the promoters. *Johnson v. New York*, 109 App. Div. (N. Y.) 821, 96 N. Y. Suppl. 1130. judgment reversed 186 N. Y. 139, 78 N. E. 715.

**14. California.**—*Ex parte Smith*, 26 Cal. App. 116. 146 Pac. 82.

**Illinois.**—*People v. Lloyd*, 178 Ill. App. 66; *People v. Sunwalt*, 178 Ill. App. 357; *People v. Beak*, 291 Ill. 449, 126 N. E. 201.

**Kansas.**—*State v. Bailey*, 107 Kans. 637, 193 Pac. 354, citing *Huddy on Automobiles* (5th Ed.), § 729.

**Maine.**—*State v. Mayo*, 106 Me. 62, 75 Atl. 295, 26 L. R. A. (N. S.) 502.

**Minnesota.**—*State v. Waterman*, 112 Minn. 157, 130 N. W. 972; *Schaar v. Comforth*, 128 Minn. 460, 151 N. W. 275.

**Missouri.**—*City of St. Louis v. Hammond*, 199 S. W. 411.

**Nebraska.**—*Schultz v. State*, 88 Neb. 613, 130 N. W. 972, 34 L. R. A. (N. S.) 243.

And see sections 57, 230.

class legislation, though a different speed is thereby prescribed than is allowable for street cars or other conveyances.<sup>15</sup> One who operates a motor vehicle on a public highway at a speed which is unreasonable under the circumstances may be liable, not only to civil liability for damages thereby sustained by other travelers,<sup>16</sup> but, if he is thereby violating a valid speed regulation, he may be subject to a criminal prosecution.<sup>17</sup> If his speed is in excess, both of a statutory limitation and of an effective municipal ordinance, he may be proceeded against under either regulation, but only one judgment of conviction can be rendered against him for a single offense.<sup>18</sup>

### Sec. 730. Speed regulations — violation of ordinance.

Unless precluded by statute, it is well established that a municipality may make reasonable regulations prescribing the rate of speed which shall not be exceeded by motor vehicles within the corporate boundaries.<sup>19</sup> The State, however, is the supreme law making power with reference to the use of high-

15. *Christy v. Elliott*, 216 Ill. 31, 1 L. R. A. (N. S.) 215, 74 N. E. 1035, 3 Ann. Cas. 487 108 Am. St. Rep. 196; *City of St. Louis v. Hammond* (Mo.), 199 S. W. 411; *Chittenden v. Columbus*, 26 Ohio Circuit Rep. 531. And see section 62.

16. Section 303, *et seq.*

17. *People v. Kelly*, 204 Ill. App. 201.

**Speeding around curve.**—See *Deveraux v. State* (Ga. App.), 106 S. E. 739.

18. *People v. Fitzgerald*, 101 Misc. (N. Y.) 695, 168 N. Y. Suppl. 930.

19. *California*. — *Ex parte Daniels* (Cal.), 192 Pac. 44.

*Illinois*. — *Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917; *Chicago v. Shaw Livery Co.*, 258 Ill. 409, 101 N. W. 588.

*Iowa*.—*Pilgrim v. Brown*, 168 Iowa, 177, 150 N. W. 1.

*Missouri*.—*City of St. Louis v. Ham-*

*mond*, 199 S. W. 411; *City of Windsor v. Bast* (Mo. App.), 199 S. W. 722.

*New York*.—*People v. Untermeyer*, 153 App. Div. 176, 138 N. Y. Suppl. 334; *People v. Fitzgerald*, 101 Misc. 695, 168 N. Y. Suppl. 930; *People v. Dwyer*, 136 N. Y. Suppl. 148; *People v. Bell*, 148 N. Y. Suppl. 753; *People v. Ruetiman*, 85 Misc. 233, 148 N. Y. Suppl. 612.

*Ohio*.—*City of Fremont v. Keating*, 96 Oh. St. 468, 118 N. E. 114.

*Oregon*.—*Kalich v. Knapp*, 73 Oreg. 558, 152 Pac. 594; *Everart v. Fischer*, 75 Oreg. 316, 145 Pac. 33.

*Pennsylvania*.—*Radnor Tp. v. Bell*, 27 Pa. Super. Ct. 1.

And see sections 70-73.

**Park commissioners** may have the power to regulate the speed of automobiles driving through parks or parkways. *Commonwealth v. Tyler*, 199 Mass. 490, 85 N. E. 569. And see section 73.



ways and it may reserve all of the burden of prescribing the rates of speed upon itself and forbid municipalities from passing regulations relative thereto.<sup>20</sup> And regulations which have been duly enacted by the common council or legislative body of a city or village may be abrogated by the State. The State may render void a municipal ordinance without saving pending prosecutions from the effect of its action.<sup>21</sup> And, in some jurisdictions, municipalities are not authorized to punish a violation of their ordinances by resort to criminal process.<sup>22</sup> Municipal ordinances, to be effective, must be reasonable.<sup>23</sup> The courts do not generally take judicial notice of municipal ordinances, and the People, if relying thereon, must prove the same.<sup>24</sup> Moreover, in some jurisdictions, the burden is on the People of showing, not only that the ordinance was passed by the local legislative body, but that all of the details for the effectiveness of the ordinance have been complied with, such as the publishing of the ordinance in the newspapers, posting the same, etc.<sup>25</sup> Where, in a prosecution for operating an automobile at a speed in excess of the regulations of a town,

20. *Ex parte* Smith, 26 Cal. App. 116 146 Pac. 82; *City of Fremont v. Keating*, 96 Oh. St. 468, 118 N. E. 114; *Ex parte* Wright, 82 Tex. Cr. 247, 199 S. W. 486; *City of Seattle v. Rothweiler*, 101 Wash. 680, 172 Pac. 825.

21. *Ex parte* Wright, 82 Tex. Cr. 247, 199 S. W. 486.

22. See *Chapman v. Selover*, 172 N. Y. App. Div. 858, 159 N. Y. Suppl. 632, wherein it was held that there was no statute authorizing the trustees of a village to make violation of a local ordinance respecting the speed of motor vehicles a crime, but that the trustees in the exercise of their power to fix the punishment for the violation of such an ordinance are limited to the imposition of a fine to be collected in a civil action, except that they may also ordain that such violation constitutes disorderly conduct.

23. *City of St. Louis v. Hammond* (Mo.), 199 S. W. 411; *City of Windsor v. Bast* (Mo. App.), 199 S. W. 722.

And see section 78.

24. *People v. Traince*, 92 Misc. 82, 155 N. Y. Suppl. 1015; *White v. State*, 82 Tex. Cr. 274, 198 S. W. 965. And see section 82.

25. *People v. Chapman*, 88 Misc. (N. Y.) 469 152 N. Y. Suppl. 204.

**Posting and publication.**—In a prosecution for a violation of a speed ordinance, after proof that a proposed ordinance had been filed with the Secretary of State as required by statute and that it had been published in a newspaper as required by law, but no evidence was offered to show that the newspaper was the official municipal paper or that it was the only newspaper published in the municipality, or that copies of the ordinance were posted in three public places as required by the law, it was held that the ordinance was of no force and effect. *People v. Chapman*, 88 Misc. (N. Y.) 469, 152 N. Y. Suppl. 204.

it was agreed that the regulations were "duly established," such a stipulation is deemed to admit that they were advertised and posted as required by the statute on the subject.<sup>26</sup> It is, however, the rule in some States that an inferior court having jurisdiction in a municipality, will take judicial notice of the ordinances of such municipality.<sup>27</sup>

**Sec. 731. Speed regulations—establishment of signs as to speed limited by ordinance.**

In some jurisdictions where statutes permit municipalities to enact speed regulations by local ordinances, it is required that signs shall be erected at the territorial limits of the city or village so as to inform motorists of the speed which is permitted within its bounds. Unless required by statute, such signs are not necessary to the validity of the ordinance.<sup>28</sup> But if required, it is necessary in a prosecution for a violation of the statute that it be shown, not only that the ordinance was duly enacted, but that the proper signs have been established. And under such circumstances it is held that an information charging the offense must allege the erection of the sign.<sup>29</sup> If the statute under which the ordinance is enacted requires an arrow on the sign pointing in the direction in which the speed is to be reduced, a prosecution under the ordinance will

<sup>26</sup> Commonwealth v. Sherman, 191 Mass. 439, 78 N. E. 98.

<sup>27</sup> City of Spokane v. Knight, 96 Wash. 403, 165 Pac. 105.

<sup>28</sup> People v. Untermeyer, 153 N. Y. App. Div. 176, 138 N. Y. Suppl. 334; Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325, 8 Ann. Cas. 435.

**Within distance from bridge.**—An ordinance limiting the speed of automobiles within a radius of half a mile from a certain bridge is not invalid because it fails to provide for establishing or making in any way the limits of such district so that a driver will know when he reaches it. Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325, 8 Ann. Cas. 435.

<sup>29</sup> People v. Hayes, 66 Misc. 606, 124 N. Y. Suppl. 417, wherein it was said: "The construction of the statute which compels the erection of signs upon all highways where speed is to be reduced is consistent with its general object and the evil sought to be corrected. Violations of speed regulations are not crimes *mala in se*; they involve no moral turpitude. The legislature, therefore, has directed that, before one can be held for violations of this prohibited act, a notice shall be given by means of a sign; and, if it be plainly readable and contains what the statute says it must, it then becomes actual notice, whether seen or not."

fail, if compliance has not been made with the arrow provision.<sup>30</sup>

### Sec. 732. Speed regulations — definiteness of statute.

As a general proposition a statute which does not describe the offense with terms of reasonable certainty is not enforceable as a criminal statute.<sup>31</sup> Thus, there is ground for holding that a statute that does not prescribe the maximum rate at which motor vehicles may be propelled, but merely forbids an "unreasonable" speed, is not a regulation which can be enforced by a criminal prosecution,<sup>32</sup> though the statute might be given effect in civil actions between individuals.<sup>33</sup> And the fact that one clause of the statute is so indefinite that the courts will not enforce it in a criminal prosecution does not necessarily annul the entire statute; the balance of the statute may state in express language a speed which the automobilist must not exceed under circumstances.<sup>34</sup> And it is held that a statute which limits the rate of speed of motor vehicles to a designated number of miles per hour, is not void for uncertainty, because it provides in another section that the vehicle shall not be driven at any speed greater than is reasonable and proper, although the latter section is regarded as a limitation upon the speed rates specifically prescribed.<sup>35</sup> Moreover, in most States statutes prohibiting dangerous or reckless driving of motor vehicles, or forbidding an unreasonable rate, without prescribing definitely the limit of speed, are enforced.<sup>36</sup> Regulations in some States make a prescribed rate of speed *prima facie* evidence of negligence, but permit the driver to rebut the presumption by showing that in the par-

30. *Town of Decatur v. Gould*, 185 Iowa, 203, 170 N. W. 449

31. Laws which create crimes ought to be so explicit in themselves, as by reference to some known standard, so that all may know what they prohibit and all men may know what it is their duty to avoid. *U. S. v. Sharp*, 1 Pet. C. C. Rep. 118.

32. *Strickland v. Whatley*, 142 Ga. 802, 83 S. E. 856; *Elsbery v. State*.

12 Ga. App. 86, 76 S. E. 779.

33. *Strickland v. Whatley*, 142 Ga. 208, 83 S. E. 856; *Elsbery v. State*, 12 Ga. App. 86, 76 S. E. 779.

34. *Strickland v. Whatley*, 142 Ga. 802, 83 S. E. 856; *Elsbery v. State*, 12 Ga. App. 86, 76 S. E. 779.

35. *Byrd v. State*, 59 Tex. Cr. 513, 129 S. W. 620. See also *State v. Mills* (N. Car.), 106 S. E. 677.

36. Sections 66, 306.

ticular case under consideration the speed was not unreasonable.<sup>37</sup>

**Sec. 733. Speed regulations — exceeding “common traveling pace.”**

An interesting legal question has been decided by the Supreme Court of *Rhode Island*, in a prosecution of an automobilist under an old statute which prohibited persons driving vehicles faster than “a common traveling pace.” Just exactly what a common traveling pace is or should be was the fact for determination by the court. Since we have in our automobile laws specific prohibitions against unreasonable and dangerous driving, the decision of the *Rhode Island* Supreme Court is important and instructive. The opinion of the court says: “It is clearly evident that the safety of the traveling public was the object sought by the act. Such safety could not be attained by permitting each vehicle, each horse or other thing, which could be ridden or driven, to go at a traveling pace possible to it. There could not be, with safety to the traveling public on foot, on horseback or in carriage, a traveling pace for each individual who rode in the streets or highways, fixed only by the rate of speed possible to the animal or thing which he rode or drove. Safety could not be attained only by requiring all to use that prudence and caution in the matter which was ordinarily used by prudent and reasonable men when driving in the streets or highways of thickly settled towns; that is, a pace which was reasonable and proper, considering the place and circumstances, a pace which was recognized by reasonable men as a common traveling pace.”<sup>38</sup>

**Sec. 734. Speed regulations — violation not *malum in se*.**

The violation of a statute or municipal ordinance relative to the speed of motor vehicles is not considered as a crime involving moral turpitude. It is considered as an offense *malum prohibitum*, not *malum in se*.<sup>39</sup> Hence, in many cases

37. Section 322.

Atl. 1061.

38. *State v. Smith*, 29 R. I. 245, 69

39. *See v. Wormser*, 129 N. Y. App.

the intention of the party is not a material element of investigation.<sup>40</sup> In an action against the owner of an automobile for injuries alleged to have been caused by negligence in frightening a horse, it was held that the evidence that the defendant had been convicted of exceeding the speed limits fixed by local ordinances in different places was not competent, as it had no bearing on the question of negligence involved in the particular case at trial, and was not evidence affecting the moral character of the defendant.<sup>41</sup>

### **Sec. 735. Speed regulations — intention.**

Intention is not generally an essential element of violations of motor vehicle laws. The purpose of the restrictions is to protect the public and the acts prohibited by the automobile laws are committed at the peril of those coming within the statutory provisions. Excessive speeding, failure to register, driving without a license, lack of the required equipment, operating a motor vehicle at night between the designated hours without the required lights, are violations of the mandatory requirements which must be obeyed and it is no excuse that the defendant did not know he exceeded the speed limit, or that his rear lamp or number tag had accidentally dropped off, or that he was not complying with the regulations in other particulars. The only intention necessary to render a person liable to a penalty for a violation of the automobile law is the doing of the act prohibited.<sup>42</sup> Thus, the owner of a machine who is riding in the rear seat and conversing with another occupant of the machine may be convicted of permitting the chauffeur to run at an unlawful speed, though he was unconscious of the rate he was traveling.<sup>43</sup> And, when one exceeds a specific limit prescribed by statute or ordinance, it will not

Div. 596, 113 N. Y. Suppl. 1093; *People v. Harrison*, 183 N. Y. App. Div. 812, 170 N. Y. Suppl. 876; *People v. Hayes*, 66 Misc. (N. Y.) 606, 124 N. Y. Suppl. 417.

<sup>40</sup> Section 735.

<sup>41</sup> See *v. Wormser*, 129 N. Y. App. Div. 596, 113 N. Y. Suppl. 1093.

<sup>42</sup> *People v. Thexton*, 188 Ill. App. 2.

<sup>43</sup> *People v. Harrison*, 183 N. Y. App. Div. 812, 170 N. Y. Suppl. 876, reversing 102 Misc. 151, 170 N. Y. Suppl. 876; *People v. Moresini*, N. Y. Law Journal, April 18, 1918. And see section 726.

avail him to show that the rate he ran his machine was reasonable under the circumstances.<sup>44</sup> But, under some speed regulations, a violation of the prescribed limit is only *prima facie* wrongful, and an opportunity is allowed the driver to show that the speed in question was not excessive in view of the circumstances.<sup>45</sup> In a criminal prosecution for driving an automobile at an unlawful rate of speed, it is no defense to show that the car was under the control of another riding in the machine unless the driver can show that he was under duress and so drove the car at the instance and requirement of another.<sup>46</sup>

### **Sec. 736. Speed regulations — ignorance of speed limit.**

The burden is upon the driver of a motor vehicle to inform himself as to the rate of speed, with which the machine may be driven at different places.<sup>47</sup> And, if he fails to secure the vital information and thereby exceeds a speed limit, his ignorance of the regulation affords no defense to a prosecution. Even in the case of an ordinance of a municipal corporation which makes a special rate for automobilists within the territorial limits of the municipality, the driver of the machine is bound to know the speed limit. Unless required by statute, the municipal authorities are not even obliged to erect a sign at the boundary of the municipality to warn autoists of the speed limit.<sup>48</sup> And, where a statute fixes the rate of speed for "business" portions of a city, the operator is bound to ascertain at his peril when he strikes the business section of the city, though exactly what is or what is not the business part may be a question of fact.<sup>49</sup>

### **Sec. 737. Speed regulations — exceptions in emergency cases — police and fire apparatus.**

It seems desirable that exceptions to the speed limits should exist in cases of emergency, as when necessity for the treat-

<sup>44</sup> *People v. Ruetiman*, 85 Misc. (N. Y.) 233, 148 N. Y. Suppl. 612; *State v. Buchanan*, 32 R. I. 490, 79 Atl. 1114.

<sup>45</sup> Section 322.

<sup>46</sup> *Goodwin v. State*, 63 Tex. Cr. 140, 138 S. W. 399.

<sup>47</sup> *People v. Dow*, 155 Mich. 115, 118 N. W. 745.

<sup>48</sup> Section 731.

<sup>49</sup> *People v. Dow*, 155 Mich. 115, 118 N. W. 745.

ment of the sick, or cases of police officers seeking to arrest criminals, or when fire apparatus is hurrying to extinguish a fire. These considerations, however, are for the law making bodies, and the courts should not graft onto the regulation an exception not expressed. Thus, a police officer may violate the speed statute when he is attempting to catch and arrest automobilists who are also violating it.<sup>50</sup> But, generally motor vehicles of the police and fire departments are expressly excepted from the speed regulations.<sup>51</sup> An ordinance fixing speed limitations for use of streets by vehicles, which excepts vehicles operated by police and fire departments is not, by reason of the exception, invalid.<sup>52</sup> In case of military necessity in time of war, State regulations do not affect the speed with which persons in the United States military or naval service may propel a motor vehicle.<sup>53</sup>

### Sec. 738. Speed regulations — warning autoists of speed trap.

In a case in England, it appeared that two constables, having measured certain distances on a road much frequented by automobiles, were watching in order to ascertain the pace at which each car passed over the measured distance, with a view to discovering whether it was proceeding at an illegal rate of speed. An automobilist was arrested, but he gave warning of the police trap to approaching cars, which then slackened speed. There was no evidence that the accused was acting in concert with any of the drivers of the cars, or that any car when the warning was given was going at an illegal pace. The court held that the defendant was not guilty of the offense of obstructing the officers in the execution of their duties.<sup>54</sup>

50 *Keevil v. Ponsford* (Tex. Civ. App.), 173 S. W. 518, wherein it was said: "Peace officers are not excepted from the operation of the laws limiting the speed of vehicles upon public highways. Certainly, an exception should be made in favor of those whose special duty it is to detect and arrest parties running in excess of the legal limit, while discharging such duty. The courts, however, cannot ingraft

this exception."

51 *Devin v. Chicago* 172 Ill. App. 246. See also *State v. Gorham* (Wash.), 188 Pac. 457.

52 *Ex parte Snowden*, 12 Cal. App. 521, 107 Pac. 724.

53 *State v. Burton*, 41 R. I. 303, 103 Atl. 962.

54 *Bastable v. Little*, L. R. (1907), 1 K. B. 59.

**Sec. 739. Speed regulations — former jeopardy.**

Frequently an automobile driver is arrested for overspeeding, and when formal complaint is made against him, he not only faces a charge of exceeding the speed limit, but sometimes is held to answer another accusation of "dangerous driving." Especially is this the case where there were aggravating circumstances connected with the alleged offense or the arrest. Necessarily in many instances the operation of an automobile at a great speed on the public highways constitutes "dangerous driving," but where the public prosecutor complains against the defendant for dangerous driving and has him convicted on that charge, it should not be within his power to convict the accused on the charge of exceeding the speed limit. This practice is illegal for the reason, that, if the court takes into consideration the speed of the automobile on the hearing of the dangerous driving charge, and if the defendant is then prosecuted on the second charge of violating the speed limit, he is placed in jeopardy twice, which is prohibited by State constitutions and the common law.<sup>55</sup>

One is not generally considered as placed in jeopardy by a mere accusation or arraignment. Thus, it has been held that, where a person has been arraigned before a magistrate on a charge of excessive speeding of an automobile within the city limits and committed, he may thereafter be arraigned for the same act, charged as a second offense, and that his commitment for trial upon the latter charge is not illegal.<sup>56</sup> But it has also been decided that where a person has been arraigned before a magistrate in *New York* city charged with a violation of the motor vehicle law and the papers returned by the magistrate show that the defendant waived examination before him and was held for trial before the Court of Special Sessions, the district attorney has no power to file an information against him as for a second offense. In such a case, however,

55. Conviction of driving motor car in a manner dangerous to the public to procure which evidence was given as to speed and the question of speed taken into consideration, held a bar to a conviction for driving at a speed in

excess of twenty miles an hour *Welton v. Taneborne* (K. B. Div.), 99 *Law T. R.* (N. S.) 668.

56. *Matter of Burns*, 68 *Misc. R.* (N. Y.) 299, 125 *N. Y. Suppl.* 86.



it is decided that the pleading of the so-called first offense as a "second" offense may be treated as surplusage and the defendant tried as for a first offense.<sup>57</sup>

**Sec. 740. Speed regulations — identification of offender.**

It has been held that there can be no conviction for violating the speed law where the only evidence to connect the defendant with the violation is the fact that according to the automobile register a machine having the same number as the one used in violation of the law belongs to the defendant.<sup>58</sup>

**Sec. 741. Speed regulations — information or indictment.**

An information for violating a speed regulation should contain allegations of all the essential elements of the offense.<sup>59</sup> If the regulation makes the prescribed rate for a certain distance an offense, the information must allege that the accused ran his vehicle faster than the limit for the required distance.<sup>60</sup> In other words, if the offense consists in maintaining a certain speed for a given distance, the information is insufficient if it fails to allege that the speed was maintained for the prescribed distance.<sup>61</sup> It may not be necessary to allege the particular point or street where the offense was committed,<sup>62</sup> yet

57. *People v. Reppin*, 126 N. Y. Suppl. 169.

58. *Seranton v. Hawley*, 9 Lack. (Pa.) 65.

**Sufficiency of proof of previous convictions and of identity.**—*Martin v. White* (K. B. Div.), 102 Law T. R. (N. S.) 23.

59. *State v. Buchanan*, 32 R. I. 490, 79 Atl. 1114.

**Language of statute.**—An information in the language of the statute charging defendant with a violation of section 10 of the Motor Vehicle Act of 1911 is sufficient, since the statute sufficiently describes the offense. *People v. Levin*, 181 Ill. App. 429.

**Sufficiency of warning to driver by constable of intended prosecution** within section 9 (2) of the English Motor Car Act 1903. *Jessopp v. Clarke*

(K. B. Div.), 99 Law T. R. (N. S.) 28.

60. *People v. Winston*, 155 N. Y. App. Div. 907, 139 N. Y. Suppl. 1072.

61. *People v. Fuchs*, 71 Misc. (N. Y.) 69, 129 N. Y. Suppl. 1012; *People v. Payne*, 71 Misc. (N. Y.) 72, 129 N. Y. Suppl. 1007.

62. *White v. State* (Tex. Cr.), 198 S. W. 964. See also *State v. Buchanan*, 32 R. I. 490, 79 Atl. 1114.

**Proof of place of offense.**—"While it was unnecessary to allege upon what particular street in the corporate limits of Hillsboro appellant so unlawfully ran and operated his automobile, yet as the pleader alleged that it was upon East Elm street, it was necessary to prove that it was upon this particular street." *White v. State*, 82 Tex. Cr. 274, 198 S. W. 964.

the information is defective if it does not allege that the *locus in quo* is a public highway.<sup>63</sup> An indictment alleging the commission of the offense on a certain street, cannot be sustained by evidence that it was committed on another street.<sup>64</sup> But a prosecution will not be dismissed because the information refers to a chapter of the laws by the wrong number.<sup>65</sup>

### Sec. 742. Speed regulations — punishment.

While unlawful speeding of motor vehicles may in some cases cause the death of another traveler and thus subject the driver to a prosecution for homicide,<sup>66</sup> the unlawful speeding, of itself, is not generally classified as a serious offense, but is a misdemeanor rather than a felony.<sup>67</sup> And, if the fine is not paid, the sentence may include a provision that the offender shall be confined in jail until it is paid, the jail term not to exceed a limited number of days.<sup>68</sup> Exceeding the speed limit, of itself, is an offense which is ordinarily punished merely by the imposition of a fine on the offender.<sup>69</sup> Where a State statute provided that a violation shall be punished by a fine not exceeding twenty-five dollars, it was held that a fine fixed by a municipal ordinance at a sum not over fifty dollars was illegal and beyond the power of the court to impose.<sup>70</sup> And, where the jurisdiction of the court as to fines is limited to the sum of fifty dollars, a judgment imposing a fine of one hundred dollars is void.<sup>71</sup> The statutes of the particular juris-

63. *Ex parte* Worthington, 21 Cal. App. 497, 132 Pac. 82.

64. *Nalls v. State* (Ga. App.), 107 S. E. 354.

65. *People v. Payne*, 71 Misc. (N. Y.) 72, 129 N. Y. Suppl. 1007.

66. Sections 757-766.

67. *Commonwealth v. Sherman*, 191 Mass. 439, 78 N. E. 98.

68. *Chapman v. Selover*, 225 N. Y. 417, 122 N. E. 417, reversing 172 App. Div. 858.

69. See *State v. Hamley*, 137 Wis. 458, 119 N. W. 114.

**Right to appeal.**—Where in case a fine exceeds a certain sum a right of appeal is given, it is held that if a fine to the limit specified is imposed and in addition thereto the person convicted is required to pay costs, the amount of the costs cannot be added to the fine so as to give a right of appeal. *Ex parte* Novis (K. B. Div.), 93 Law T. R. (N. S.) 534.

70. *People v. Chapman*, 88 Misc. (N. Y.) 469, 152 N. Y. Suppl. 204.

71. *People v. De Graff*, 56 Misc. (N. Y.) 429, 107 N. Y. Suppl. 1038.

diction must be examined to determine the disposition of fines collected.<sup>72</sup>

### Sec. 743. Speed regulations — evidence of speed.

Questions arising out of the proof of speed of a vehicle, such as the right of occupants and bystanders to give opinions on the question, are discussed in another place in this work.<sup>73</sup>

### Sec. 744. Statutes with no prescribed limit of speed.

Statutes have been in force from time to time in some jurisdictions which do not expressly prescribe the limit of speed for motor vehicles on the public highways, but in general terms prohibit "reckless" or "dangerous" driving.<sup>74</sup> In at least one jurisdiction, it has been held that a statute which merely prohibits driving at an "unreasonable" speed is so indefinite that it cannot be enforced as a criminal law, but merely affords a rule for application in civil actions.<sup>75</sup> But, generally such statutes have been enforced in criminal as well as civil cases,<sup>76</sup> it being a question for the jury whether the speed of the ma-

72. See *State v. Robinson*, 78 N. H. 286, 99 Atl. 292, as to the construction of the statutes of New Hampshire.

73. Sections 920-933.

74. *Hayes v. State*, 11 Ga. App. 371, 75 S. E. 523; *State v. Welford*, 29 R. I. 450, 72 Atl. 396; *Smith v. Boon*, 84 L. T. (Eng.) 593; *Mayhew v. Sutton*, 86 L. T. (Eng.) 18; *Rex v. Wells*, 91 L. T. (Eng.) 98; *Throughton v. Manning*, 92 L. T. (Eng.) 855.

75. *Empire L. Ins. Co. v. Allen*, 141 Ga. 413, 81 S. E. 120; *Strickland v. Whatley*, 142 Ga. 802, 83 S. E. 856; *Elsbery v. State*, 12 Ga. App. 86, 76 S. E. 779; *Quarles v. Gem Plumbing Co.*, 18 Ga. App. 592, 90 S. E. 92.

76. *Commonwealth v. Horsfall*, 213 Mass. 232, 100 N. E. 362; *State v. Schaeffer*, 96 Ohio, 215, 117 N. E. 220; *State v. Welford*, 29 R. I. 450, 72 Atl. 396; *Rex v. Wells*, 91 L. T. (Eng.) 98. See also *State v. Pfeifer*, 96 Kans. 791.

153 Pac. 552. And see sections 66, 732.

**Complaint or information.**—A complaint under a statute forbidding the operation of a motor vehicle in a careless or negligent manner, must state the particulars wherein the operation of the machine was careless or negligent. *State v. Aaron*, 90 Vt. 183, 97 Atl. 659. But see *State v. Welford*, 29 R. I. 450, 72 Atl. 396. And, where the statute covers only highways laid out under statutory authority, the complaint should allege the particular highway where it is claimed the violation occurred. *State v. Aaron*, 90 Vt. 183, 97 Atl. 659.

**Trial without jury.**—In some states the legislature may provide for the trial of offenders for reckless driving of motor vehicles before a magistrate without the intervention of a jury. *Crichton v. State*, 115 Md. 423, 81 Atl. 36.

chine was "unreasonable."<sup>77</sup> A more popular form of statute is one which makes an express limitation of speed, and then generally forbids an "unreasonable" rate.<sup>78</sup> Under such a statute, there is no question about the power to enforce the express limit in a case which falls within the language thereof, though there might be doubt about the criminal enforcement of the balance of the act.<sup>79</sup> Statutes of this nature may be so drawn that a *prima facie* case of violation is shown when it is proved that the speed of a machine was greater than that mentioned in the act, but the defendant may be allowed to rebut the *prima facie* case by showing that the speed was reasonable under the circumstances.<sup>80</sup>

### Sec. 745. Defending speed cases — in general.

When an automobile driver is arrested for violating the speed law, he generally knows whether his car traveled faster than the legal limit, but there are some cases where the question of his speed is a close one. In such cases a doubt may arise in regard to the guilt or innocence of the defendant, and there are many elements which are influential in a correct estimation of the time by the officer using a stop watch. To defend cases of this character where there is a fair question

**77. No jury.**—When the case is tried before a magistrate with no jury, the question whether the speed was unreasonable, is a question of fact to be decided by the magistrate. *People v. Sumwalt*, 178 Ill. App. 357.

**78.** *Strickland v. Whatley*, 142 Ga. 802, 83 S. E. 856; *State v. Waterman*, 112 Minn. 157, 130 N. W. 972.

**79.** *El-bery v. State*, 12 Ga. App. 86, 76 S. E. 779; *Byrd v. State*, 59 Tex. Cr. 513, 129 S. W. 620.

**80.** *People v. Lloyd*, 178 Ill. App. 66; *People v. Sumwalt*, 178 Ill. App. 357. And see section 322.

**Burden of proof.**—"As a matter of law, the burden of proof is upon the prosecution to prove the guilt of the defendant upon the whole evidence. As a matter of proof, when it is shown that the rate of speed exceeds the rate

specified in the statute, a *prima facie* case of guilt is made out for the prosecution, and the defendant is then called upon to meet and overcome such *prima facie* case; and this is often spoken of as the burden of proof. That is, in the sense of necessity of producing evidence to meet a *prima facie* case, the burden of proof passes from party to party as the case progresses, while the burden of establishing the guilt of the defendant, as charged in the information, continues upon the prosecution throughout the trial. If a *prima facie* case is made out by the prosecution, and the defendant offers no evidence to meet it, then the *prima facie* case becomes conclusive, and justifies a finding of guilt." *People v. Lloyd*, 178 Ill. App. 66.

in regard to whether the law has been violated is not an altogether hopeless task, although it must be admitted that the odds are considerably against the automobilist. There are cases of arrest where the speed laws are not violated, and such cases should on principle be vigorously defended. Many cases also come up where the speed laws are undoubtedly violated, and to defend such is a waste of time and labor unless a very clear defence can be made or the circumstances are extremely mitigating. It is far better in these instances to plead guilty and escape with as low a fine as possible.

**Sec. 746. Defending speed cases — arrests.**

The automobilist arrested for violating the law is taken before a magistrate or police officer, and ordinarily admitted to bail. In some sections he may have an immediate hearing, but it is advisable where a defense is to be interposed to request an adjournment and ask for a hearing at a future day, so that time may be had to communicate with counsel and prepare the defense. In making arrests of automobilists it must be borne in mind that violations of the automobile laws are not felonies but merely misdemeanors. The method of arresting an automobilist is of importance in defending the prosecution. If an arrest is made illegally, either because there was not an infraction of the law or because of the method of making the arrest, then either is at least an extenuating circumstance, which should be influential in determining the case in favor of the automobilist, especially if he is charged with merely a technical violation of the law.

**Sec. 747. Defending speed cases — extenuating facts in defense.**

In the trial of automobile speed cases, especially in preliminary hearings, before committing magistrates, it will be found that if there is any evidence at all of a violation of law the magistrate will hold the defendant for trial, leaving the question of guilt or innocence of the accused to be determined by the court or jury which examines into the merits of the case. In fact, it is the imperative duty of binding over magis-

trates to hold a defendant for trial if there is any evidence of a trustworthy nature which shows that he violated the law, no matter how much contradictory evidence may be produced by the automobilist, if it does not cast substantial discredit upon the testimony of the officer. All that magistrates at preliminary hearings need to find, is probable cause that the law was violated. Notwithstanding the duties of magistrates, imposed by the law upon them, there is more or less discretion, which every judge is bound to exercise in determining cases which come up before him. In the exercise of this discretion magistrates frequently dismiss charges of violating the speed laws, because, for example, a physician was hurrying to the bedside of a patient; a sick man was in the automobile, being carried to a hospital. An interesting case came before a magistrate in the city of *New York*, where an automobilist was arrested for violating the speed law. While under arrest and being conducted to the police station in the custody of the officer he operated the car at a slightly excessive speed. Another complaint was entered against him for violating the speed law while on his way to the station. Obviously, a case of this kind should be dismissed, since the illegal act was performed while in the custody of the officer and with his implied consent, as it is not only the duty of an officer to make an arrest after the commission of a misdemeanor, but it is his duty to arrest an offender at the time of committing an illegal act, thereby preventing its consummation. The magistrate dismissed the second charge against the automobilist.

#### **Sec. 748. Defending speed cases — preparing the defense.**

It is useless to go into court to defend an automobilist for violating the law without making a thorough preparation. The first thing that an arrested automobilist ought to do is to ascertain the precise course over which he was timed. The points or marks of this course should be determined, so that before the hearing the course can be measured by the automobilist in company with others, who can act as witnesses. An officer's word that the distance of the course is 264 feet,

for example, should not be accepted without verification. The officer may or may not have measured it. Very often the policeman makes a rough guess as to the distance, especially when the automobilist is timed for the length of a block. It will not do to guess at the distance when an automobilist is timed over a short course, for a mistake of a few seconds, or even a fraction of a second, may make legal the speed which appeared illegal. Always measure the course over which you were timed, is the advice given to automobilists who wish to defend their cases.

#### **Sec. 749. Defending speed cases — making tests.**

If an automobilist is arrested for over-speeding while traveling up grade, which oftentimes happens, it is a good plan to test the car up the grade with a speedometer and ascertain whether it can travel at the speed charged. There are many other tests which should be made, such, for example, as demanding that the officer produce his stop watch so that it can be compared with other stop watches in order to see if it gains. In a case which the writer defended some time ago, it was found that a police officer's stop watch gained one second in every sixty. Then, again, the ability of the officer to use a stop watch accurately should also be tested. The condition of the officer's eyesight may be very material, and he should be cross-examined in regard to his ability to see, especially when the automobile was timed from a point several hundred feet distant from where he stood. An ordinary mode of proof which is given by a police officer is that he saw the automobile pass a certain mark so many feet away from him, pressed his stop watch at that time, and when he saw the machine pass the second mark he pressed his stop watch again, whereupon he figured up the speed rate from the number of seconds indicated by his timepiece, which showed a speed of twenty-five miles an hour. Did the officer see the automobile pass the first mark of its course? If he did see it, what portion of the machine passed the mark when he first pressed the stop watch? The front, middle or back? In nine cases out of ten the officer will swear it was either the front, middle or back

of the machine which passed the mark when he pressed his watch, and that it was *exactly the front, middle or back* of the machine, not even a foot out of the way either one side or the other. Such testimony seems to be altogether too accurate for reliability and should be discredited. But it may be stated that in a large majority of the cases the police officer does not actually see the automobile pass or leave the first mark of his course.

**Sec. 750. Defending speed cases — that rate of speed was on speedway where permitted.**

Where in an action for injuries sustained by being struck by an automobile alleged to be running at a rate of speed in excess of that allowed by law, if a defendant seeks to avail himself of the fact that the place where such speed was maintained was a race course or speedway, this is a matter of defense which he must allege and prove.<sup>81</sup>

**Sec. 751. Defending speed cases — identity of defendant.**

It is not wise to be excessively technical in prosecuting an automobilist, nor is it well to be technically absurd in defending him; but there are certain rights which every defendant may insist upon being accorded him, such, for example, as the presumption of innocence and his right to demand that the prosecution prove its case against him beyond reasonable doubt. An accused person is not obliged to prove anything in automobile speed cases. The onus is upon the prosecution to prove beyond reasonable doubt two things:

*First*, that the automobile was driven at a rate of speed over the legal limit.

*Second*, that the person arrested is the person who committed the illegal driving.

Not only must it be shown that the rate of speed was unlawful but the accused must also be identified as the one who was driving when the law was being violated. His identity must be clearly and satisfactorily established.<sup>82</sup>

<sup>81</sup>. Lefkowitz v. Sherwood (Tex. Civ. App.). 136 S. W. 850.

<sup>82</sup>. See section 740.



**Sec. 752. Defending speed cases — arrests at night.**

The accuracy of timing automobiles is reduced at night time, especially if it is very dark along the highway. It is a very difficult task to see when an automobile passes a certain mark a considerable distance away, and the chances of mistake are so great that the court should look with caution upon stop-watch evidence of this character. Then, again, the lights which the machine ordinarily carries are apt to confuse the timer, since it is impossible to see anything except them.

**Sec. 753. Defending speed cases — venue.**

One of the burdens assumed by the prosecution is proof that the crime was committed within the jurisdiction of the court. It is not generally required that the information specifically state the street or part of street where the violation occurred, yet if such place is definitely stated in the information, the People may be required to prove that the violation occurred there.<sup>83</sup> The venue, like other elements of the offense, may ordinarily be proved by circumstantial evidence. Thus, although no witness has made the direct statement that the unlawful speeding was in a certain city, yet the venue may be held sufficiently proved to support a conviction on appeal, where witnesses have stated that it occurred "in the city" and upon certain named streets which were in the city.<sup>84</sup> To support a prosecution for unlawful speeding on a public highway, it is necessary that evidence be produced to show that the street or highway in question was a public thoroughfare.<sup>85</sup>

**Sec. 754. Defending speed cases — evidence of peace officers.**

Evidence of police officers should be scrutinized for interest, bias, or other facts which might impair the value of their statements. Thus, the court should permit the accused to cross-examine such a witness whether he is employed by the municipal authorities to follow automobiles for the purpose of ascertaining whether they are violating the speed regula-

<sup>83</sup>. *White v. State*, 82 Tex. Cr. 274, 198 S. W. 964.

<sup>84</sup>. *City of Spokane v. Knight*, 96 Wash. 403, 165 Pac. 105.

<sup>85</sup>. *Allen v. State*, 74 Tex. Cr. 623, 169 S. W. 1151. See also *Ex parte Worthington*, 21 Cal. App. 497, 133 Pac. 82.

tions and whether he was paid a sum of money for each conviction thus secured.<sup>86</sup> But a judgment of conviction on a charge of operating a motor vehicle at an unlawful rate of speed will not be reversed because the magistrate, on a conflict of testimony between the police officer and the defendant, believed the officer.<sup>87</sup>

### **Sec. 755. Defending speed cases — evidence of speed.**

There are several different methods of timing automobiles, such as by the use of a stop watch, the speedometer, the photo-speed-recorder, and opinion evidence as to speed—given by eye witnesses who may be either trained or untrained in the calculation of the velocity of moving objects. Speed alone is an intangible thing, the estimation of which results in a mathematical calculation. It is necessarily composed of time and distance, and is relative to either a stationary object or point, or an object or point which is moving. The latter case occurs when an automobile is being timed by a person who is also moving along the highway, such, for example, as an officer on a bicycle, or motor cycle, or in an automobile. At the outset it should be understood that no person can be convicted of a criminal offense, unless it is upon the sworn testimony of a

<sup>86</sup> *White v. State*, 82 Tex. Cr. 274, 198 S. W. 964.

<sup>87</sup> *People v. Ruetiman*. 85 Misc. (N. Y. 233, 148 N. Y. Suppl. 612, wherein it was said: "One of the grounds urged by the defendant for a reversal of the judgment of conviction is that the magistrate was not warranted on the conflict of testimony in believing the police officer, the only witness called by the people. The question as to which witness was to be believed was pre-eminently one for the magistrate, who saw the witnesses and observed their demeanor and manner of testifying. He was therefore in a better position to determine the truthfulness or untruthfulness of their testimony than a judge who reviews the case and who has only the written record upon which

to rely. This court will not invade the province of a magistrate and interfere with his decision upon a question of fact, unless it clearly appears that his finding is not sustained by the evidence or that he has made an erroneous determination upon a question of law. If the evidence justifies the conclusion which he reached, the jurisdiction of this court to review the judgment of conviction must be confined to an examination of the record, with a view of ascertaining whether it was the result of a fair and impartial hearing, or whether such error or mistakes were committed as to make it probable that the defendant's rights were so prejudiced that in the interest of justice there should be a new trial."

witness who saw the act committed. In the case of an automobile violating the speed law, the witness, if we are to follow the requirements of law, must be able to testify under oath that he saw the automobile travel, that he saw the defendant cause the automobile to travel, over a certain designated and measured space within a certain measured lapse of time. As suggested, there are quite a number of elements in the offense of speeding an automobile which are to be established in order to convict a driver.

First and foremost, where a stop watch is used to time an automobile, a measured distance along the highway must have been measured accurately. This distance must have been measured by the person testifying in the witness chair and who swears as to the speed. It will not do that another person measured the course and told the officer that it was a certain number of feet or yards. If the officer testifies that the speed of an automobile exceeded a certain rate according to his stop watch, and he bases his estimation on the distance which the automobile traveled within the time, but he merely knew the distance from the say-so of some other person who measured it, this testimony is incompetent. It constitutes hearsay, which is never permitted in courts of law. So, one of the first things for an automobilist to do is to see that no hearsay evidence is introduced against him to accomplish his conviction. The measurement of the course must be methodically accurate. Any old yard-stick or tape-measure will not do. The units of measurement must be such as are prescribed by law and according to the standards usually kept by the State. For an officer to testify to the fact that he measured a certain distance along the highway with a measure does not constitute accurate measure of the distance of the course, unless it is shown that the measure used was accurate. He may state that he measured a course with a certain kind of a measure.

The question of proof of the speed of motor vehicles, particularly with reference to the opinions of witnesses on the subject, is further discussed in another place in this work.<sup>88</sup>

88. Sections 920-933.

**Sec. 756. Defending speed cases — speedometer.**

In a prosecution for a violation of a speed regulation, evidence of a police officer that he followed the offending automobile on a motorcycle and that the speedometer on the cycle registered a certain speed in excess of the legal limit, is admissible.<sup>89</sup> The fact that his testimony shows that he relied on the speed indicated by the speedometer, does not condemn his evidence as hearsay.<sup>90</sup> The court may properly exclude evidence as to what police departments used the Jones speedometer, though offered for the purpose of proving the accuracy of the speedometer belonging to the defendant.<sup>91</sup>

**Sec. 757. Homicide — reckless driving as murder.**

Under the common law rule, if a man drives recklessly a powerful vehicle into a crowd and kills a person, it may constitute murder, for if the driver saw or had timely notice of the mischief likely to ensue, and yet wilfully drove on, his

89. *City of Spokane v. Knight*, 96 Wash. 403, 165 Pac. 105, wherein it was said: "Appellant next argues that the evidence is insufficient to sustain the verdict, because it does not show that the appellant operated his automobile more than 20 miles per hour. An officer of the city testified, in substance, that he took the speed of the appellant by means of a motorcycle, to which was attached a tested speedometer; that he took appellant's speed from Garfield street to Sherman street, a distance of more than a thousand feet, maintaining an equal speed at a constant distance of about 50 feet behind the appellant, and his speedometer registered 30 miles an hour; that, between two other streets, upon the same occasion, he took his speed, and the speedometer on his motorcycle registered 27 miles per hour. This same witness testified that his speedometer had been tested as often as three times a week, and was found to be correct. The appellant testified that he had a speedometer on his automobile, which

he testified was correct, and which showed that he was traveling at less than 20 miles per hour. There was some evidence that speedometers are not accurate, and get out of order, and it is argued by the appellant that the officer's speedometer may have been out of order; and did not register the speed correctly; but that was a question for the jury. Speedometers, like other machines, may get out of order; but, where they are tested regularly, they may be relied upon with reasonable certainty to determine accurately the rate of speed at which a machine is driven. It cannot be said therefore that, because speedometers may be out of order, rates of speed may not be measured by instruments manufactured for that purpose, and which usually give approximately correct rates of speed. The question was one for the jury"

90. *White v. State*, 82 Tex. Cr. 274, 198 S. W. 964.

91. *State v. Buchanan*, 32 R. I. 490, 79 Atl. 1114.

offense would be something more than manslaughter. In such a case, the presumption of malice arises from the doing of a dangerous act intentionally.<sup>92</sup> The following rule was laid down in 1 East's Pleas of the Crown, 263: "A person driving a carriage happens to kill another: If he saw or had timely notice of the mischief likely to ensue, and yet wilfully drove on, it will be murder; for the presumption of malice arises from the doing of a dangerous act intentionally. There is the heart regardless of social duty. If he might have seen the danger, but did not look before him, it will be manslaughter, for want of due circumspection. But if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and he will be excused." To constitute murder, however, in driving a motor vehicle against another traveler, unusual circumstances must be connected with the offense. To establish murder, it is required that the proof show such a degree of recklessness in the operation of the machine as amounts to a wilful disregard of the rights of others.<sup>93</sup>

Thus, in East's Pleas of the Crown is found the following case and comment: "A was driving a cart with four horses in the highway at Whitechapel; and he being in the cart and the horses upon a trot, they threw down a woman who was going the same way with a burthen upon her head, and killed her. Holt, C. J., Tracy, J., Baron Burg, and the Recorder Level held this to be only misadventure. But, by Lord Holt, if it had been in a street where people usually pass, this had been manslaughter; but it was clearly agreed that it could not be murder.

"It must be taken for granted from this note of the case, that the accident happened in a highway *where people did not usually pass*; for, otherwise, the circumstances of the driver

92. State v. Schutte, 87 N. J. L. 15, 93 Atl. 112; Reg. v. Cook, 1 L. D. Raym. (Ang.) 143, 1 East's Pleas of the Crown, 263.

**Evidence of speed.**—Upon a prosecution for driving "in a manner dangerous to the public" under section 1.

subsection 1, of the English Motor Car Act of 1903, it was held that evidence of the speed at which the machine was driven was admissible. Hargreaves v. Baldwin, 93 L. T. N. S. (Eng.) 311.

93. People v. Barnes, 182 Mich. 179, 148 N. W. 400.

being in his cart, and going so much faster than is usual for carriages of that construction, savoured much of negligence and impropriety; for it was extremely difficult, if not impossible, to stop the course of the horses suddenly in order to avoid any person who could not get out of the way in time. And, indeed, such conduct in a driver of such heavy carriages might under most circumstances be thought to betoken a want of due care, if any though but few persons might probably pass by the same road. The greatest possible care is not to be expected, nor is it required; but whoever seeks to excuse himself for having unfortunately occasioned by any act of his own the death of another, ought at least to show that he took that care to avoid which persons in similar situations are most accustomed to do. Upon this supposition the death is to be referred to misadventure, which was occasioned by the head of a workman's axe flying off and killing a bystander."

#### **Sec. 758. Homicide — negligent or illegal driving as manslaughter.**

The death of a traveler on the highway, when occasioned by the grossly negligent or unlawful management of a motor vehicle, is generally to be classified as manslaughter rather than murder.<sup>94</sup> If the responsibility is based on negligence,

94. *State v. McIver*, 175 N. Car. 761, 94 S. E. 682. "This is the first case that has reached this court, involving criminal liability for homicide resulting from the operation of an automobile, but the principles of law involved are thoroughly settled in this jurisdiction, and there can be no doubt that under the decisions of this court, carelessness or negligence or recklessness in the performance of a lawful act, which results in the death of another, is always unlawful and criminal if the agency employed was at the time and place of a character that its negligent or reckless use was necessarily dangerous to human life or limb or property; and this dangerous character of the agency employed has been accepted in

this State, in a long line of decisions, as sufficient to render a reckless or negligent or careless use criminal, upon the theory, no doubt, that a want of ordinary care in the use of such an instrumentality in the presence of others or upon a crowded thoroughfare in a city, or where others were naturally expected to be, is gross negligence, and it is quite apparent that such a position is logically correct, for there are many instrumentalities of death with reference to which a want of ordinary care in proximity to others is carelessness of the grossest kind. . . . So while it may be conceded that at common law culpable negligence in a criminal prosecution had to be of the quality known as gross negligence, and it

the negligent conduct must have been something more than is required on the trial of an issue in a civil action, but it is sufficient in a criminal prosecution if it was such as would be likely to produce death or great bodily harm.<sup>95</sup> The conduct of the driver is not excused by a mistake in judgment brought about by his own reckless conduct.<sup>96</sup> Under modern statutes, when the driver of a motor vehicle is guilty of some recklessly negligent act or some infraction of statutes regulating the operation of such machines, and death to a pedestrian or other traveler thereby results, it is held that the driver may be tried and convicted for manslaughter.<sup>97</sup> For example, if

is true no doubt that any negligence less than gross negligence in the performance of a lawful act would be insufficient to make of an unintentional killing the offense of involuntary manslaughter, . . . but it is not at all necessary that to attain this result it is necessary in all cases to refer to the culpable carelessness or negligence as gross negligence, because where in an instruction the agency and circumstances surrounding the homicide are described, the same result is obtained by treating as culpable the careless use of a necessarily dangerous instrumentality in a public place or in such close proximity of others as to endanger their lives." *Held v. Commonwealth*, 183 Ky. 209, 208 S. W. 772.

**Intoxication of defendant.**—The fact that the driver of the machine was intoxicated at the time of the homicide is a very persuasive factor in determining guilt. *State v. Salmer*, 181 Iowa, 280, 164 N. W. 620. "It is gross and culpable negligence for a drunken man to guide and operate an automobile upon a public highway, and one doing so and occasioning injuries to another, causing death, is guilty of manslaughter. It was unlawful for defendant to operate his automobile upon the public highway while he was intoxicated; made unlawful by statute,

and wrong in and of itself, and it was criminal carelessness to do so and he is guilty of manslaughter, provided the death of Agnes Thorne was a proximate result of his unlawful act." *People v. Townsend* (Mich.), 183 N. W. 177.

**95.** *State v. Gray* (N. Car.), 104 S. E. 647; *State v. McIver*, 175 N. Car. 761, 94 S. E. 682; *State v. Rountree* (N. Car.), 106 S. E. 669. "But negligence alone which might be sufficient to sustain a civil action will not justify a conviction for manslaughter." *State v. Oakley*, 176 N. Car. 755, 97 S. E. 616.

**96.** *State v. McIver*, 175 N. Car. 761, 94 S. E. 682.

**97.** *Arkansas*.—*Madding v. State*, 118 Ark. 506, 177 S. W. 410.

*Connecticut*.—*State v. Campbell*, 82 Conn. 671, 74 Atl. 927, 18 Ann. Cas. 236; *State v. Goetz*, 83 Conn. 437, 76 Atl. 1000, 30 L. R. A. (N. S.) 458.

*Delaware*.—*State v. Long*, 7 Boyce's (30 Del.) 397, 108 Atl. 36; *State v. McIvor*, 111 Atl. 616; *State v. Kreuger*, 111 Atl. 911.

*District of Columbia*.—*Sinclair v. U. S.*, 48 Wash. L. Rep. 454.

*Georgia*.—*Beams v. State* (Ga. App.), 100 S. E. 230.

*Illinois*.—*People v. Falkovitch*, 280 Ill. 321, 117 N. E. 398; *People v. Camberis*, 130 N. E. 712; *People v. Schwartz*, 131 N. E. 806.

the driver of an automobile holding conversation with a companion and not looking ahead to see who might be in the highway, kills a child, he would be guilty of manslaughter.<sup>98</sup> And it is held that one exceeding the speed limit and thereby killing a foot traveler or an occupant of another vehicle may be guilty of manslaughter.<sup>99</sup> The general principle underlying

*Indiana*.—*Luther v. State*, 177 Ind. 619, 98 N. E. 640.

*Iowa*.—*State v. Biewen*, 169 Iowa, 256, 151 N. W. 102.

*Kansas*.—*State v. Bailey*, 107 Kans. 637, 193 Pac. 354.

*Michigan*.—*People v. Harris*, 182 N. W. 673; *People v. Townsend* (Mich.), 183 N. W. 177.

*Minnesota*.—*State v. Goldstone*, 175 N. W. 892.

*Missouri*.—*State v. Watson*, 216 Mo. 420, 115 S. W. 1011; *State v. Horner*, 266 Mo. 109, 180 S. W. 873.

*Nebraska*.—*Schultz v. State*, 89 Neb. 34, 130 N. W. 972, Ann. Cas. 1912 C. 495, 33 L. R. A. (N. S.) 403.

*New Jersey*.—*State v. Elliott*, 110 Atl. 135.

*North Carolina*.—*State v. McIver*, 175 N. Car. 761, 94 S. E. 682; *State v. Gray*, 104 S. E. 647; *State v. Rountree*, 106 S. E. 669.

*Ohio*.—*State v. Born*, 85 Ohio St. 430, 98 N. E. 108; *State v. Schaeffer*, 96 Ohio St. 215, 117 N. E. 220; *Schier v. State*, 96 Ohio, 245, 117 N. E. 229.

*Rhode Island*.—*State v. Wagner*, 86 Atl. 147.

*South Carolina*.—*State v. Hanahan*, 111 S. Car. 58, 96 S. E. 667.

*Tennessee*.—*Lauterbach v. State*, 132 Tenn. 603, 179 S. W. 130.

*Texas*.—*Hoffman v. State* (Tex. Cr.), 209 S. W. 747.

**Liquors**.—Evidence that auto was unlawfully carrying liquors was received. *People v. Harris* (Mich.), 182 N. W. 673.

**Failure to render assistance after accident**.—Where a motor vehicle has

caused the death of a pedestrian or other traveler in the highway, the fact that the driver of the machine continues his course rapidly and does not stop to render assistance to the injured person, is a circumstance indicative of guilt. *State v. Biewen*, 169 Iowa, 256, 151 N. W. 102. Such conduct on the part of the driver may also constitute a distinct offense. See section 775.

**Indictment need not describe the particular character or kind of the motor vehicle with which the killing was accomplished.** *People v. Falkovitch*, 280 Ill. 321, 117 N. E. 398.

**Death of officer jumping on car to arrest driver.** *State v. Weisengoff* (W. Va.), 101 S. E. 450.

**98.** *Knights Case*, 1 *Lewin's Crown Cases*, 168.

**99.** *Connecticut*.—*State v. Goetz*, 83 Conn. 437, 76 Atl. 100, 30 L. R. A. (N. S.), 458.

*Delaware*.—*State v. Long*, 7 *Boyce's* (30 Del.) 397, 108 Atl. 36; *State v. Melvor*, 111 Atl. 616.

*Georgia*.—*Farrior v. State* (Ga. App.), 107 S. E. 67; *Hudson v. State* (Ga. App.), 107 S. E. 94.

*Illinois*.—*People v. Adams*, 289 Ill. 339, 124 N. E. 575; *People v. Schwartz*, 131 N. E. 806.

*Kansas*.—*State v. Bailey*, 107 Kans. 637, 193 Pac. 354.

*Michigan*.—*People v. Pretswell*, 202 Mich. 1, 167 N. W. 1000; *People v. Schwartz*, 183 N. W. 723.

*Minnesota*.—*State v. Goldstone*, 175 N. W. 892.

*New Jersey*.—*State v. Elliott*, 110 Atl. 135.



this rule is that, where a driver of an automobile shows a wanton and reckless disregard and indifference to the rights of others, a criminal intent is presumed rendering him criminally liable for his acts.

### **Sec. 759. Homicide — unusual speed.**

If the driver of a carriage drives it at an unusually rapid pace, and a person is killed, though the driver gives warning repeatedly to such person to get out of danger; if owing to the rapidity of the driving the person cannot get out of the way in time, but is killed, the driver is in law guilty of manslaughter.<sup>1</sup> So, also, if two drivers of a vehicle drive on the highway at a furious rate of speed in a race, and one of them runs over a man and kills him, both are guilty of manslaughter, where both were urging and inciting the race, and it is no defense that the death was caused by the negligence of the deceased himself, or that he was either deaf or drunk at the time.<sup>2</sup>

### **Sec. 760. Homicide — racing along public highways.**

In an early English case,<sup>3</sup> it was held that, if each of two persons are driving a cart at a dangerous and furious speed, and they are inciting each other to drive at a dangerous and furious rate along a turnpike road, and one of the carts run over a man and kill him, each of the two persons is guilty of manslaughter, and it is no ground of defence, that the death was partly caused by the negligence of the deceased himself, or that he was either deaf or drunk at the time. And in an-

*New York.*—*People v. Darragh*, 141 N. Y. App. Div. 408, 126 N. Y. Suppl. 522.

*North Carolina.*—*State v. Gray*, 104 S. E. 647; *State v. Rountree* (N. Car.), 106 S. E. 669.

*Ohio.*—*State v. Schaeffer*, 96 Ohio St. 215.

*Tennessee.*—*Lauterbach v. State*, 132 Tenn. 603, 179 S. W. 130.

*Utah.*—*State v. Lake*, 196 Pac. 1015.  
Flight of the accused after the act

is evidence of guilt. *People v. Schwartz* (Ill.), 131 N. E. 806.

1. *State v. Hines* (Minn.), 182 N. W. 450.

2. *People v. Daragh*, 141 N. Y. App. Div. 408, 126 N. Y. Suppl. 522; *Lauterbach v. State*, 132 Tenn. 603, 179 S. W. 130; *Reg. v. Timmins*, 7 C. & P. (Eng.) 500.

3. *Reg. v. Swindall*, 2 C. & K. (Eng.) 230.

other English case,<sup>4</sup> the court held that, if the driver of a carriage is racing with another carriage, and, on account of being unable to pull up his horses in time, the first mentioned carriage is upset, and the person is thrown off and killed, it is manslaughter in the driver of that carriage. The racing of motor vehicles along the public highways generally results in a violation of the speed limits; and, if such is the case and death results to another traveler from the commission of such offense, a prosecution for manslaughter can be sustained.<sup>5</sup>

### **Sec. 761. Homicide — accidental killing.**

For a mere accident there is no civil or criminal responsibility. Every injury or death caused by the operation of vehicles on the public ways does not result in legal responsibility. There must be negligence or carelessness in the driving in order to render it wrongful.<sup>6</sup> If the driver of a vehicle uses all reasonable care and diligence, and an accident happens through some chance which he could not foresee or avoid, he is not to be held liable for the results of such accident.<sup>7</sup> But one who runs his automobile recklessly in a city street and thereby becomes unable to avoid hitting a pedestrian, is not entitled to an acquittal on a charge of manslaughter merely because, when the danger became imminent, he used his best efforts to prevent a collision.<sup>8</sup> Where a witness has testified fully on his direct examination as to all the material circumstances connected with an accident, including what he did and what he did not do, and what the result would have been had he done differently, he is not entitled to state, in addition, that he did all that could be done to avoid the accident, for that is but an expression of his own opinion upon a question which is within the province of the jury.<sup>9</sup>

4. *Rex v. Timmins*, 7 C. & P. (Eng.), 499.

5. See sections 728, 758.

6. *Reg. v. Murray*, 5 Cox C. C. (Eng.) 509.

7. *Reg. v. Murray*, 5 Cox. C. C. 509.

8. *State v. Campbell*, 82 Conn. 671, 74 Atl. 927, 18 Ann. Cas. 236.

9. *State v. Campbell*, 82 Conn. 671, 74 Atl. 927, 18 Ann. Cas. 236.

**Sec. 762. Homicide — death of passenger in motor vehicle.**

Where one undertakes to drive another in a vehicle, he is compelled by law to exercise proper care for the passenger's safety. If the passenger is killed by the culpable negligence of the driver, the crime of manslaughter may be committed.<sup>10</sup>

**Sec. 763. Homicide — liability of owner.**

Where a collision occurs on the highway and death is caused, the person criminally responsible is the man actually in charge of the vehicle and whose negligence caused the accident at the time the collision took place. But even he is not criminally responsible for a death caused by his negligence, where he would not have been liable in a civil action.<sup>11</sup> Ordinarily the owner is not criminally liable for the conduct of the chauffeur, though the circumstances in particular cases may be such as to charge him.<sup>12</sup> Thus, in one case, where the conviction of the chauffeur was affirmed, the conviction of the owner who was riding in the car at the same time, but was not running the machine and could not have done anything to prevent the collision, was held to be unjustified, where there is no evidence that it was the habit of the chauffeur to run dangerously close to the other cars and wagons to the knowledge of the owner without correction.<sup>13</sup>

**Sec. 764. Homicide — burden of proof.**

In an old English case, where the driver of a cab was indicted for manslaughter for killing a woman and his defense was that he used due and proper care in driving the cab upon the occasion in question, it was held that the burden of proving negligence did not lie on the prosecution, but that, upon proof of the killing, the burden was cast on the accused to show that he used due care.<sup>14</sup> It is thought, however, that

10. Reg. v. Jones, 22 L. T. N. S. (Eng.) 1087.  
217, 11 Cox. C. C. 544; State v. Block,

87 Conn. 573, 89 Atl. 167; Sinclair v. U. S. (D. C.), 48 Wash. L. Rep. 454; Farrior v. State (Ga. App.), 107 S. E. 67.

11. Reg. v. Birchall, 4 F. & F.

12. Section 725.

13. People v. Scanlon, 132 N. Y. App. Div. 528, 117 N. Y. Suppl. 57.

14. Reg. v. Cavendish, 2 C. & K. 230.

in this country, under modern statutes and rules of criminal procedure, the burden is generally on the People to prove the absence of due care. The ordinary rule is that the burden is upon the State to prove beyond a reasonable doubt the commission of the offense.<sup>15</sup> Moreover, the prosecution is bound to show that the wrongful conduct of the motorist was the proximate cause of the death of the victim.<sup>16</sup>

**Sec. 765. Homicide — contributory negligence of decedent as a defense.**

Where a person has, by his driving of an automobile in a wilful, careless, reckless and negligent manner, or at an unlawful rate of speed, as defined by statute, caused the death of another, the negligence of such decedent is held, under ordinary circumstances, not to relieve the driver from criminal liability for his act.<sup>17</sup> Thus, if one running his motor vehicle at a speed prohibited by statute kills a child in the street, it is no defense to a prosecution for homicide that the child suddenly and, perhaps, negligently ran in front of the machine.<sup>18</sup>

15. *State v. Hanahan*, 111 S. Car. 58, 96 S. E. 667.

16. *State v. Schaeffer*, 96 Ohio, 215, 117 N. E. 220; *State v. Hanahan* (S. Car.), 96 S. E. 667.

17. *Arkansas*.—See *Bowen v. State*, 100 Ark. 232, 140 S. W. 28.

*Connecticut*.—*State v. Campbell*, 82 Conn. 671, 74 Atl. 927, 18 Ann. Cas. 236.

*Kentucky*.—*Held v. Commonwealth*, 183 Ky. 209, 208 S. W. 772.

*Minnesota*.—*State v. Hines*, 182 N. W. 450.

*Nebraska*.—*Schultz v. State*, 89 Neb. 34, 130 N. W. 972.

*New Jersey*.—*State v. Elliott*, 110 Atl. 135.

*North Carolina*.—*State v. McIver*, 175 N. C. 761, 94 S. E. 682; *State v. Oakley*, 176 N. Car. 755, 97 S. E. 616; *State v. Gray*, 104 S. E. 647.

*South Carolina*.—*State v. Hanahan*, 111 S. Car. 58, 96 S. E. 667.

*Tennessee*.—*Lauterbach v. State*, 132 Tenn. 603, 179 S. W. 130.

*West Virginia*.—*State v. Weisengoff*, 101 S. E. 450.

*England*.—*Reg. v. Jones*, 2 Cox. C. C. 544.

18. *Lauterbach v. State*, 132 Tenn. 603, 179 S. W. 130, wherein it was said: "The plaintiff in error is not relieved by the fact that the child ran suddenly in front of the machine. One who engages in the performance of an unlawful act must take the criminal consequences of whatever happens to third persons as a result of that act. It was his duty to anticipate that he might encounter, not only grown persons, but even little children, or even people who were afflicted with blindness or deafness. One who disobeys the statutory rule as to speed is acting in defiance of law, and must be held to have anticipated the responsibility of any injury caused by his recklessness."

The conduct of the deceased, however, is material in a prosecution of this nature to the extent that it bears upon the negligence or wrongful conduct of the accused.<sup>19</sup>

**Sec. 766. Homicide — prior reputation of chauffeur for care.**

Where a chauffeur is charged with manslaughter, evidence is not admissible to show that he had previously borne the reputation of being a careful driver and had been so regarded by those who had ridden with him. Such evidence does not tend to show that he was not guilty of gross negligence at the particular occasion of the homicide.<sup>20</sup>

**Sec. 767. Assault and battery.**

There can be no doubt that an assault and battery can be committed by striking another with an automobile, although, of course, there must be some evidence of criminal intent.<sup>21</sup> "But the intent may be inferred from circumstances which legitimately permit it. Intent to injure may not be implied from a lack of ordinary care. It may be from intentional acts, where the injury was the direct result of them, done under circumstances showing a reckless disregard for the safety of others, and a willingness to inflict the injury, or the commission of an unlawful act which leads directly and naturally to the injury."<sup>22</sup> The same general rules which apply so as to charge the driver of a motor vehicle with homicide when he has killed a traveler with his machine,<sup>23</sup> render him liable

19. *Held v. Commonwealth*, 183 Ky. 209, 208 S. W. 772; *State v. Oakley* (N. C.), 97 S. E. 616.

20. *State v. Goetz*, 83 Conn. 437, 76 Atl. 1000, 30 L. R. A. (N. S.) 458.

21. *People v. Hopper* (Colo.), 169 Pac. 152; *People v. Clink* (Ill.), 60 Nat. Corp. Rep. 155; *Luther v. State*, 177 Ind. 619, 98 N. E. 640; *Bleiweiss v. State* (Ind.), 119 N. E. 375; *Coffey v. State*, 82 Tex. Cr. 481, 200 S. W. 384; *Tarver v. State* (Tex. Cr.), 202 S. W. 734. See also, *State v. Krouger* (Del.), 111 Atl. 614.

22. *People v. Hopper* (Colo.), 169 Pac. 152; *People v. Clink*, 216 Ill. App.

357; *Luther v. State*, 177 Ind. 619, 98 N. E. 640; *Bleiweiss v. State* (Ind.), 119 N. E. 375; *Bleiweiss v. State* (Ind.), 122 N. E. 577.

**Question for jury.**—"The issue of intent is a question of fact to be determined by the court or jury trying the case from all the evidence given at the trial, and where there is sufficient evidence to present an issue of fact on that question, the finding of the court or jury thereon will not be disturbed on appeal." *Bleiweiss v. State* (Ind.), 119 N. E. 375.

23. Sections 757-766.

as for assault and battery when the injuries are not so serious as to result in death.<sup>24</sup> As was said in a recent case,<sup>25</sup> "It re-

**24. Colorado.**—People v. Hopper, 169 Pac. 152.

**Georgia.**—Dennard v. State, 14 Ga. App. 485, 81 S. E. 378; Tift v. State, 17 Ga. App. 663, 88 S. E. 41.

**Illinois.**—People v. Clink, 216 Ill. App. 357.

**Indiana.**—Luther v. State, 117 Ind. 619, 98 N. E. 640; Schneider v. State, 181 Ind. 218, 104 N. E. 69; Bleiweiss v. State (Ind.), 119 N. E. 375.

**Kentucky.**—Lyons v. Commonwealth, 176 Ky. 657, 197 S. W. 387.

**New Jersey.**—State v. Schutte, 87 N. J. L. 15, 93 Atl. 112, affirmed 88 N. J. L. 396, 96 Atl. 659. See also, State v. Albertalli (N. J.), 112 Atl. 724.

**Ohio.**—Fishwick v. State, 33 Ohio Cir. Ct. R. 63.

**Pennsylvania.**—Commonwealth v. Beigdoll, 55 Pa. Super Ct. 186.

**Assault and battery** may be committed by striking another with an automobile intentionally, or by driving the machine so recklessly as to justify a jury in finding that there was a reckless disregard of human life and safety. Dennard v. State, 14 Ga. App. 485, 81 S. E. 378. The same is true where, under like circumstances, the automobile is driven against another vehicle in which persons are riding, whereby the collision occasions bruises, blows, and similar physical injuries to persons in the vehicle so struck. Tift v. State, 17 Ga. App. 663, 88 S. E. 41.

**Driver subject to sudden attacks of vertigo.**—When there is a lack of either actual or legally imputable intention to do a certain act, there may be an absence of criminal responsibility, and the act be attributable to misfortune or accident. Carbo v. State, 4 Ga. App. 583, 63 S. E. 140; Wolfe v. State, 121 Ga. 587, 49 S. E. 688. But

criminal negligence may sometimes be a sufficient substitute for deliberate intention in the commission of crime. Since it would be for a jury to say whether the act of one who knew he was subject to occasional sudden attacks of vertigo or like malady, which rendered him wholly unable to steer an automobile or to control its movements, in undertaking to drive such an automobile at a high rate of speed along a public highway, was such a disregard of probable consequences as amounted under the circumstances in proof, to criminal negligence as to one who was injured by the defendant's inability to steer his machine, it was not error for the court to charge, in connection with other instructions given the jury, that "if, however, you find beyond a reasonable doubt that at the time of said collision and injuries the defendant was subject to frequent attacks of vertigo or similar afflictions which, when they came on necessarily rendered him powerless to control a moving automobile that he might at the time be driving; and that, with full knowledge that he was subject to such attacks and the effect of such attacks, defendant was intentionally running said automobile at a rate of speed so high as to obviously make said machine dangerous to others traveling in vehicles upon said highway, and while thus running said car defendant suffered a customary attack of such malady, which rendered him powerless to control said car, whereby said collision occurred, resulting in such injuries, the collision would not be attributable to misfortune or accident, but defendant would be guilty of the offense of an assault and battery." Tift v. State, 17 Ga. App. 663, 88 S. E. 41.

**Instruction.**—In a criminal prosecu-

quires neither argument nor illustration to show that the excessive rate of speed at which an automobile is driven is a product of the will of its driver and not the result of his mere inattention or negligence. The two cannot be confused any more than the hurling of a baseball bat into a crowd of spectators could be confused with its accidentally slipping from the hand of the batter. If a blow inflicted in the former manner would constitute an assault, so must a blow inflicted by a wilful act applied to a much more dangerous agency, since it cannot be that what would be a crime if done with a plaything weighing a few ounces ceases to be a crime if committed with an engine weighing thousands of pounds driven by many horse powers of force. It has often been held that responsibility increases with the likelihood of injury, but never the reverse, that I am aware of. There is therefore no legal reason why the crime of assault and battery may not be committed by driving an automobile on a public highway at a rate of speed that endangers the safety of other persons and actually results in such an injury."

The speed of the car is not necessarily determinative, it is held, whether an assault and battery has been committed. Thus, it has been said that the fact that the car when striking a person was exceeding the speed limit fixed by statute is not a controlling factor, but is only a circumstance to be considered in deciding whether the defendant was running his automobile at a rate of speed which, under the existing conditions, was obviously dangerous to pedestrians or others using the highway.<sup>25</sup>

tion for assault with an automobile. it is not error for the court to charge the jury as follows: "Persons traveling in automobiles or buggies have the lawful right to use a public highway. but in so doing they should not, without lawful justification or excuse, intentionally, wantonly or recklessly drive their vehicle against that of another person, to the injury of such other person." *Tift v. State*, 17 Ga. App. 663, 88 S. E. 41.

25. *State v. Schutte*, 87 N. J. L. 15,

93 Atl. 112, affirmed 88 N. J. L. 396, 96 Atl. 659.

26 *State v. Schutte*, 88 N. J. L. 396, 96 Atl. 659, wherein it was said: "A man who deliberately drives his car into a mass of people standing in the street looking at a baseball score board is guilty of assault and battery for running over some of them, although his automobile is traveling far below the speed limit; whereas, one driving on a lonely country road with no pedestrians on it in sight might be entirely

The circumstances may, however, justify a conviction for simple assault when they would not warrant the jury in finding the accused guilty of some form of aggravated assault. Thus, it has been held that the fact that a motorist operated his machine recklessly, whereby he struck and injured another person, does not establish the motorist's guilt of the crime of assault *with intent to inflict great bodily injury*, even though his mode of operation was wantonly negligent, and he must be deemed to have intended the result of his acts, because the intent to inflict such bodily injury is a specific element of the crime, and the fact that the motorist accidentally struck another will not establish such intent. It appeared that actually he did not know of the accident at the time it occurred.<sup>27</sup> An automobile may be a "deadly weapon" within the meaning of a statute relating to assaults.<sup>28</sup>

### Sec. 768. Larceny or theft of automobile.

A motor vehicle is property which may be the subject of larceny, and in recent years a considerable number of prosecutions for the offense have been reported.<sup>29</sup> And, if one

guiltless of the crime of assault and battery for running over a child which suddenly darted from a concealed position by the highway, although the automobile at the time was exceeding the speed limit."

27. *State v. Richardson*, 179 Iowa. 770, 162 N. W. 28.

28. *People v. Clink*, 216 Ill. App. 357.

29. *Alabama*.—*Dennison v. State* (Ala. App.), 88 So. 211.

*Colorado*.—*Bush v. People*, 187 Pac. 528.

*Florida*.—*Sykes v. State*, 78 Fla. 167 82 So. 778.

*Georgia*.—*Carson v. State*, 22 Ga. App. 551, 96 S. E. 500; *Johnson v. State* (Ga. App.), 100 S. E. 235.

*Illinois*.—*People v. Surace*. 129 N. E. 504.

*Iowa*.—*State v. Hatter*, 184 Iowa, 878, 169 N. W. 113; *State v. Keller*.

183 N. W. 307; *Wald v. Auto Salvage & Exch. Co.*, 179 N. W. 856.

*Kansas*.—*State v. Bratcher*, 105 Kans. 593, 195 Pac. 734; *State v. Phillips*, 106 Kans. 192, 186 Pac. 117; *State v. Phillips*, 106 Kans. 192, 186 Pac. 742.

*Maryland*.—*Myers v. State*, 113 Atl. 92.

*Missouri*.—*State v. Thompson*, 222 S. W. 789; *State v. Weiss* (Mo. App.), 219 S. W. 368. \*

*Ohio*.—*Patterson v. State*, 96 Ohio St. 90, 117 N. E. 169.

*Oklahoma*.—*Thayer v. State*, 177 Pac. 381; *McLaughlin v. State*. 193 Pac. 1010.

*Texas*.—*Hamilton v. State*, 82 Tex. Cr. 554, 200 S. W. 155; *Moore v. State*, 83 Tex. Cr. 319, 203 S. W. 767; *Smith v. State*, 83 Tex. Cr. 485, 203 S. W. 771; *Thomas v. State*, 83 Tex. Cr. 282, 203 S. W. 773; *Moore v. State*, 85 Tex.



breaks into a garage or other building for the purpose of stealing an automobile, he may be prosecuted for burglary.<sup>30</sup> Intent is an essential element in the crime of larceny, and an accused is entitled to present facts showing that his possession of the automobile was not within an intent to steal the same.<sup>31</sup> Thus, when the taking is not to deprive the owner

Cr. 573, 214 S. W. 347; *Cone v. State* (Tex. Cr.), 216 S. W. 190; *Bride v. State* (Tex. Cr.), 218 S. W. 762; *Escobedo v. State* (Tex. Cr.), 225 S. W. 377; *Goodby v. State* (Tex. Cr.), 225 S. W. 516; *Smith v. State* (Tex. Cr.), 227 S. W. 1105; *Hunt v. State* (Tex. Cr.), 229 S. W. 869; *Smith v. State* (Tex. Cr.), 230 S. W. 160; *Hunt v. State* (Tex. Cr.), 230 S. W. 406; *Hunt v. State* (Tex. Cr.), 231 S. W. 775; *Siebold v. State* (Tex. Cr.), 232 S. W. 328.

#### **Evidence of theft of gloves in auto.**

—In a prosecution for the stealing of an automobile, evidence is admissible which shows that a pair of gloves left in the automobile by the owner were found in the possession of the defendant at the time of his arrest, though the commission of another offense is thereby shown. *People v. Cahill*, 11 Cal. App. 685, 106 Pac. 115.

**Jurisdiction of District Court.**—In *Texas*, it has been held that the theft of an automobile is a misdemeanor and is not triable in the District Court. *Greenwood v. State*, 76 Tex. Cr. 364, 174 S. W. 1049.

**Indictment.**—The description of the property in the indictment should be simply such as, in connection with the other allegations, will affirmatively show the accused to be guilty, will reasonably inform him of the transaction charged, and will put him in a position to make needful preparations for his defense. Hence, an indictment which charges that the accused "did wrongfully, fraudulently and privately take, steal and carry away, with intent to steal the same, one five-passenger Ford

automobile of the value of four hundred dollars and the property of W. C. Jones," is sufficient. *Carson v. State*, 22 Ga. App. 551, 96 S. E. 500. A description of the property as a "Ford touring car" is sufficient. *Lasher v. State* (Fla.), 86 So. 689.

**Variance.**—An indictment charged the larceny of an "Overland," and the proof showed the larceny of a "Willys-Overland." *Held*, that the variance did not amount to a failure to sustain the charge in the indictment. *Stewart v. State*, 23 Ga. App. 139, 97 S. E. 871.

**Machine in garage.**—An indictment may be sustained for the larceny of an automobile, where the indictment alleges the ownership of the machine in the garage keeper having possession thereof, though the evidence discloses that another person is the actual owner and that the garage keeper is merely a bailee. *State v. Shoemaker*, 96 Ohio St. 570, 117 N. E. 958.

**Attempted larceny.**—See *Com. v. Kozlowsky* (Mass.), 131 N. E. 207.

30. *State v. Orman* (Mo.), 217 S. W. 25; *State v. Dotson*, 97 Wash. 607, 166 Pac. 769.

31. *Stilwell v. People* (Colo.), 197 Pac. 239; *Collins v. State*, 82 Tex. Cr. 24, 198 S. W. 143; *Aeley v. State*, 84 Tex. Cr. 231; *Hunt v. State* (Tex. Cr.), 231 S. W. 775. See also *People v. Mulvaney*, 286 Ill. 114, 121 N. E. 229.

**A bailee who has lawful possession** cannot commit larceny. But one who obtains possession of personal property by trick, device, or fraud with intent to appropriate the property to his own

of the property, but is merely for the purpose of using it for a brief period, it is held that the crime of larceny or theft is not committed.<sup>32</sup> In some jurisdictions, statutes have specially created a criminal offense aimed against such an unlawful use of another motor vehicle.<sup>33</sup> But, if the car is taken without the owner's consent and is run until the gasoline gives out and is then abandoned by the roadside a considerable distance from the owner's residence, the question of the intent to steal the machine is one for the jury.<sup>34</sup> Possession of an automobile which has been recently stolen may be *prima facie* evidence of guilt.<sup>35</sup> An indictment for receiving stolen goods may be found against one who receives an automobile, with knowledge of the theft.<sup>36</sup> And, if the machine is in the possession of a bailee, his unlawful conversion of it, or of the proceeds, may constitute embezzlement.<sup>37</sup>

### Sec. 769. Using machine without consent of owner.

A special provision of law has been enacted in some jurisdictions providing a punishment for the unlawful use of an

use, the owner or custodian intending to part with possession only commits larceny when he subsequently appropriates it. *Sykes v. State*, 78 Fla. 167, 82 Pac. 778.

**Bad check.**—Giving a bad check as the purchase price of an automobile does not necessarily constitute larceny. *Patterson v. Indiana Investment, etc., Co. (Ind. App.)*, 131 N. E. 19.

**32.** *State v. Boggs*, 181 Iowa, 358, 164 N. W. 759; *Smith v. State*, 66 Tex. Cr. 246, 146 S. W. 547.

**Intention of accomplice** is not important. *State v. Herring (Iowa)*, 174 N. W. 495.

**33.** Section 769.

**34.** *Brennon v. Commonwealth*, 169 Ky. 815, 185 S. W. 489.

**35.** *People v. Surace (Ill.)*, 129 N. E. 504; *State v. Davis (Iowa)*, 179 N. W. 514; *State v. Bratcher*, 105 Kans. 593, 185 Pac. 734; *State v. Thompson*

(Mo.), 222 S. W. 789; *State v. Weiss (Mo. App.)*, 219 S. W. 368; *Berry v. State (Tex. Cr.)*, 223 S. W. 212; *Hunt v. State (Tex. Cr.)*, 229 S. W. 869.

**36.** *Delaware*.—*State v. Derrickson*, 114 Atl. 286.

*Indiana*.—*Parsons v. State*, 131 N. E. 381; *Marco v. State*, 125 N. E. 34.

*Kansas*.—*State v. Lewark*, 106 Kans. 184, 186 Pac. 1002.

*Michigan*.—*People v. Lintz*, 203 Mich. 683, 169 N. W. 98; *People v. Di-Pietro*, 183 N. W. 22.

*Nebraska*.—*Sandlovich v. State*, 176 N. W. 81.

*Texas*.—*Kolb v. State (Tex. Cr.)*, 228 S. W. 210.

**37.** *Botkin v. State (Okla.)*, 185 Pac. 835.

**Conspiracy to receive stolen automobiles.**—See *People v. Bond*, 291 Ill. 74, 125 N. E. 740; *Commonwealth v. Harris*, 232 Mass. 588, 122 N. E. 749.

automobile without the owner's consent.<sup>38</sup> The necessity of such legislation is due to the frequency with which persons have unlawfully taken the machines of others for a temporary use, and to the fact that a taking for temporary purposes, when the wrongdoer intended to return the machine within a brief period, is not always regarded as an offense within the common law definitions of larceny.<sup>39</sup> There should be no doubt about the constitutionality of such an enactment.<sup>40</sup> One may commit the offense if he assists in driving the car away, with knowledge of the taking, although he did not assist in the taking.<sup>41</sup> A statute of this character is harmonized with the older enactments against larceny or theft, by construing the new law as applying only to cases of an unlawful temporary use of the machine, while the older law covers the case where the wrongdoer sought to deprive the owner permanently of his property.<sup>42</sup> The scope of a statute of this character may not be restricted to the taking and operation of a motor vehicle by one who has no relation whatever to the owner, but may extend to and include one who may have a general relation or a special relation to the owner, such as servant or bailee, for it may be intended by the statute to prevent a servant or bailee improperly taking and operating a motor vehicle quite as well as it is intended to protect the owner and the public from the taking of the same by a stranger.<sup>43</sup>

**38. Conspiracy.**—In a case in *South Carolina* it was decided that the law of conspiracy is not restricted to unlawful acts which affect the community or public, as distinguished from an individual. And the doctrine was affirmed that it is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which, if done, would be criminal, but that it is enough if the acts agreed to be done are wrongful, that is, amount to a civil wrong. So in this case it was decided that while there is no statute making it criminal to use the automobile of another without his consent, yet it is clearly unlawful to so use it, and that an indictment for conspiracy lies for

the taking of an automobile without the owner's consent. *Stato v. Davis*, 88 S. Car. 229, 70 S. E. 811. See also *State v. Martin*, 11 S. C. 352, 98 S. E. 127.

**39.** Section 768.

**40.** *Singleton v. Commonwealth*, 164 Ky. 243, 175 S. W. 372.

**41.** *People v. Murname* (Mich.), 182 N. W. 62.

**42.** *Sparks v. State*, 76 Tex. Cr. 263, 174 S. W. 351. See also *Howard v. State*, 76 Tex. Cr. 347, 174 S. W. 824.

**Use by garagekeeper.**—See *People v. Smith* (Mich.), 182 N. W. 62.

**43.** *People v. Smith* (Mich.), 182 N. W. 64.

In other words, a chauffeur employed to operate a machine, or a garage manager or a garage employee engaged to care for or repair a machine, who exceeds the contract of his employment by taking and operating his employer's machine without his employer's consent, may be just as amenable to the provisions and punishments of such a law as one, who without any relation to the owner, takes and operates a machine without the owner's consent.<sup>44</sup> The pivotal point in prosecutions under such a statute frequently is whether the machine was operated without the consent of the owner. If one employed to repair a car takes a ride therein with the chauffeur, he may escape criminal liability by showing that he believed the chauffeur was testing the car in accordance with the owner's direction.<sup>45</sup> The fact that the accused has been permitted, or allowed, at times, to drive the automobile to the railroad station to meet some member of the family, does not give the consent of the owner, or person in charge of the car, to drive it at other times to other places. Consent within the meaning of the statute implies authority to drive another's car, it requires the sanction on the part of the owner, or person in charge of the car, to another to drive it.<sup>46</sup> The word "consent" as used in a statute of this character should be interpreted as meaning voluntarily yielding the will to the proposition of another, acquiescence or compliance therewith. The owner's consent must precede the act of taking, or assuming possession of, the motor vehicle and does not relate to what transpires thereafter. The gist of the offense is the taking and operating, or causing a motor vehicle to be taken or operated, by another, without the consent of the owner. Such a law is not designed to punish one who obtains consent of the owner to take and operate his motor vehicle by misrepresentations or for a fraudulent purpose, but one who takes possession thereof without the consent of

44. *State v. Cusack*, 4 *Boyce* (Del.) 469, 89 *Atl.* 216.

45. *State v. Cusack*, 4 *Boyce* (Del.) 469, 89 *Atl.* 216.

The indictment must allege the

ownership of the vehicle. *People v. Kasker*, 209 *Ill. App.* 597.

46. *State v. Harris* (Del.), 114 *Atl.* 284.

the owner.<sup>47</sup> The accused may show that he had permission to use another machine, as such evidence bears on the wilfulness of using the machine in question.<sup>48</sup>

### Sec. 770. Failure to register machine.

Various interesting legal problems arise as to the *civil* liability of an owner of a motor vehicle when he fails to have the machine licensed and registered in accord with the State statutes on the subject.<sup>49</sup> The law also imposes a *criminal* liability on the owner for a failure to comply with the statute in such respect. An indictment for a violation of such a statute may be sufficient where it substantially follows the language of the statute.<sup>50</sup> So where a statute provides that every person "desiring" to operate an automobile must obtain a license from certain officers, an indictment is not bad because of the omission of the word "desire," the indictment otherwise substantially following the language of the statute.<sup>51</sup> It is also a general rule that matters of defense need not be anticipated by the State so as to require an averment in an indictment of facts which will render them unavailable.<sup>52</sup> And exceptions in the statute need not be negatived in the indictment.<sup>53</sup> An indictment for operating a motorcycle without registration is sufficient though it does not allege the operation upon a street or highway within the State, if the statute makes it an offense to operate the machine at all until it is registered.<sup>54</sup>

47. *State v. Boggs*, 181 Iowa, 358, 164 N. W. 759.

48. *People v. Kepford* (Cal. App.), 199 Pac. 64.

49. Sections 125-127.

50. *State v. Cobb*, 113 Mo. App. 156, 87 S. W. 551. See *Joyce on Indictments*, §§ 371, *et seq.*

51. *State v. Cobb*, 113 Mo. App. 156, 87 S. W. 551.

52. *Joyce on Indictments*, § 279.

Under the English Motor Car Act of 1903, a right to use a general identi-

fication mark is assigned for one year, on the registration of the car, and it is no defense to a charge of using a car on a highway without registration that no notice was given to the accused of the expiration of the right. *Caldwell v. Hague*, 84 L. J. K. B. (Eng.) 543.

53. *State v. Shafer* (Okla.), 179 Pac. 782.

54. *State v. Seinknecht*, 136 Tenn. 130, 188 S. W. 534.

**Sec. 771. Failure of chauffeur to have license.**

In most States, it is now required that chauffeurs shall be duly licensed, and an unlicensed chauffeur is subject to criminal prosecution if he drives an automobile on the highways of the State.<sup>55</sup> An employee of an electric company, who, not having a chauffeur's license, uses in the discharge of his duties an automobile furnished by his employer, is properly convicted of operating an automobile without a chauffeur's license.<sup>56</sup>

**Sec. 772. Driving machine while intoxicated.**

Experience has shown that a motor vehicle operated by an intoxicated chauffeur is a menace to other travelers and strict measures must be taken to suppress such conduct. Hence, the operation of a motor vehicle when in an intoxicated condition will under modern statutes generally subject the offender to a criminal prosecution.<sup>57</sup> It is not essential for the violation of such a statute, as a general proposition, that the driver should be so intoxicated that he cannot safely drive the machine. The expression in the statute "under the influence of intoxicating liquors" covers, not only all well known and

55. See chapter XII.

56. *People v. Fulton*, 96 Misc. (N. Y.) 663, 162 N. Y. Suppl. 125, wherein it was said: "The question, therefore, is, what effect shall be given to subdivision 4 of section 289 of the Highway Law, which reads as follows: 'No person shall operate or drive a motor vehicle as chauffeur upon a public highway—unless such person shall have complied in all respects with the requirements of this section.' Section 281 of the same law provides: 'The chauffeur shall mean any person operating or driving a motor vehicle as an employee or for hire.' The defendant being an employee is squarely within the prohibition of the statute. To hold otherwise would nullify the plain language of the law, and, in my opinion, the intent of the legislature."

57. *Helmer v. Superior Ct.* (Cal. App.), 191 Pac. 1001; *St. Clair v. State* (Ga. App.), 107 S. E. 570; *Curtis v. Joyce*, 90 N. J. L. 47, 99 Atl. 932; *State v. Jones* (N. Car.), 106 S. E. 827.

**As a nuisance.**—The operation of an automobile while intoxicated is not a public or common nuisance indictable at common law. *State v. Rodgers* (N. J.), 102 Atl. 433, reversing *State v. Rodgers* (N. J.), 99 Atl. 931.

**Joinder with reckless driving.**—Where an indictment joined charges of reckless driving and of driving while intoxicated, a conviction for reckless driving was sustained, although the question of intoxication was withdrawn by the court after the submission of the case. *State v. Derry*, 118 Me. 431, 108 Atl. 568.

easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors and which tends to deprive him of that clearness of intellect and control of himself which he would otherwise possess.<sup>58</sup> Intoxication cannot be inferred solely from the fact that the car was driven recklessly.<sup>59</sup> To be "intoxicated," one must generally be affected by alcoholic beverage to such an extent as to impair his judgment or his ability to operate the machine.<sup>60</sup> He need not, however, have reached a state of "drunkenness."<sup>61</sup>

### Sec. 773. Violation of law of road.

In the regulation of the use of the public highways, the Legislature may properly make a violation of the law of the road a criminal offense.<sup>62</sup> The law makers, however, in their discretion, may impose merely a civil liability for a violation.<sup>63</sup> Under a motor vehicle statute providing in part that "in cities or villages, or any place where traffic is large or on streets usually congested with traffic of horse-drawn vehicles or street cars, slow moving vehicles must keep near the right-hand curb, allowing those moving more rapidly to keep near the center of the street," it was held that a defendant may properly be convicted under the statute, though he was not blocking any traffic, but was merely driving on the part of the street most convenient to him.<sup>64</sup> Ordinances may regulate the passage of street cars.<sup>65</sup> A statutory provision mak-

58. *State v. Rogers*, 91 N. J. L. 212, 102 Atl. 433.

59. *People v. Weaver*, 188 N. Y. App. Div. 395, 177 N. Y. Suppl. 71.

60. *People v. Weaver*, 188 N. Y. App. Div. 395, 177 N. Y. Suppl. 71.

61. *Hart v. State* (Ga. App.), 105 S. E. 383.

62. *State v. Larrabee*, 104 Minn. 37, 115 N. W. 948.

**Insufficient complaint.**—*Jonischkies v. State* (Tex. Cr.), 227 S. W. 952.

63. *People v. Martinitis*, 168 N. Y. App. Div. 446, 153 N. Y. Suppl. 791, holding that the driver of a farm

wagon cannot be convicted of a crime for driving on the wrong side of the road in the evening without lights.

64. *State v. Bussian*, 111 Minn. 488, 127 N. W. 495, 31 L. R. A. (N. S.) 682.

65. *Nicholls v. City of Cleveland* (Ohio), 128 N. E. 164.

66. *Hale v. State*, 21 Ga. App. 658, 94 S. E. 823, wherein it was said: "The statute under consideration provides that the operator, when meeting another vehicle, 'shall turn his vehicle to the right so as to give one-half of the traveled roadway, if practicable,

ing it a penal offense for the operator of a motor vehicle, when meeting a vehicle approaching from the opposite direction, to fail to turn to the right so as to give one-half of the traveled roadway, if practicable, and a fair opportunity to the other to pass without unnecessary interference, has been held to be too uncertain and indefinite to be capable of enforcement by criminal prosecution.<sup>66</sup> It may be a criminal offense to fail to give a signal when approaching and attempting to pass a vehicle moving in the same direction.<sup>67</sup>

#### **Sec. 774. Failure to stop on signal.**

Statutes have been generally enacted so as to require the driver of a motor vehicle to stop upon receiving a signal from the driver of a horse-drawn conveyance, or otherwise manage the machine so as not to frighten the animal.<sup>68</sup> A violation of such a statute may be made a criminal offense. An enactment of this nature may be construed so as to require the operator of the motor vehicle to stop upon a signal from an occupant of the carriage, though such occupant is not the driver of the horse or team.<sup>69</sup> A statute of the kind under consideration may give the operator of the machine some discretion as to whether he shall stop. Thus, in at least one jurisdiction, it has been enacted that he shall stop his ma-

and a fair opportunity to the other to pass by without unnecessary interference.' But who should determine, in each particular case, whether, under the particular circumstances of that case, it was practicable for the driver to give the other party half of the traveled roadway? Under certain circumstances one jury might consider such action practicable, and convict; another jury, under the same circumstances might deem it impracticable, and acquit. If the driver of the motor vehicle deemed it impracticable to give half of the traveled roadway and in good faith failed so to do, he would be convicted of the offense should the jury find he used poor judgment in

passing upon the practicability. How is the driver to know in all cases when he is violating this statute? The remaining portion of the section under consideration, requiring such driver to give a 'fair opportunity' to the other to pass by without 'necessary interference,' needs no discussion to show its definiteness and vagueness. Probably no two minds would agree on the meaning of 'a fair opportunity,' nor of 'unnecessary interference.' "

67. *Russell v. State* (Tex. Cr.), 228 S. W. 566.

68. *Pinion v. State* (Tex. Cr.), 219 S. W. 831.

69. *State v. Goodwin*, 169 Ind. 265, 82 N. E. 459.



chine, "unless a movement forward shall be deemed necessary to avoid accident or injury."<sup>70</sup>

**Sec. 775. Stopping and furnishing identity in case of accident — constitutionality of statute.**

Statutes have been enacted in some jurisdictions requiring an automobilist, upon causing injury to property or to another traveler, to stop his machine, and furnish his name or other means of identification to the traveler injured or to a police officer, or to give assistance to the persons injured.<sup>71</sup> The flight of an automobilist after causing injury to another, is deemed such a serious offense that it is made a felony in some jurisdictions.<sup>72</sup> The constitutionality of such a statute is affirmed by the courts, though there is a strong argument that it compels one to give evidence against himself.<sup>73</sup> Such a law is affirmed on the ground that it is within the police power of the State,<sup>74</sup> and also on the theory that the State has

**70.** *McCummins v. State*, 132 Wis 236, 112 N. W. 25.

**71.** *People v. Finley*, 27 Cal. App. 291, 149 Pac. 779; *State v. Verrill* (Me.), 112 Atl. 673; *People v. Curtis*, 225 N. Y. 519, 122 N. E. 623; *Rex v. Hankey*, 93 L. T. N. S. (Eng.) 107.

**Identification.**—Error was committed in receiving testimony to the effect that a witness saw an automobile running through a street in the city where the accident occurred about twelve o'clock on that night at a speed of forty or fifty miles an hour, where the witness did not identify the car nor state any fact which warranted the inference that it was the automobile of the defendant. *People v. Curtis*, 217 N. Y. 304, 112 N. E. 54.

**Res gestae.**—Statements made by the injured person immediately after the accident may be received as a part of the *res gestae*. *People v. Curtis*, 225 N. Y. 519.

**72.** *People v. Finley*, 27 Cal. App. 291, 149 Pac. 779; *People v. Fodera*, 33 Cal. App. 8, 164 Pac. 22; *People v.*

*Rosenheimer*, 209 N. Y. 115, 102 N. E. 530, Ann. Cas. 1915 A. 161, 46 L. R. A. (N. S.) 77.

**73.** *Alabama*.—*Woods v. State*, 15 Ala. App. 251, 73 So. 129.

*California*.—*People v. Diller*, 24 Cal. App. 799, 142 Pac. 797; *People v. Finley*, 27 Cal. App. 291, 149 Pac. 779; *People v. Fodera*, 33 Cal. App. 8, 164 Pac. 22.

*Massachusetts*.—*Commonwealth v. Horsfall*, 213 Mass. 232, 100 N. E. 362, Ann. Cas. 1914 A. 682.

*New York*.—*People v. Rosenheimer*, 209 N. Y. 115, 102 N. E. 530, Ann. Cas. 1915 A. 161, 46 L. R. A. (N. S.) 77, reversing 146 App. Div. 875, 130 N. Y. Suppl. 544.

*New Hampshire*.—*State v. Sterrin*, 78 N. H. 220, 98 Atl. 482.

**74.** *Ex parte Kneeder*, 243 Mo. 632, 147 S. W. 983, Ann. Cas. 923, 40 L. R. A. (N. S.) 622, wherein it was said: "The statute is a simple police regulation. It does not make the accident a crime. If a crime is involved, it arises from some other statute. It does

plenary power over the use of the highways, and that the operator of a motor vehicle in the use of the highways exercise a privilege which the law makers might deny to him, and that having given him the privilege of using the highways it may prescribe the conditions under which such use may be exercised.<sup>75</sup>

not attempt in terms to authorize the admission of the information as evidence in a criminal proceeding. The mere fact that the driver discloses his identity is no evidence of guilt, but rather of innocence. (*State v. Davis*, 108 Mo. 667.) On the contrary, flight is regarded as evidence of guilt. In the large majority of cases such accidents are free from culpability. If this objection to the statute is valid, it may as well be urged against the other provisions, which require the owner and chauffeur to register their names and numbers, and to display the number of the vehicle in a conspicuous place thereon, thus giving evidence of identity, which is the obvious purpose of the provisions. (*St. Louis v. Williams*, 235 Mo. 503.) We have several statutes which require persons to give information which would tend to support possible subsequent criminal charges, if introduced in evidence. Persons in charge are required to report accidents in mines and factories. Physicians must report deaths and their causes, giving their own names and addresses. Druggists must show their prescription lists. Dealers must deliver for inspection foods carried in stock. We held a law valid which required a pawnbroker to exhibit to an officer his book wherein were registered articles received by him, against his objection based on this same constitutional provision. We held this to be a mere police regulation, not invalid because there might be a possible criminal prosecution in which it might be attempted to use this evidence to show

him to be a receiver of stolen goods. (*State v. Levin*, 128 Mo. 588.) If the law which exacts this information is invalid because such information, although in itself no evidence of guilt, might possibly lead to a charge of crime against the informant, then all police regulations which involve identification may be questioned on the same ground. We are not aware of any constitutional provision designed to protect a man's conduct from judicial inquiry, or aid him in fleeing from justice."

75. *People v. Rosenheimer*, 209 N. Y. 115, 102 N. E. 530, Ann. Cas. 1915 A. 161, 46 L. R. A. (N. S.) 77, wherein it was said: "There is one ground upon which, in my opinion, the validity of the statute can be safely placed. The legislature might prohibit altogether the use of motor vehicles upon the highways or streets of the State. It has been so held in *State of Maine v. Mayo* (106 Me. 62), and *Commonwealth v. Kingsbury* (199 Mass. 542). Doubtless the legislature could not prevent citizens from using the highways in the ordinary manner, nor would the mere fact that the machine used for the movement of persons or things along the highway was novel justify its exclusion. But the right to use the highway by any person must be exercised in a mode consistent with the equal rights of others to use the highway. That the motor vehicle, on account of its size and weight, of its great power and of the great speed which it is capable of attaining, creates, unless managed by careful and

### Sec. 776. Stopping and furnishing identity in case of accident — intent.

Under the language of the statutes prohibiting the flight of an automobilist after an accident, the intent of the accused

competent operators, a most serious danger, both to other travelers on the highway and to the occupants of the vehicles themselves, is too clearly a matter of common knowledge to justify discussion. The fatalities caused by them are so numerous as to permit the legislature, if it deemed it wise, to wholly forbid their use. (*Otis v. Parker*, 197 U. S. 606; *People v. Persee*, 204 N. Y. 397, 97 N. E. 877.) If the legislature may declare it a crime to use a motor vehicle on the highway under any circumstances, I do not see why it may not equally declare it a crime to so use such a vehicle as to injure any one in person or property. That, in effect, is a diminution, not an increase, of the criminality it had the power to attribute to the use of a motor vehicle. The provision now before us is but a still further diminution of the statutory inhibition the legislature would be authorized to enact. It does not declare it a crime to operate an automobile on the highway or even that in its operation injury to person or property shall be a crime, but only that failure by the operator, in case of such injury, to identify himself shall be criminal. I cannot see why the greater power does not include the less. Of course, the whole of this argument rests on the proposition that in operating a motor vehicle the operator exercises a privilege which might be denied him, and not a right, and that in a case of a privilege the legislature may prescribe on what conditions it shall be exercised. . . . Moreover, as already said, the operator is not obliged to report the circumstances from which his culpability may

be inferred and if he be culpable it does not necessarily follow that he has been guilty of a crime. A distance separates the negligence which renders one criminally liable from that which establishes civil liability. That a defendant can be compelled as a witness to testify to facts establishing his civil liability is unquestionable. This statute does not prescribe any new criminal liability for injury to persons by a motor vehicle. The operator commits a crime only when his conduct is such as would in any other action on his part producing like results make him a criminal. The primary object of the statute, in my judgment, is not to convict any person of crime, but to subject him to civil liability. I appreciate that when examined as a witness in a civil suit the defendant might claim his privilege. I also appreciate that the right to justify a disobedience of this statute by proof that the circumstances render him liable to criminal prosecution would be of little advantage to the defendant. He would acquit himself of one crime only by convicting himself of another. Nevertheless when we bear in mind not only the greater danger occasioned by the use of motor vehicles, but also the fact that the great speed at which they can be run enables the person causing injury to readily escape undetected, leaving parties injured in person or property unable to tell from whom they shall seek redress, I think it involves no violation of public policy or of the principles of personal liberty to enact that as a condition of operating such a machine the operator must waive his constitutional privilege and tell who he

is a material element of the offense.<sup>76</sup> Thus, where the accused after a collision on the highway waited for a considerable time at his own automobile which was disabled in the accident, and then sent another man back to the place of the collision with instructions to disclose his identity, his conduct may be a sufficient compliance with the statute, though such agent fails to make the disclosure.<sup>77</sup> And the accused may claim that he did not know of the accident.<sup>78</sup> "Knowledge" of the injury within the meaning of the statute may arise when the accused has actual knowledge thereof or when the circumstances are such as to cause a reasonable person to believe that injury would flow from the accident.<sup>79</sup>

**Sec. 777. Stopping and furnishing identity in case of accident — burden of proof.**

With reference to whether the burden is upon the prosecution to show that no report of the accident was made or

is to the party who has been injured or to the police authorities, if, indeed, requiring him to give such information is an impairment of his constitutional privilege, which we do not decide." See also *State v. Sterrin*, 78 N. H. 220, 98 Atl. 482.

76. *Commonwealth v. Horsfall*, 213 Mass. 232, 100 N. E. 362.

77. *Commonwealth v. Horsfall*, 213 Mass. 232, 100 N. E. 362.

78. *People v. Fodera*, 33 Cal. App. 3, 164 Pac. 22; *Robertson v. McAllister*, 19 Canada C. C. 441, 5 D. L. R. 476.

79. *Woods v. State*, 15 Ala. App. 251, 73 So. 129.

**Knowledge of injury.**—It is essential to a conviction under an indictment for violation of subdivision 3 of section 290 of the Highway Law (L. 1910, ch. 374), that the jury should be satisfied beyond a reasonable doubt not only that an injury had been caused to person or property, but that the defendant knew that such injury had been caused, and notwithstanding such knowledge left the scene of the acci-

dent without giving his name, address or license number, and that he neglected subsequently to report the injury to the nearest police station or judicial officer as the law requires. *People v. Curtis*, 217 N. Y. 304, 112 N. E. 54.

**Evidence of extent of injuries.**—“Upon the trial of an indictment for a violation of section 290 of the Highway Law, evidence might properly be given showing how much a person was injured in an automobile collision as bearing upon the seriousness of the accident and tending to show that it ought not to have escaped the notice and attention of the defendant. The subsequent suffering of the injured person, however, and the length of time he was obliged to remain in the hospital and the details of the medical or surgical treatment which he received could have no legitimate bearing upon any of the issues arising on the trial of the indictment.” *People v. Curtis*, 217 N. Y. 304, 112 N. E. 54.

whether the burden is placed upon the defendant to show a proper report, it has been said: "I think that within the fair purview of this statute the people should not be required first to show that there was no report to the injured party, and then to prove that a police officer was present and no report made to him, or that no police officer was in the vicinity, and then to show, perhaps as a result of several exact and nice measurements, that a report was not made to the nearest police station or judicial officer. I am convinced that this is a situation in which there is a negative proposition which does not fairly permit of direct proof, and that it is a matter immediately within the knowledge of the defendant under such surrounding circumstances that the *onus probandi* should rest upon him to show that a report was made."<sup>80</sup>

**Sec. 778. Stopping and furnishing identity in case of accident  
— time of report.**

Unless the accused was injured personally in the accident, or a situation is created whereby an immediate report cannot be made by him, the statute will generally require him to stop and report immediately. If he drives on several miles before he stops, he may be convicted of the offense.<sup>81</sup>

**Sec. 779. Stopping and furnishing identity in case of accident  
— no person to receive report.**

The fact that the person injured was unconscious and no other person was present to whom the accused might report the required facts does not justify him in at once leaving the scene without waiting for the arrival of a person to whom the information could be given.<sup>82</sup>

80. *People v. McLaughlin*, 100 Misc. (N. Y.) 340, 165 N. Y. Suppl. 545.

81. *People v. McLaughlin*, 100 Misc. (N. Y.) 340, 165 N. Y. Suppl. 545.

82. *State v. Sterrin*, 78 N. H. 220, 98 Atl. 482, wherein the court expressed its views as follows: "It is argued that because in the present case the person injured was unconscious, and no other person was present, therefore the

defendant was at liberty to at once leave the scene of the accident without waiting for the arrival of any one who might demand the information described in the statute. It is apparent that the legislature could not have intended to make it easier for the operator of a car to escape detection in case of severe injury like the one here inflicted than where the injury was trif-

**Sec. 780. Lights on machine.**

The motor vehicle laws in most jurisdictions require the installation of lights on automobiles and their use at certain hours in the day, in some instances the law specifically prescribing the kind of lights.<sup>83</sup> The violation of such provisions is usually made a misdemeanor.<sup>84</sup> The statutes may also require the illumination of the back plate on the vehicle.<sup>85</sup> A statute requiring lights on a machine operated during a certain period does not apply when one has left his vehicle beside the highway with the machinery dead.<sup>86</sup>

ing. The object was to secure information in cases where identification might be difficult if the statute was not observed. Nor is it true that this intent is not fairly expressed by the language used. The statute means that the person causing the injury must return to the place of the accident and there remain for a sufficient time to give 'proper persons' a reasonable opportunity to demand of him the information which the statute requires that he should give upon such demand. It is manifest that what conduct will or will not amount to a compliance with this obligation must vary with the varying circumstances of the individual cases. If there could be a case where it was evident that no person who could make the demand was likely to appear, and therefore the operator of the car could be excused for not waiting for such appearance, the situation in this case was not one to warrant any such conclusion. The place where the collision occurred was a city street, and the time shortly before 6 o'clock in the afternoon. There was every reason to believe that some one would shortly appear to whom the required information could be given if demanded. It was not even shown that the defendant

went away because he thought there was not likely to be an opportunity to give information. On the contrary, his own testimony establishes the fact that he left to avoid being identified as the person responsible for what had occurred. The evidence, if believed, proved that the statute had been violated, and the case was properly submitted to the jury.'

83. Sections 344-345.

84. *Ex parte* Hinkelman (Cal.), 191 Pac. 682; *Nelson v. State* (Ga. App.), 107 S. E. 400; *State v. Claiborne*, 135 Iowa, 170, 170 N. W. 417, 3 A. L. R. 392.

Conviction for driving a motor car without a light is held in England to be a conviction for "an offense in connection with the driving of a motor car" within the meaning of the Motor Car Act 1903, 3 Edw. 7, ch. 36, § 4, which makes it competent for the court before whom a person is convicted to cause the particulars of the conviction to be indorsed upon any license held by him. *Ex parte* Symes (K. B. Div.), 103 Law T. R. (N. S.) 428.

85. *Brown v. Crossley*, 80 L. J. K. B. (Eng.) 478.

86. *State v. Bixby*, 91 Vt. 237, 100 Atl. 42.

**Sec. 781. Removal of manufacturer's serial number.**

In a few States, penal laws have been enacted forbidding one from having in his possession a motor vehicle from which the manufacturer's serial number or other distinguishing identification mark has been removed. The purpose of such an act is to prevent the defacing, covering or destruction of the number or mark, to preserve the identity of vehicles, and thereby protect the public against violations of the law. The constitutionality of such a regulation has been sustained.<sup>87</sup>

87. *People v. Fernow*, 286 Ill. 627, 122 N. E. 155, wherein it was said: "The motor vehicle has become the most common and efficient agency for the commission of crime and the chief instrumentality employed by criminals to avoid detection and escape punishment, and one of the methods employed is to destroy the evidence of identity. Motor vehicles have also become very frequent subjects of larceny, and the removal or change of the serial number is a convenient method for preventing identification and recovery. One committing a crime, even the most serious, and escaping in an automobile, would be more difficult of apprehension if the serial number or identification mark should be removed. The section is a legitimate and proper exercise of the police power. The argument that the section conflicts with the Bill of Rights and the Fourteenth Amendment to the Constitution of the United States, which prohibit deprivation of life, liberty, or property without due process of law, is that the section creates a crime without guilty knowledge or intent, because the manufacturer's serial number or distinguishing mark may have been changed without the knowledge of the person having possession of the motor vehicle, and may have been changed before the law went into effect. At common law a crime consisted of an unlawful act

with evil intent, and in crimes created by statute a specific intent may be required so that the intent and act may constitute the crime, and in such cases the intent must be alleged and proved. Where a specific intent is not an element of the crime it is not always necessary that a criminal intent should exist. In the exercise of the police power for the protection of the public the performance of a specific act may constitute the crime regardless of either knowledge or intent, both of which are immaterial on the question of guilt. For the effective protection of the public the burden is placed upon the individual of ascertaining at his peril whether his act is prohibited by criminal statute. . . . The argument that the section is class legislation by singling out particular persons and casting a burden upon them is on the ground that persons having possession of buggies, wagons, binders, plows, and other articles of personal property are exempted from the restrictions placed upon those having motor vehicles. It is too clear for argument that the articles mentioned are not used in the commission of crime as motor vehicles are, and that the public needs no protection against them by registration with the secretary of state or a serial number. The act applies to all in the same situation, and is not subject to any of the objections made."

**Sec. 782. Reward for apprehension of offenders.**

It has been held in one State that the district attorney of a county has no authority to offer rewards to be paid to persons furnishing evidence upon which convictions may be had of anticipated violations of the Motor Vehicle Law, and that the audit of claims by the county auditing board for such rewards may be restrained by a taxpayer.<sup>88</sup> Moreover, it is thought that constables and deputy sheriffs would not be entitled to recover such rewards, though the offer were legal, as the arrest of offenders violating the law is a part of their duty.<sup>89</sup>

**88.** *McNeil v. Board of Supervisors of Suffolk County* 114 N. Y. App. Div. 761, 100 N. Y. Suppl. 239.

**89.** *McNeil v. Board of Supervisors of Suffolk County*, 114 N. Y. App. Div. 761, 100 N. Y. Suppl. 239.



**CHAPTER XXVIII.**

## MANUFACTURERS OF MOTOR VEHICLES.

**SECTION 783. Scope of chapter.**

- 784. Relation with dealers and salesmen — agency defined.
- 785. Relation with dealers and salesmen — nature of contract between manufacturer and dealer.
- 786. Relation with dealers and salesmen — mutuality of contract.
- 787. Relation with dealers and salesmen — definiteness of order for machines.
- 788. Relation with dealers and salesmen — interstate commerce.
- 789. Relation with dealers and salesmen — remedy of dealer for failure of manufacturer to perform contract.
- 790. Relation with dealers and salesmen — recovery by dealer of deposit.
- 791. Relation with dealers and salesmen — return of parts to manufacturer.
- 792. Relation with dealers and salesmen — sales by manufacturer in dealer's exclusive territory.
- 793. Relation with dealers and salesmen — sales not authorized by manufacturer.
- 794. Relation with dealers and salesmen — authority of agent to bind manufacturer.
- 795. Relation with dealers and salesmen — ratification by manufacturer of unauthorized acts of agent.
- 796. Relation with dealers and salesmen — termination of contract.
- 797. Relation with dealers and salesmen — dealer and sub-dealer.
- 798. Relation with dealers and salesmen — fixing price for sale by dealer.
- 799. Relation between manufacturer and consumer — in general.
- 800. Relation between manufacturer and consumer — liability for injury from defect.
- 801. Relation between manufacturer and consumer — duty to make repairs.
- 802. Relation between manufacturer and consumer — sharing profits with consumer.
- 803. Trade marks.

**Sec. 783. Scope of chapter.**

This chapter is intended to cover certain matters relating peculiarly to the manufacturers of motor vehicles, such as their relations with their agents and dealers, and their liability for injuries sustained by purchasers of vehicles from agents, etc. Matters relating to the sales of vehicles, as between the parties to such sales, are discussed in another chapter.<sup>1</sup>

1. Chapter XXX.

**Sec. 784. Relation with dealers and salesmen — agency defined.**

Legally speaking, it is said "an agency, within the meaning of the automobile trade, consists in giving to the agent the exclusive right to purchase for cash from the manufacturer machines at a discount from the list price, and to retail them to customers within specified territory at the full list price. In other words, no commission, as such, is paid to an agent on the sale of a machine, but he has the exclusive right to certain territory and purchases on his own account for cash at an agreed upon discount from the retail list price."<sup>2</sup> Where one party requests another to perform valuable services in effecting the sale of an automobile, agreeing "to protect" him if such sale is made, and the influence and solicitation of the party so engaged are the efficient cause in effecting the sale, such contract should be construed in the light of the surrounding circumstances, and the party may be entitled to commissions.<sup>3</sup>

**Sec. 785. Relation with dealers and salesmen — nature of contract between manufacturer and dealer.**

It is sometimes important to determine whether the relation between the manufacturer of motor vehicles and the local dealer who sells them to customers is that of principal and agent. If such relation is shown to exist, the manufacturer may be bound by the acts of the dealer under the rules of the law of principal and agent.<sup>3a</sup> The relation is determined by the language of the contract between the parties and by the acts of manufacturer in permitting the dealer to hold himself out to others as an agent. As a general rule, however, the relation is not that of principal and agent, and the manufacturer is not bound by the statements or conduct of the dealer.<sup>4</sup> An agency is not created although the contract is entitled

2. *Frederickson v. Locomobile Co. of America*, 78 Neb. 775, 111 N. W. 845.

3. *Frederickson v. Locomobile Co. of America*, 78 Neb. 775, 111 N. W. 845.

3-a. *Nichols v. Kissel Motor Car Co.*, 144 Minn. 137, 174 N. W. 733; *Antich v. Motor Car Inn Garage (Miss.)*,

87 So. 279.

4. *Banker Bros. Co. v. Pennsylvania*, 222 U. S. 210, 32 Sup. Ct. Rep. 38; *Bendix v. Staver Carriage Co.*, 174 Ill. App. 589; *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144.

"Agency Agreement," and purports to grant to the dealer an exclusive agency in a certain territory.<sup>5</sup> But where the dealer merely takes an order for the approval of the manufacturer, the dealer's commission to be fifteen per cent. of the list price, the transaction does not amount to a sale to the dealer at eighty-five per cent. off the list price.<sup>6</sup> The contract may be one of consignment, rather than of sale, to the dealer;<sup>7</sup> and the dealer may be factor rather than a purchaser or agent.<sup>8</sup> The manufacturer of automobile supplies and one selling them on a commission are not ordinarily partners.<sup>9</sup> One may not testify that he was acting as an agent for the manufacturer in making a sale, for such testimony is a mere conclusion; the witness should state the facts showing his relation with the manufacturer, leaving to the court or jury the question whether he was an agent.<sup>10</sup> If the contract between the manufacturer and dealer is in writing, it should be produced as the best evidence of the relation between the parties.<sup>11</sup>

### **Sec. 786. Relation with dealers and salesmen — mutuality of contract.**

A contract, in order to be binding, must be mutual.<sup>12</sup> An agreement between the manufacturer of motor vehicles and a dealer contemplating that the dealer shall purchase a certain number of machines during a year and binding him in other respects, but not binding the manufacturer to sell the machines, and giving the manufacturer the privilege of can-

5. *Bendix v. Staver Carriage Co.*, 174 Ill. App. 589. "The mere fact that the parties entitled their agreement an 'Agency Agreement' does not make it such, even when followed by a grant of an exclusive right to sell, where it appears from the whole contract that the parties intended that the title to the property involved should pass to the alleged 'agent' upon delivery." *Bendix v. Staver Carriage Co.*, 174 Ill. App. 589.

6. *Whitney v. Briggs*, 92 Misc. (N. Y.) 424, 156 N. Y. Suppl. 1107.

7. *Cole Motor Car Co. v. Hurst*, 228 Fed. 280.

8. *Overstreet v. Hancock* (Tex. Civ. App.), 177 S. W. 217.

9. *Fehrenbach v. Stults* (Mo. App.), 206 S. W. 578.

10. *Ford Motor Co. v. Livesay* (Okla.), 160 Pac. 901.

11. *Ford Motor Co. v. Livesay* (Okla.), 160 Pac. 901.

12. *Velie Motor Co. v. Kopmeier Motor Car Co.*, 194 Fed. 324, 114 C. C. A. 284.

celling the agreement at any time but not giving such right to the dealer, is void for want of mutuality.<sup>13</sup> And the fact that there is a clause in the contract permitting its cancellation by either party "for just cause," does not supply the mutuality required for its enforcement.<sup>14</sup> The mere appointment of the dealer as an agent for the sale of the machines does not cure the lack of mutuality, as the position of agent is an empty thing unless backed up by an enforceable agreement on the part of the manufacturer to deliver such automobiles as the dealer might be able to sell.<sup>15</sup> But where the contract has been acted upon during its entire period, it will not be questioned for lack of mutuality so far as it has been executed, and to that extent it measures and controls the rights of the respective parties.<sup>16</sup> A contract is mutual and binding on both parties thereto where it is apparent that plaintiff's agreement to maintain a sales office, to buy one of defendant's motor cars and keep it as a sample, and to use all reasonable efforts to sell such cars formed an important part of the consideration for defendant's promise to furnish cars, to give an exclusive territory and to give a discount on all sales made therein by either plaintiff or itself.<sup>17</sup> And, where the contract requires ordinarily the delivery of machines by the manufacturer to the dealer, it is not unenforceable, because it also provides that if by reason of fire, strikes or other cause, the manufacturer should be unable to make delivery, he would return the deposit and not be liable for commissions or damages.<sup>18</sup>

### **Sec. 787. Relation with dealers and salesmen — definiteness of order for machines.**

A provision in a contract requiring the dealer to take a certain number of cars during a year, with no further description

13. *Velie Motor Co. v. Kopmeier Motor Car Co.*, 194 Fed. 324, 114 C. C. A. 284; *Oakland Motor Car Co. v. Indiana Automobile Co.*, 201 Fed. 499; *Tift v. Shiver* (Ga. App.), 102 S. E. 47; *Goodyear v. Koehler S. G. Co.*, 159 App. Div. 116, 143 N. Y. Suppl. 1046.

14. *Oakland Motor Car Co. v. Indiana Automobile Co.*, 201 Fed. 499.

15. *Goodyear v. Koehler S. G. Co.*, 159 App. Div. 116, 143 N. Y. Suppl. 1046.

16. *Gile v. Interstate Motor Car Co.*, 27 N. Dak. 108, 145 N. W. 732.

17. *Bendix v. Staver Carriage Co.*, 174 Ill. App. 589.

18. *Meade v. Poppenberg*, 167 N. Y. App. Div. 411, 153 N. Y. Suppl. 182.

of the kind of cars to be taken, is too indefinite for enforcement, where it appears that the manufacturer makes more than one class of machines.<sup>19</sup> Under such an agreement there is no means provided for the identification of the cars, and it is without force as a contract for future sale and delivery.<sup>20</sup>

**Sec. 788. Relation with dealers and salesmen — interstate commerce.**

A contract for the shipment of automobiles from a manufacturer in one State to a dealer in another State, is for an interstate shipment on an interstate contract.<sup>21</sup> Its validity, therefore, with reference to anti-trust laws, is to be determined according to the federal law rather than according to the law of the State of the dealer.<sup>22</sup> But, as between the ultimate purchaser of a vehicle and the dealer, both of whom reside in the same State where the transaction is consummated, the sale is not a matter of interstate commerce, though the dealer procures the car from a manufacturer from another state and the purchaser obtains a warranty directly from the manufacturer and pays the freight on the machine.<sup>23</sup>

**Sec. 789. Relation with dealers and salesmen — remedy of dealer for failure of manufacturer to perform contract.**

If the contract between the dealer and the manufacturer binds the latter to furnish certain cars for the dealer's customers, and the manufacturer fails to perform his part of the contract, the dealer may maintain an action against him for the recovery of his damages.<sup>24</sup> The measure of damages in such a case, when the dealer has an opportunity to make sales, may be the difference between the price he agreed to pay and

19. *Oakland Motor Car Co. v. Indiana Automobile Co.*, 201 Fed. 499; *Wheaton v. Cadillac Automobile Co.*, 143 Mich. 21, 106 N. W. 399.

20. *Oakland Motor Car Co. v. Indiana Automobile Co.*, 201 Fed. 499; *Tift v. Shiver* (Ga. App.), 102 S. E. 47.

21. *Cole Motor Car Co. v. Hurst*, 228

Fed. 280.

22. *Cole Motor Car Co. v. Hurst*, 228 Fed. 280.

23. *Banker Bros. Co. v. Pennsylvania*, 222 U. S. 210, 32 Sup. Ct. Rep. 38.

24. *French v. Pullman Motor Car Co.*, 242 Pa. St. 136, 88 Atl. 876.

their value if they had been delivered.<sup>25</sup> The manufacturer, however, may relieve himself from liability for failure to ship a machine by inserting in the agency contract a provision to the effect that he will not be required to honor orders for machines.<sup>26</sup> If the dealer is given an "exclusive" right to sell cars within a certain territory, a sale by the manufacturer directly to a person within such district may constitute a breach of the agency agreement and the dealer may recover damages.<sup>27</sup> If, however, the dealer makes a sale outside of his territory, he would not ordinarily be entitled to recover any commission thereon, but a different situation may arise when he shows that after making such a sale the manufacturer agreed to pay him a commission.<sup>28</sup> If the dealer arranges for the sale of a vehicle and the manufacturer refuses to make the delivery, the dealer may be entitled to recover the commissions he would have earned.<sup>29</sup> And clearly, in the absence of some counterclaim or affirmative defense, the dealer will be entitled to commissions on cars which have been sold and delivered by him within his territory.<sup>30</sup>

25. *Studebaker Corp. v. Dodds*, 161 Ky. 542, 171 S. W. 167.

**Measure of damages.**—In one case, the court charged as follows. "The commissions on the cars to which Mr. French was entitled are fixed by the contract, and they are easily calculated. After you have ascertained the number of cars, if any, on which he was refused a delivery, you may ascertain the amount of the commissions. But that would not be the measure of damages. His net profits, after deducting all the expenses of carrying on the office—cost of employees, cost of advertising, cost of keeping the cars in the repair shop and garage, and the cost of everything incidental to the business—would be the measure of damages. It would only be Mr.

French's net profits, after deducting all those matters." *French v. Pullman Motor Car Co.*, 242 Pa. St. 136, 88 Atl. 876. See also, *Orester v. Dayton Rubber Mfg. Co.*, 228 N. Y. 134, 126 N. E. 510.

26. *Kilker v. Ford Motor Co.*, 36 S. Dak. 293, 164 N. W. 57.

27. Section 792.

28. *Garfield v. Peerless Motor Car Co.*, 189 Mass. 395, 75 N. E. 695.

29. *Dildine v. Ford Motor Co.* 159 Mo. App. 410, 140 S. W. 627; *Pixlee v. Buick Motor Co.* (Mo. App.), 198 S. W. 86.

30. *Pixlee v. Buick Motor Co.* (Mo. App.), 198 S. W. 86. See also, *Brokhansen v. Ford Motor Co.*, 210 Ill. App. 418.

### Sec. 790. Relation with dealers and salesmen — recovery by dealer of deposit.

As a part of the contract between a dealer and a manufacturer of motor vehicles, the dealer is generally required to deposit a certain sum of money with the manufacturer as a part payment on machines to be shipped to the dealer or as security for some other purpose. Upon the performance of his contract of agency, the dealer is entitled to a return of the deposit.<sup>31</sup> But merely the fact that he was unable to sell the required number of machines, although he diligently tried to do so, will not necessarily entitle him to recover the fund.<sup>32</sup> If he fails to order the number of cars he agreed to take, he cannot recover the deposit, when he proves no breach of contract on the part of the manufacturer.<sup>33</sup> But, if the manufacturer cancels the agency, without just cause, the dealer may thereupon be entitled to recover the deposit.<sup>34</sup> Or, if the manufacturer is unable or fails to deliver the cars anticipated by the parties, the deposit may be recovered.<sup>35</sup> The contract may contain a provision permitting the manufacturer to retain such deposit as liquidated damages in case of a breach of the contract by the dealer; such a provision is not in the nature of a penalty, because from the nature of the case, it is extremely difficult, if not impossible, to fix actual damages.<sup>36</sup>

31. *Price v. Hornburg*, 101 Wash. 472, 172 Pac. 575. See also *Reichert v. Russell Motorear Co.*, 186 Iowa 437, 170 N. W. 441.

32. *Gile v. Interstate Motor Car Co.*, 27 N. Dak. 108, 145 N. W. 732.

33. *Meade v. Poppenberg*, 167 N. Y. App. Div. 411, 153 N. Y. Suppl. 182.

34. *Drake v. White S. M. Co.*, 133 N. Y. App. Div. 446, 118 N. Y. Suppl. 178; *Overstreet v. Hancock* (Tex. Civ. App.), 177 S. W. 217. See also *Bert-holf v. Fish*, 182 Iowa 1308, 166 N. W. 713.

35. *Clark v. Gerlinger Motor Car Co.*, 100 Wash. 1, 170 Pac. 142.

36. *Bilz v. Powell*, 50 Colo. 482, 117 Pac. 344; *Gile v. Interstate Motor Car Co.*, 27 N. Dak. 108, 145 N. W. 732. "Whether a sum fixed by contract as

damages for a failure to perform, shall be treated as liquidated damages, or as a penalty, is always dependent on the intention of the parties. *Carson v. Arvantes*, 10 Colo. App. 382, 385, 50 Pac. 1080; 13 Cyc., p. 90. In arriving at that intention, there is no single test for all cases. In most, numerous rules must be applied. Due weight should and will be given the words used, but such words are not always controlling. Though a sum is designated as 'liquidated damages,' it may be construed as a 'penalty,' or, if called a 'penalty,' it may, nevertheless, be held to be 'liquidated damages' in those cases where it is plain, from all the facts and circumstances, that such was the intent of the parties. However, when the intention is once ascer-

In such a case, if the dealer fails to perform the contract, he will be unable to recover the deposit.<sup>37</sup> But, if the dealer fails to perform his part of the contract, the manufacturer is not necessarily confined to the deposit as the extent of his damages, but he may show that he has sustained further injury.<sup>38</sup> When the dealer fails to take the number of cars he has agreed to take, the manufacturer may recover the profits thereby lost, that is, the difference between the price agreed to be paid for the cars not taken and the cost thereof to the manufacturer.<sup>39</sup>

### **Sec. 791. Relation with dealers and salesmen — return of parts to manufacturer.**

Where the plaintiff undertook the sale of automobiles and appliances for the defendant as its agent in a certain locality, and was entitled under the contract to return to the defendant certain extra parts for automobiles which he had purchased during the term of the contract, or within thirty days after its termination, and to receive credit for said parts returned, the plaintiff was entitled to recover for parts actually returned, where they were accepted by the defendant, although they were not returned within the time limited by the contract, for the acceptance by the defendant without objection was a waiver of the time limit. The recovery, in such a case, may be based on the value of the goods at the time of the purchase, and not at the time of redelivery.<sup>40</sup>

tained, it controls, and courts cannot justly make a new contract for the parties, as they might have made, in the light of subsequent events. Whether it was folly or wisdom for the parties to so contract, concerns no one but themselves. Courts have said that the law relative to liquidated damages, has always been in a state of great uncertainty; and that this has been occasioned by judges endeavoring to make better contracts for parties

than they have made for themselves." *Bilz v. Powell*, 50 Colo. 482, 117 Pac. 344.

37. *Bilz v. Powell*, 50 Colo. 482, 117 Pac. 344; *Gile v. Interstate Motor Car Co.*, 27 N. Dak. 108, 145 N. W. 732.

38. *Poppenberg v. Owen & Co.*, 84 Misc. 126, 146 N. Y. Suppl. 478.

39. *Poppenberg v. Owen & Co.*, 84 Misc. 126, 146 N. Y. Suppl. 478.

40. *Ford v. Ford Motor Co.*, 179 App. Div. 472.



**Sec. 792. Relation with dealers and salesmen — sales by manufacturer in dealer's exclusive territory.**

When a dealer has the exclusive agency to sell vehicles in a certain territory, he is entitled to recover damages against the manufacturer for machines sold by others in the territory.<sup>41</sup> A contract making one an "exclusive agent" is not to be distinguished from a contract giving "exclusive sale."<sup>42</sup> It has been held that, in the absence of proof of a trade usage to the contrary, the dealer cannot recover commissions for a sale to a resident of his district, but made wholly outside thereof.<sup>43</sup> But a custom of the trade to the effect that the dealer shall have commissions on all sales made to residents of his district is admissible, and on such proof he may be entitled to commission on a sale made out of his district to a resident therein.<sup>44</sup> The sale of a "taxicab" may be a violation of an exclusive agency for "automobiles."<sup>45</sup> If the contract does not provide for the amount of damages to which the dealer shall be entitled in such a contingency, and there is no trade custom which would entitle the dealer to his commissions on the sale, the damages are not necessarily the commissions he would have earned on the sale, but are the actual damages which he can show he has sustained.<sup>46</sup> In such a case, to recover substantial damages, the dealer should show that he could have made the sale had there not been a transgression on his district.<sup>47</sup> The amount of profits of which the dealer was deprived, is the measure of his damages.<sup>48</sup> This may be com-

41. *Illsley v. Peerless Motor Car Co.*, 171 Ill. App. 459; *Ford v. Ford Motor Co.*, 179 N. Y. App. Div. 472; *Cofield v. Jenkins Motor Co.*, 89 S. Car. 419, 71 S. E. 969; *Overstreet v. Hancock* (Tex. Civ. App.), 177 S. W. 217. See also *Swain v. Kleiber*, 39 Cal. App. 178 Pac. 728.

42. *Illsley v. Peerless Motor Car Co.*, 177 Ill. App. 459.

43. *Haynes Automobile Co. v. Wood-ill Automobile Co.*, 163 Cal. 102, 124 Pac. 717, 4 L. R. A. (N. S.) 971; *Parry v. American Motors Calif. Co.*, 25 Cal. App. 706, 145 Pac. 165; *Nickels v. Pre-witt Auto Co.* (Tex. Civ. App.), 149

S. W. 1094. See also *Cedar Rapids Auto & Supply Co. v. Jeffrey & Co.*, 139 Iowa 7, 116 N. W. 1054.

44. *Garfield v. Peerless Motor Car Co.*, 189 Mass. 395, 75 N. E. 695.

45. *Wier v. American Locomotive Co.*, 215 Mass. 303, 102 N. E. 481.

46. *Illsley v. Peerless Motor Car Co.*, 177 Ill. App. 459.

47. *Illsley v. Peerless Motor Car Co.*, 177 Ill. App. 459.

48. *Schiffman v. Peerless Motor Car Co.*, 13 Cal. App. 600, 110 Pac. 460; *Sparks v. Reliable, etc., Car Co.*, 85 Kans. 29, 116 Pac. 363.

puted to be the discount from the list price to which the dealer was entitled after taking out the expenses of making the sales.<sup>49</sup> The fact that the actual sale was made by the manufacturer at less than the list price, does not mitigate the amount of damages.<sup>50</sup> It has been held in soome jurisdictions that the commissions the dealer would have earned, furnish the measure of damages in case the manufacturer violates the exclusive provision of the agency contract.<sup>51</sup>

**Sec. 793. Relation with dealers and salesmen — sales not authorized by manufacturer.**

One employed as an automobile salesman for a commission by the manager of a department for the sale of commercial automobiles, without authority to make contracts covering the department for the sale of automobiles for pleasure use, is not entitled to commissions for a sale of an automobile for pleasure use.<sup>52</sup>

**Sec. 794. Relation with dealers and salesmen — authority of agent to bind manufacturer.**

The terms of the contract and the acts of the manufacturer in holding out one as his agent, determine whether the relation of principal and agent exists.<sup>53</sup> Assertions of the agent as to his authority are not relevant on the question.<sup>54</sup> The

49. *Wier v. American Locomotive Co.*, 215 Mass. 303, 102 N. E. 481.

50. *Wier v. American Locomotive Co.*, 215 Mass. 303, 102 N. E. 481.

51. *Overstreet v. Hancock* (Tex. Civ. App.), 177 S. W. 217; *Eastern Motor Sales Corp. v. Apperson-Lee Motor Co.*, 117 Va. 495, 85 S. E. 479; *Cofield v. Jenkins Motor Co.*, 89 S. Car. 419, 71 S. E. 969.

52. *Dahlman v. White Co.*, 132 N. Y. Suppl. 771.

53. *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144. See also *Hughey v. Sbarbaro*, 181 Ill. App. 396.

54. *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144, wherein it was said: "The appellant says that Humphreys

told him that he was the agent of appellee, and when he signed the receipt of that date he added to his name the words "Agent Metz Company." It is a well-established rule that one cannot make a contract, or bind another, as an agent of such other, by pretending that he is an agent, or stating that he is such. To bind one upon a contract made by another such other must have authority to make such contract from the one sought to be bound, and the contract must be one within the scope of the authority given; or else the one sought to be bound upon a contract made by another must have by some word or act, either before, or at the time of, the making of the contract,

sales manager of a manufacturer has the authority to bind the company by an admission as to its liability to pay to one of its agents a commission on the sale of a machine.<sup>55</sup>

**Sec. 795. Relation with dealers and salesmen — ratification by manufacturer of unauthorized acts of agent.**

Although a contract made by an agent of an automobile company is not binding on the company because of the lack of the agent's authority, it is a well settled rule of the Law of Agency that the principal may subsequently ratify the authorized act so that he will become bound by the contract. But, before ratification can be binding, the principal must have had some knowledge of the material facts of the transaction, and he must have intended to ratify the agent's acts.<sup>56</sup> The fact that the company has received and accepted from the agent a part of the purchase price for an automobile, is not necessarily a ratification of the acts of the agent. And the fact that the company did not promptly repudiate the acts of the agent, will not necessarily bind it, where the failure to repudiate did not act to the prejudice of the party dealing with the act.<sup>57</sup> But it has been held that, where a principal accepts the proceeds of a sale made by an agent having authority to sell, he is bound by the agent's guaranty as to the condition of the machine, where the same was the inducing cause of the sale.<sup>58</sup>

**Sec. 796. Relation with dealers and salesmen — termination of contract.**

An agency agreement may be terminated by the expiration of the time limit mentioned therein. Or, under certain cir-

estopped himself from denying the authority to act for him, of the one making the contract; or else the contract must have been made by one acting on behalf of the one sought to be bound, although not authorized to do so, and thereafter the one sought to be bound must have ratified the unauthorized contract made for him. As above stated, the evidence not only fails to show that at the time of the making of the contract between Humphreys

and appellant Humphreys had any authority to make a contract for appellee, but conclusively shows his want of such authority."

55. *Garfield v. Peerless Motor Car Co.*, 189 Mass. 395. 75 S. E. 695.

56. *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144.

57. *Short v. Metz Co.*, 165 Ky. 319, 176 S. W. 1144.

58. *Washburn v. Ranier Co.*, 130 N. Y. App. Div. 42. 114 N. Y. Suppl. 424.

cumstances, the manufacturer is entitled to terminate the agreement before the arrival of the specified time. Thus, when an agency is given to a partnership and the member of the firm with whom the manufacturer was acquainted and upon whom he relied in the management of the agency, retires from the firm, the agency may be terminated.<sup>59</sup> And where a dealer, who has agreed to give his entire time to the business, negotiates with other manufacturers and attempts to set up a rival business of his own, the manufacturer is justified in terminating the contract.<sup>60</sup> Where one of the conditions of the agency contract is that the dealer shall conduct the agency satisfactorily to the manufacturer, the manufacturer may terminate the arrangement upon becoming dissatisfied.<sup>61</sup>

59. *Wheaton v. Cadillac Automobile Co.*, 143 Mich. 21, 106 N. W. 399.

60. *Bilz v. Powell*, 50 Colo. 482, 117 Pac. 344, wherein it was said: "In the employment of plaintiff the defendant bargained for the former's disinterested skill, diligence, zeal and fidelity for the latter's exclusive benefit. When defendant discovered the lack of these in plaintiff, he had the right to discharge him and terminate the employment. A principal need not keep in his employ an agent who is working against him, and using the confidential information obtained by reason of the relation to undermine the business of such principal."

61. *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N. W. 457, wherein it was said: "Contracts of this general character, known as 'satisfaction contracts,' in which one party agrees to perform his part to the satisfaction of the opposite party, are fruitful and frequent sources of litigation, owing to the disappointments they so often bring to the party who has taken the chance of performing satisfactorily, and the difficulty of ascertaining what really constitutes satisfaction, which primarily, is but a mental process. Such contracts are enforceable, however, to the extent the intention of the

contracting parties can be ascertained. If parties voluntarily assume the obligations and hazards of a satisfaction contract, their legal rights are to be determined and adjudicated according to its provisions. It is elementary that courts cannot make contracts for parties nor relieve them of the consequences of their contracts, however ill-advised. In many cases of this nature which have been before various tribunals, there is recognized two quite well-defined classes—one where the personal taste, feeling, sensibility, fancy, or individual judgment of the party to be satisfied are especially involved; the other where mechanical utility or operative fitness in relation to which some standard is available are bargained for. In the former class the authorities preclude disputing the propriety or reasonableness of the declaration of dissatisfaction on the part of the individual entitled to exercise it. It is said to be with him purely a personal matter of which he is made the sole judge. It being his right to say whether he is satisfied or not, it cannot be left to another to say that he ought to be satisfied. In the latter class of cases the authorities are more conflicting. In numerous decisions it has been held, under the

Under a contract for an exclusive agency in a certain district,<sup>62</sup> the dealer is generally entitled to commissions on sales which have been made in his district before the termination of the contract.<sup>63</sup> And this is so though the delivery of the machine is not accomplished until after the termination.<sup>64</sup> But, in the absence of bad faith on the part of the manufacturer, he is not entitled to commissions on a sale made after the termination, although some of his prior work may have aided the sale.<sup>65</sup> And where the contract provides for commissions only on machines consigned during its life, the agent is not entitled to commissions when the order is procured such a short time before the expiration of the contract that delivery is impossible before such time.<sup>66</sup> If the manufacturer wrongfully terminates the agency, the dealer is entitled to maintain an action for the damages he has sustained.<sup>67</sup> The fact that the damages which are sustained by the dealer in such a case are somewhat difficult of ascertainment, does not furnish a reason for the denial of recovery, if there can be found from the evidence a reasonably certain basis for computation.<sup>68</sup> If

phraseology of the contracts being considered and the attending circumstances, that not only the honesty of the declared dissatisfaction may be questioned, but even, in special instances, the adequacy and reasonableness of the ground for such action are open to investigation. . . . We think the contract under consideration falls more closely within the former class. It was an agency in the nature of employment to render services involving something more than the operative fitness or mechanical utility of a tangible thing. It involved personal efficiency, energy, initiative, business experience and ability to formulate methods and make them successful, as well as cooperation and confidential relations with defendant, of such a character as to lead to the conclusion that the parties contemplated, and provided for, the right of defendant to terminate the relationship when, according to its own fancy and judgment, the

work done and methods pursued were not satisfactory."

62. Section 792.

63. *Eastern Motor Sales Corp. v. Apperson-Lee Motor Co.*, 117 Va. 495, 85 S. E. 479.

64. *Eastern Motor Sales Corp. v. Apperson-Lee Motor Co.*, 117 Va. 495, 85 S. E. 479.

65. *Parry v. American Motors Calif. Co.*, 25 Cal. App. 706, 145 Pac. 165.

66. *Ford Motor Co. v. Crawford Auto Co.* (Tex. Civ. App.), 206 S. W. 108.

67. *Holton v. Monarch Motor Car Co.*, 202 Mich. 693, 168 N. W. 539.

68. "As is frequently the case the actual damages suffered by plaintiffs were somewhat difficult of ascertainment, but this fact does not furnish a reason for denying all recovery for prospective profits, if there can be found in the testimony a reasonably certain basis for computing them. The period for which the contract should

an automobile salesman is wrongfully discharged, the *prima facie* measure of his damages is the amount of his wages for the unexpired term, less what he actually earned during the unexpired period in whatever occupation or what he might have earned with reasonable diligence in other employment of the same general nature.<sup>69</sup>

be in force was limited and definite. The number of cars which the plaintiffs agreed to purchase was definite. The profit of plaintiffs upon each class of car was definite. The amount of business done by them in the 2½ months which they had operated under the contract was definite and ascertainable. The number of cars sold by defendant during the balance of the contract year was shown. The number of agencies established was shown. The number of cars contracted for and with whom contracted were shown. It was further shown that the general demand for gasoline motor cars in the country in 1914 outran the supply up to July 1st. With this and other like data before the jury it was proper to submit to them the question as to what, if anything, plaintiffs had lost by being deprived of the right to complete their contract." *Holton v. Monarch Motor Car Co.*, 202 Mich. 271, 168 N. W. 539.

69. *Bertholf v. Fisk*, 182 Iowa 1308, 166 N. W. 713. "It was the duty of the plaintiff to reduce his damages by reasonable effort to obtain other employment. This duty went no farther, however, than that he should seek other employment of the same general nature. He was not bound to seek employment of a different nature. On the other hand, it was not forbidden to him to seek employment of a different nature or to engage therein. If the plaintiff had made a reasonable

effort to secure employment of the same general nature and failed, such effort would be conclusive upon the defendant. If he failed to seek employment of the same general nature, then it was still open to the defendant to show in reduction of damages what employment of such general nature the plaintiff could with reasonable effort have obtained and what he could have earned therein. The plaintiff's case was not as a matter of law forfeited by his failure in that regard. His failure to make the effort simply subjected him to the same rule of mitigation as he would have been subject to if a reasonable effort on his part would have resulted in such mitigation. On the other hand, if the plaintiff chose other occupation of a different nature, it was open to the defendant at his option to show plaintiff's actual earnings in such occupation in reduction of damages. The plaintiff would commit no wrong by choosing such other occupation. An employee wrongfully discharged is not bound to acquire the consent of his former employer to engage in some different occupation. He is bound only to use reasonable effort to reduce his *prima facie* damages. He is not bound to extend this effort beyond employment of the same general nature. But, if he does engage in different employment, he had not thereby sinned." *Bertholf v. Fisk*, 182 Iowa 1308, 166 N. W. 713.

**Sec. 797. Relation with dealers and salesmen — dealer and sub-dealer.**

One employed by a dealer to assist in the sale of automobiles, is not generally considered a partner of the dealer, although the basis of his compensation is a percentage of the profits.<sup>70</sup> Where an agent for the sale of machines has a sub-agent who agrees to take a certain number of machines but fails to do so, the measure of damages is ordinarily the difference between the cost to the agent and the selling price to the sub-agent; but, if the dealer is able to sell all of the machines he can procure of the manufacturer notwithstanding the default of the sub-agent the damages he sustains are only nominal.<sup>71</sup> It is an implied condition of the contract between the agent and a sub-agent that the agent will be able to furnish the machines which are sold by the sub-agent; and, if a sale fails, through no fault of the customer, he is entitled to recover the deposit he made at the time of the order, and neither the agent nor the sub-agent can retain such deposit from the customer.<sup>72</sup> But, where the dealer expressly excepts himself from liability to the sub-dealer in case the manufacturer fails to deliver the required number of cars, the sub-dealer is not entitled to recover compensation from the dealer for his loss of time in attempting to make sales.<sup>73</sup>

**Sec. 798. Relation with dealers and salesmen — fixing price for sale by dealer.**

It is within the power of the manufacturer of a motor vehicle to dictate the price at which the machine and its parts shall be sold by its dealers.<sup>74</sup> Neither State nor federal anti-trust laws are violated by the acts of the manufacturer in parceling out exclusive agencies for districts and then prohibiting the sale of machines at less than a certain price.<sup>75</sup> But after

70. Studebaker Corp. v. Dodds 161 Ky. 542, 171 S. W. 167.

71. Tedford Auto Co. v. Horn, 113 Ark. 310, 168 S. W. 133.

72. Bangs v. Farr, 209 Mass. 339, 95 N. E. 841. See also Clark v. Gerlinger Motor Car Co., 100 Wash. 1, 170 Pac. 142.

73. Clark v. Gerlinger Motor Car Co., 100 Wash. 1, 170 Pac. 142.

74. See Baran v. Goodyear Tire & Rubber Co., 256 Fed. 571; Whitney v. Biggs 92 Misc. (N. Y.) 424, 156 N. Y. Suppl. 1107.

75. Cole Motor Car Co. v. Hurst, 228 Fed. 280, wherein it was said: "Sure-

the machine has passed from the dealer into the hands of a third person, who is under no contractual relations with the manufacturer, the latter has no control over the machine or equipment.<sup>76</sup>

### Sec. 799. Relation between manufacturer and consumer — in general.

If the manufacturer sells a motor vehicle to a customer, without the intermediary of an agent or dealer, the relation between the parties is that of vendor and vendee, and their rights are determined according to the Law of Sales.<sup>77</sup> Or, if the dealer making a sale is merely an agent of the manufacturer, then the ordinary relation of vendor and vendee would exist between the parties. But, as is stated above,<sup>78</sup> the dealer is not generally an agent of the manufacturer so as to bind the latter by his representations. Where the dealer is not an

ly the Cole Company had the right to determine that its agents should sell its cars at its own price. True, he was given the privilege of selling in certain counties, and no others, and he was restricted from selling the cars of other motor car companies in the same counties; but this method is an ordinary instrumentality by which manufacturers and others display and dispose of their goods and commodities, and make sure of payment, if they can. It is not restrictive of trade in any sense. Insurance companies, and many other occupations and trades, parcel out their territory to different agents, and make similar arrangements. That it could not defeat competition is obvious to the court. There are a multitude of other companies from whom purchasers can readily obtain motor cars, varying in little, if anything, from the perfectibility of the car made by the plaintiff company. It is common knowledge that most, if not all, of such motor companies avail themselves of similar arrangements. The public, indeed, finds it no small task to avoid the competition and solicitations of

the agents or consignees of such companies. Periodicals of every description portray, advertise and enlarge upon the variety and superiority of their excellencies. There surely, then, has been no restraint of this trade. Was it not, then, easily possible that in the flourishing counties of the Lone Star State enumerated in the contract, notwithstanding the same, anyone might have purchased a Ford, a Cadillac, a Pierce-Arrow, a Packard, a Chalmers, a Hudson, or any other of the multitudinous machines which are being constantly manufactured and offered for sale at widely varying prices? Where, then is the restraint of trade in this transaction? It exists in the refusal of the defendant to pay the balance he owes for the automobiles he received, which, since capital is timorous, may have, for the future, some restraining effect upon similar arrangements."

76. *Ford Motor Co. v. International Automobile League*, 209 Fed. 235.

77. Chapter XXX.

78. Section 785.



agent of the manufacturer, the customer purchasing a car of the dealer cannot maintain an action against the manufacturer for a failure to make a delivery,<sup>79</sup> or for breach of warranty.<sup>79a</sup>

### **Sec. 800. Relation between manufacturer and consumer — liability for injury from defect.**

It is a rule of the Law of Torts that the manufacturer of articles inherently dangerous, such as poisons and explosives, for example, may be liable to a third person who becomes the owner thereof through purchase from another and who is injured by reason of negligence in the manufacture of the article. Whether this doctrine applies to motor vehicles is a question on which there is a conflict of decisions. In the Circuit Court of Appeals, it was held that a manufacturer was not liable for injuries sustained by one riding in an automobile when a wheel of the machine broke, the manufacturer having purchased the wheels of a reputable manufacturer.<sup>80</sup> And similar doctrine has been supported in *Oklahoma*.<sup>81</sup> On the other hand, other State courts have sustained the liability of the manufacturer in such cases.<sup>82</sup> And it has been

79. *Anderson v. White Co.*, 68 Wash. 568, 123 Pac. 1009.

79-a. *Piper v. Oakland Motor Co.* (Vt.), 109 Atl. 911.

80. *Cadillac Motor Co. v. Johnson*, 221 Fed. 801. This decision, however, was subsequently overruled on a second appeal in the same litigation. *Johnson v. Cadillac Motor Co.*, 261 Fed. 878, 8 A. L. R. 1023.

81. *Ford Motor Co. v. Livesay* (Okla.), 160 Pac. 901, wherein it was said: "It is a general rule that a manufacturer or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles. In the leading case of *Winterbottom v. Wright*, 10 M. & W. 109, the rule is placed upon the ground of public policy. There would be no end of

litigation if the manufacturers were to be held liable to third persons for every act of negligence in the construction of the machines they make after the parties to whom they have sold them have received and accepted them."

82. *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, affirming 160 N. Y. App. Div. 35, 145 N. Y. Suppl. 462. The Court of Appeals in this case said: "We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril if it is negligently made, it is then a thing of danger. Its nature gives warning of the consequences to

held that the liability of the manufacturer may extend, not

be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. It is *possible* to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered. We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow. We are not required at this time to say that it is legitimate to go back of the manufacturer of the finished product and hold the manufacturers of the component parts. To make their negligence a cause of imminent danger an independent cause must often intervene; the manufacturer of the finished product must also fail in his duty of inspection. It may be that in those circumstances the negligence of the earlier members of the series is too remote to constitute, as to the ultimate

user, an actionable wrong. (Beven on Negligence, 3d Ed., 50, 51, 54; Wharton on Negligence, 2d. Ed., sec. 134; Leeds v. N. Y. Tel. Co., 178 N. Y. 118, 70 N. E. 219; Sweet v. Perkins, 196 N. Y. 482, 90 N. E. 50; Hayes v. Hyde Park, 153 Mass. 514, 516, 27 N. E. 522.) We leave that question open. We shall have to deal with it when it arises. The difficulty which it suggests is not present in this case. There is here no break in the chain of cause and effect. In such circumstances the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."

See also Quackenbush v. Ford Motor Co., 153 N. Y. Suppl. 131, wherein the court says: "A modern automobile properly equipped with brakes and assembled in harmony with the plans underlying the construction, is not inherently a dangerous machine. In the hands of a reasonably intelligent and careful operator it involves no greater hazards to the public than a team of horses attached to a wagon. But this theoretically safe machine becomes inherently unsafe when it is improperly assembled or when the brakes are constructed of materials which will not stand the necessary strain upon them; such an automobile, designed for use upon the highways (and this court may take judicial notice of the use to which such vehicles are commonly put), is a menace to the safety of the public, and it devolves the duty upon the manufacturer to use proper materials and to use due care in the assembling of such materials in the completed machine, and the character

only to the owner of the machine, but also to one riding therein.<sup>83</sup>

**Sec. 801. Relation between manufacturer and consumer — duty to make repairs.**

The manufacturer of a motor vehicle may bind itself to make repairs thereto at its own expense for a prescribed period, but on the expiration of such period, its duty to make such repairs will cease.<sup>84</sup>

**Sec. 802. Relation between manufacturer and consumer — sharing profits with consumer.**

Where a manufacturer of automobiles, for the purpose of giving publicity to its products, advertised that it would give to all retail buyers of its automobiles a certain share of its profits during the current year, providing it sold a certain

of the injuries resulting from defective materials and construction has nothing to do with the question of the manufacturer's duty. . . . The manufacturer had no more right to send out a car with a brake which was not properly tested than he had to send out a car with a wheel which was not up to the standard."

**Bill of particulars.**—In an action by the owner of an automobile against the manufacturer to recover for injuries received by the plaintiff in an accident caused by the breaking of a part of the steering gear, the court should be liberal in granting to the defendant a bill of particulars as to the defects in construction or material which the plaintiff will rely on to establish the case. The defendant is entitled to a bill of particulars as to whether the very general allegations charging negligence with respect to the manufacture of the entire automobile and all of its parts and the testing thereof were intended to be limited by more specific allegations in a later paragraph confining the negligence to the steering apparatus, and if they were

not intended to be so limited to particularize with respect to them. The defendant is entitled, also to particulars as to the parts of the steering apparatus alleged to be worn and of insufficient size and as to the parts alleged to have been omitted in the construction. The defendant is not entitled to particulars as to the experience of the plaintiff in driving automobiles or the exact time of the accident since those questions can have no bearing on the issues. But the defendant is entitled to particulars as to the exact place where the accident happened, the speed of the car at the time of the accident, and whether the plaintiff put on the foot brake or the emergency brake and whether she claims either of them was defective. *Drake v. National Motor Car Corp.*, 195 App. Div. 113.

**83.** *Olds Motor Works v. Shaffer*, 145 Ky. 616, 140 S. W. 1047, 37 L. R. A. (N. S.) 560, Ann. Cas. 1913 B. 689.

**84.** *Barry v. American Locomotive Auto Co.*, 113 N. Y. Suppl. 826.

number of cars, one who purchased an automobile from an agent of the defendant, or the purchaser's assignee, is entitled to receive a share of the profits, the conditions of the advertisement having been fulfilled, and payment cannot be refused upon the ground that the bill of sale of the car given by the agent some months after the actual sale stated that the sale did not come within the provisions of the defendant's offer. The agreement of the defendant through its advertisement is an entirely different transaction than the sale of the car between the purchaser and the agent. Such a promise to divide profits is not a mere gratuity, but a request to the public which, when acted upon, is binding.<sup>85</sup>

### Sec. 803. Trade marks.

Valid trade marks of the manufacturers of motor vehicles and their accessories will be protected by the courts.<sup>86</sup> Thus

85. *Ford v. Ford Motor Co.*, 181 N. Y. App. Div. 28, 168 N. Y. Suppl. 176. See also *Ford v. Ford Motor Co.*, 179 N. Y. App. Div. 472.

86. **Trademarks.**—With the great variety of automobile supplies and accessories continually being placed upon the market and sold under various trade names, it is not to be wondered at that the trademarks under which certain supplies and accessories are sold should be infringed. An intentional infringement of this character certainly cannot be tolerated for an instant. There are instances, however, where a party or a concern may adopt a trade name or trademark in ignorance of the fact that another already uses a similar trade name or mark. Of course, under such circumstances the subsequent use of the trade name is illegal and an injunction may be procured to stop it. The public certainly have a right to fair dealing, and the conduct of a business in such a manner that there is an express or implied representation that the goods or business of one man are the goods or business of another is an illegal depre-

dation not only upon the public but upon the dealer.

In order to obtain the advantage of one's good will and reputation in the conduct of his business, and the qualities of the article which he handles, it has been the custom for a long time to affix to the goods employed in the particular business a name or some particular mark to distinguish these goods from similar goods produced by others engaged in the same business. These distinguishing marks are called trademarks, and their use has been very general in all countries from ancient times.

A trademark may be defined as a name, sign, symbol, or device which is applied or attached to the goods offered for sale in the market, so as to distinguish them from other goods sold by others.

A trademark in order to be valid must be distinctive. It also must have some actual physical connection with the goods. It is sufficient, however, if the mark is affixed either upon the goods themselves or upon a box or wrapper containing them, or in some

the Ford Motor Company can enjoin a dealer from advertising auto parts as Ford articles, where they are not made by such company, but are adapted for use on "Ford" cars.<sup>87</sup> And the manufacturer of "Imperial" automobile tires can

other way physically attached to the article. An unlawful business cannot secure a valid trademark, and a trademark must not be in itself illegal or immoral or against public policy. No sign or symbol can be used as a valid trademark which from the fact conveyed by its primary meaning others may employ with equal truth and with equal rights for the same purposes. Arbitrary and fanciful words may constitute a valid technical trademark, such, for example, as the word "Star," as applied to shirts, and "Ideal," as applied to fountain pens, etc.

Newly coined and invented words may also constitute valid trademarks. These are frequently found in the automobile trade, and may be protected against infringement.

The color of an article or label, or its form or size, can rarely if ever be protected as a technical trademark. Neither can the name of the substance out of which it is manufactured be protected.

Words of quality, character, grade, excellence, popularity, processes of manufacture, purpose of use, ingredients, geographical terms, are usually incapable of being protected.

Trademarks and trade names are acquired by mere adoption and use. Statutory provisions for the registration of trademarks, as a general rule, apply only to words, marks, or symbols which have already become trademarks by adoption and use. The purpose of registry is simply to facilitate the remedy. Registration confers no new rights. The exclusive right to the trade name belongs to the one who was first to appropriate and use it in connection with the goods in question, and not to the inventor or the one who

first suggested it. The necessity of use is vital. The popular misapprehension that a trademark must be registered in order to be protected should be corrected. Those who first use a trademark may enjoin others who seek to use a similar device, symbol, or mark, and who attempt to trade on the good name and good will of another's business.

87. *Ford Motor Co. v. Wilson*, 223 Fed. 808, wherein it was said: "While the defendant has a right to inform the public that he is manufacturing articles suitable for use on Ford machines, he should not be permitted to advertise them as Ford articles, but should be required to describe them in such way as to indicate that they are not manufactured by the complainant. . . . Even had the complainant some knowledge of the description of the defendant's articles as Ford articles, mere nonaction, or the ignoring of a few instances of violation of right, could not deprive it of the right to stop an unauthorized use of its name when such use became of considerable magnitude, nor could it confer upon the defendant any right to put forth his goods with what must be held to be a misrepresentation as to origin. While the defendant may have considered himself morally justified in calling these articles Ford articles, because they were adapted for use in Ford machines, such an option would be erroneous, since, in common acceptance, the word 'Ford' would indicate, not merely adaptation to use in Ford machines, but articles manufactured by the complainant company. It is in the latter respect that the defendant has violated the complainant's rights."

enjoin defendants who have organized a corporation under the name of "Imperial Tire Company" and who are making tires with the name "Imperial" moulded thereon.<sup>88</sup> But it has been held that the manufacturer first making lamps with a flaring front is not entitled to a monopoly of the words "flare front."<sup>89</sup> And the words "Yellow Taxicab Company" may be acquired as a valid trade mark, so that a use of a similar name by another may be enjoined.<sup>90</sup>

88. McGraw Tire & Rubber Co. v. Griffith, 198 Fed. 566.

89. Rushmore v. Manhattan, etc., Stamping Works, 163 Fed. 939, 19 L. R. A. (N. S.) 269.

90. Yellow Cab Co. v. Cook's Taxicab Co., 142 Minn. 120, 171 N. W. 269.

Patents.—Machine for making tire casings. Firestone Tire & Rubber Co. v. Seiberling, 257 Fed. 74.

## CHAPTER XXIX.

## INSURANCE.

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### **Sec. 804. Fire insurance — construction of policy.**

A policy of insurance should be interpreted by the rules which are applicable to other written contracts for the purpose of ascertaining and giving effect to the real intention of the parties. It should be construed strictly against the insurer and favorably to the insured, when there is doubt or ambiguity in its terms, as it is supposed to be prepared by the former. But the object of the contract being to afford an indemnity against loss, it should be so considered as to effectuate this purpose, rather than in a way which will defeat it. It should have, from every point of view, a fair and reasonable construction, unless it be so clearly and unambiguously expressed as not to require construction, when its words will be taken in the plain and ordinary sense.<sup>1</sup> The rule that an insurance policy is to be liberally construed in favor of the insured is not carried to the extent of construing the policy contrary to its manifest intent and express condition.<sup>2</sup>

### **Sec. 805. Fire insurance — insurable interest.**

An insurance policy issued on an automobile to one who has no insurable interest in the machine is void; and, upon the assignment of such policy to another, the assignee has no rights thereunder.<sup>3</sup>

### **Sec. 806. Fire insurance — false representations.**

Whether a misrepresentation or concealment will avoid a policy of insurance depends, as a general proposition, upon its materiality to the risk undertaken.<sup>4</sup> An alleged misrepresentation made in an application for insurance upon an automobile is not a warranty, and, if proved to be untrue, does not

1. *Crowell v. Maryland Motor Car Ins. Co.*, 169 N. Car. 35, 85 S. E. 37.

2. *Marmon Chicago Co. v. Heath*, 205 Ill. App. 605.

3. *O'Neill v. Queen Ins. Co.* 230 Mass. 269, 119 N. E. 678.

4. *British, etc., Ins. Co. of Liverpool v. Cummings*, 113 Md. 350, 76 Atl. 571.

An incorrect statement of the number of the machine does not necessarily avoid the policy. *White v. Home Mut. Ins. Assoc. (Iowa)*, 179 N. W. 315.



avoid the policy, unless it is material to the risk assumed by the insurer.<sup>5</sup> The burden of showing the falsity of the representation as well as its materiality is upon the insurance company.<sup>6</sup> A representation as to the age or year of manufacture of a motor vehicle is generally deemed a material one, and an assured who has falsely stated such matter in his application, may be unable to collect insurance in case of damage by fire.<sup>7</sup> Indeed, it has been held that the fact that the erroneous statement was made innocently will not aid the assured.<sup>8</sup> In such a case it is also held not to be important that the agent saw the car and that he might have learned the true facts, it appearing that he was in fact a broker rather than an

5. *British, etc., Ins. Co. of Liverpool v. Cummings*, 113 Md. 350, 76 Atl. 571.

6. *British, etc., Ins. Co. of Liverpool v. Cummings*, 113 Md. 350, 76 Atl. 571; *Zackwik v. Hanover F. Ins. Co.* (Mo. App.), 225 S. W. 135.

7. *Soloman v. Federal Ins. Co.*, 176 Cal. 133, 167 Pac. 859; *Smith v. American Automobile Ins. Co.*, 188 Mo. App. 297, 175 S. W. 113; *Reed v. St. Paul Fire & M. Ins. Co.*, 165 N. Y. App. Div. 660, 151 N. Y. Suppl. 274; *Harris v. St. Paul Fire & Marine Ins. Co.*, 126 N. Y. Suppl. 118. *Compare St. Paul, etc., Ins. Co. v. Huff* (Tex. Civ. App.), 172 S. W. 755. "The misrepresentation that the car was a 1910 model while it was in fact a 1906 model, was clearly a misrepresentation of a material fact. It is impossible for Insurance agents to ascertain the condition of the car from its outside appearance. The condition largely depends upon the wearing of the gears, which are concealed within metal bound cases. It also largely depends upon the year of the manufacture, as it is a matter of common knowledge that in the manufacture of automobiles changes are made from year to year to remedy defects that are found to exist, and to add to the conveniences and safety in the use of the car, as are

shown to be important through experience. It is matter of common knowledge that in 1912 a 1910 Premier was of value greatly in excess of that of a 1906 Premier of the same model. So that there was a clear misrepresentation of a material fact which as matter of law vitiates the defendant's contract." *Reed v. St. Paul Fire & M. Ins. Co.*, 165 N. Y. App. Div. 660, 151 N. Y. Suppl. 274. "If the fact that the machine is five years old instead of two is not material to the risk we cannot see well what would be. But, however this may be, certainly the company has a perfect right to say it will not insure an automobile that is over five years old. And if the car was represented to the company to be only two, when it was five years old, and the company had no means nor opportunity of knowing any different, then there was no contract of insurance entered into by the company with reference to this car. Hence, we think the representation as to the age of the car was material to the risk as a matter of law." *Smith v. American Automobile Ins. Co.*, 188 Mo. App. 297, 175 S. W. 113.

8. *Smith v. American Automobile Ins. Co.*, 188 Mo. App. 297, 175 S. W. 113.

agent of the company.<sup>9</sup> But, on the other hand, it has been held that, where the application correctly gives the make, horse power, and manufacturer's number of the machine, but innocently misstated the year of manufacture, and it appeared that the insurer's agents had information at hand to determine the age of the car from the number, it was charged with notice of the age and was estopped to assert the misstatement as a defense.<sup>10</sup> And, under similar circumstances, it has been held to be a question for the jury whether the misstatement was material.<sup>11</sup> A statement as to the cost of the car to the insured, especially in the case of a "valued" policy, is material, and if falsely stated may avoid the policy.<sup>12</sup>

### Sec. 807. Fire insurance — change of title.

Where an insurance policy covering an automobile contains a provision that it shall be void in case of a change of title, such provision is binding upon the insured and if he sells such automobile the policy will be invalidated.<sup>12a</sup> Thus where the owner of such a vehicle entered into two transactions the first of which constituted a sale with a chattel mortgage to secure the purchase money and the second of which constituted a complete surrender of the chattel mortgage, it was held that

9. *Smith v. American Automobile Ins. Co.*, 188 Mo. App. 297, 175 S. W. 113.

10. *British, etc., Ins. Co. of Liverpool v. Cummins*, 113 Md. 350, 76 Atl. 571, wherein it was said: "As was said by Chief Justice McSherry in *Monahan v. Mutual Insurance Co.*, 103 Md. 157, 63 Atl. 212. 5 L. R. A. 759: 'All the cases which hold the contract of insurance to be vitiated by the mere representation of a mere fact when no warranty is involved have relation to facts which were, or which ought to have been peculiarly, within the knowledge of the applicant, and which were not within the knowledge of the insured. If the company ought to have known of the facts, or with proper attention to its own business

could have been apprised of them, it has no right to set up its ignorance as an excuse. It must be treated as knowing what it ought to have known.' The year in which the car was built was not within the peculiar knowledge of the appellee, nor had he, after furnishing Smith with the said number, any means or opportunities of ascertaining this fact that were not equally accessible to Smith, the agent of the company, whose duty it was to pass upon the application."

11. *Locke v. Royal Ins. Co.*, 220 Mass. 202, 107 N. E. 911.

12. *Soloman v. Federal Ins. Co.*, 176 Cal. 133, 167 Pac. 859.

12-a. *Cranston v. California Ins. Co.*, 94 Oreg. 369, 185 Pac. 292.

there was a completed sale which avoided the policy.<sup>13</sup> But, where a policy, provided that a change of ownership of the property, without the written consent of the insurance company, rendered the policy void, and that agents of the company could not waive any provision of the policy unless the waiver was written upon the policy or attached thereto, yet where the local agent of the company knew, before he issued the policy that the automobile had been sold by the assured, it was held that the company was bound by such knowledge, and was estopped from setting up, as a defense to a suit upon the policy, the noncompliance of the plaintiff with the policy.<sup>14</sup>

### **Sec. 808. Fire insurance — incumbrance on property.**

It has been held that a provision in a policy of insurance on an automobile that, if the property be or become encumbered by a chattel mortgage, the policy shall be void, is a valid provision, and if the assured so encumbers the machine, the insurance company has the right to insist that its liability under the policy has terminated.<sup>15</sup>

### **Sec. 809. Fire insurance — private garage warranty.**

Where a policy of insurance on an automobile contains a clause that, in consideration of the reduced rate at which the policy is written, it is understood that the property insured shall be kept or stored in a certain private garage, with the privilege, however, to operate the car and to house in any other building for a period not exceeding fifteen days at any one time, providing the car is en route, visiting, or being cleaned or repaired, it has been held that a permanent removal of the machine to another State renders the insurance contract void.<sup>16</sup> The provision for keeping it in a private

13. *Hamilton v. Fireman's Fund Ins. Co.* (Tex. Civ. App.), 177 S. W. 173.

14. *Commercial Union Assur. Co. v. Lyon*, 17 Ga. App. 441, 87 S. E. 761.

15. *Springfield F. & M. Ins. Co. v. Chandler*, 41 App. D. C. 209.

**Insurance by conditional vendee.**— See *Baker v. Northern Assur. Co.*

(Mich.), 183 N. W. 61.

16. *Lummas v. Fireman's Funds Ins. Co.*, 167 N. C. 654, 83 S. E. 688, wherein the court said: "The contention of the defendant is that the policy became forfeited because of this breach of the private garage warranty. The plaintiff contends that the breach of warranty was immaterial, because

garage may be waived by the company, as where its general agent advises the assured that the company has no objection to certain visits to other places.<sup>17</sup> An application stating that the machine is usually kept in a private garage, does not avoid the policy, though it appears that it was kept in a lean-to or a barn, especially where the company was charged with knowledge where the machine was kept.<sup>18</sup>

### **Sec. 810. Fire insurance — safe-guarding machine.**

Where a policy contains no provision requiring the owner of the vehicle to safeguard the machine after a fire, the fact that there were two fires occurring a few days apart which resulted in the destruction of the machine and that the owner was negligent in safeguarding the machine after the first fire, does not defeat a recovery on the policy.<sup>19</sup> The negligence of the owner does not generally constitute a defense.<sup>20</sup>

it in no way contributed to the loss, citing *Revisal*, § 4808. This position is untenable. In construing that section, this court has held that, in application for a policy of insurance, every fact stated will be deemed material which would materially influence the judgment of an insurance company either in accepting the risk or in fixing the rate of premium. *Bryant v. Insurance Co.*, 147 N. C. 181, 60 S. E. 983. It is further held in the same case that it is not necessary, in order to defeat a recovery upon such policy of insurance, that a material misrepresentation by the applicant must be shown to have contributed in some way to the loss for which indemnity is claimed. See also *Fishblate v. Fidelity Co.*, 140 N. C. 589, 53 S. E. 354. Nothing is better settled than that the location of the property insured is essentially material in contracts of insurance, and enters largely into the consideration of the company in fixing the rate of premium. The clause of the policy in this case, con-

taining this warranty, expressly declares that a reduced rate of premium is granted because of the insertion of this provision in the contract. The contention of the plaintiff that the policy could remain dormant for six months, and then be revived suddenly because the property was burned up in a repair shop, is utterly untenable. When the owner took the automobile away from the garage in Columbus, it was not for a temporary purpose. There was a removal of the property permanently to another State which, under the provisions of the policy which we have cited, rendered the contract of insurance void."

17. *Commercial Union Assur. Co. v. Hill* (Tex. Civ. App.), 167 S. W. 1095.

18. *White v. Home Mut. Ins. Assoc.* (Iowa), 179 N. W. 315.

19. *St. Paul, etc., Ins. Co. v. Huff* (Tex. Civ. App.), 172 S. W. 755.

20. *White v. Home Mut. Ins. Assoc.* (Iowa), 179 N. W. 315.

**Sec. 811. Fire insurance — use for rent or hire.**

Fire insurance policies on motor vehicles used for the pleasure or business purposes of the owner frequently contain a provision that the machine shall not be used for carrying passengers for compensation, and that it shall not be rented or leased. Such a provision is valid and its violation results in the avoidance of the policy.<sup>21</sup> Where a policy of fire insurance on an automobile, issued to plaintiff and one who bought the automobile from plaintiff and gave back a mortgage for part of the purchase price, provides that the automobile shall not be used for renting purposes or for hire, and the evidence shows that such car was used mainly, if not entirely, for livery purposes by such mortgagor, there can be no recovery under the policy.<sup>22</sup> But such a provision does not forbid the casual carrying of passengers for hire upon a particular occasion, without making a business of carrying passengers.<sup>23</sup> The condition in a policy of fire insurance issued on an automobile to the mortgagee and mortgagor of the car, as their respective interests might appear, that the car shall not be used for renting purposes or for hire, applies to both the mortgagor and the mortgagee.<sup>24</sup> In some States, the violation of the clause as to renting does not avoid the policy, unless the injury to the machine ensued at a time when the clause was so violated.<sup>25</sup>

21. *Orient Ins. Co. v. Van Zandt Drug Co.*, 50 Okla. 558, 151 Pac. 323.

22. *Marmon Chicago Co. v. Heath*, 205 Ill. App. 605.

23. *Crowell v. Maryland Motor Car Ins. Co.*, 169 N. C. 35, 85 S. E. 37; *Commercial Union Assur. Co. v. Hill* (Tex. Civ. App.), 167 S. W. 1095. Compare *Elder v. Federal Ins. Co.*, 213 Mass. 389, 100 N. E. 655. "The clause in this policy, upon the alleged violation of which the defendant relies to defeat a recovery, provides that the motor car insured 'will not be rented or used for passenger service of any kind for hire, except by special consent of the company indorsed on the policy.' It is apparent, we think, that the parties, by this clause, contem-

plated, not a single act of renting or using the car for hire, a mere casual or isolated instance, and that too, without the knowledge or consent of the owner, but something of a more permanent nature. 19 Cyc. 736. This car was not 'rented' in the sense of that word as employed in the policy, but it was used by the plaintiff's servant to carry the hunters to the country, but this can hardly be considered as being engaged in the 'passenger service.'" *Crowell v. Maryland Motor Car Ins. Co.*, 169 N. C. 35, 85 S. E. 37.

24. *Marmon Chicago Co. v. Heath*, 205 Ill. App. 615.

25. *Berryman v. Maryland Motorcar Ins. Co.* (Mo. App.), 204 S. W. 738.

**Sec. 812. Fire insurance — determination of amount of loss.**

Insurance policies generally provide that, when the insurer and the assured are unable to agree as to the amount of the damage, the parties shall each appoint an appraiser, and in case of the failure of the appraisers to agree an umpire shall be chosen, the decision of the two to be final on the amount of damage. If the umpire and one of the appraisers agree as to the amount of injury, it is not necessary that the other appraiser sign the award.<sup>26</sup> But one appraiser and the umpire cannot proceed arbitrarily and exclude the other appraiser from consideration in the matter. Each appraiser is entitled to notice of the meetings and to be heard on the questions in dispute.<sup>27</sup> The fact that the property is totally destroyed by fire does not, in those cases where "valued" policies are not in force, preclude an appraisal of the loss.<sup>28</sup> Nor is an insurance company precluded from an appraisal because it admits liability to a certain amount.<sup>29</sup>

**Sec. 813. Fire insurance — acceptance of repairs in lieu of money.**

Where, after an injury to an automobile truck by fire, the company and the owner agreed that the company, in lieu of making a cash settlement for the loss, should repair the machine, it was held that the arrangement constituted a new contract between the parties which terminated their rights under the policy, and the fact that the repairs were unreasonably delayed did not authorize the owner to maintain an action on the policy. The only remedy for the owner in case of unreasonable delay in repairs, is for damages for breach of the agreement to repair.<sup>30</sup>

26. *Union Marine Ins. Co. v. Charlie's Tr. Co.*, 186 Ala. 443, 65 So. 78.

27. *Jones v. Orient Ins. Co.*, 184 Mo. App. 402, 171 S. W. 28.

28. *Hart v. Springfield, etc., Co.*, 136 La. 114, 66 So. 558.

29. *Hart v. Springfield, etc., Co.*, 136

La. 114, 66 So. 558.

30. *Gaffey v. St. Paul, etc., Ins. Co.*, 221 N. Y. 113, 116 N. E. 778, reversing *Gaffey v. St. Paul Fire & M. I. Co.*, 164 N. Y. App. Div. 381, 149 N. Y. Suppl. 859; *Letendre v. Automobile Ins. Co. of Hartford (R. I.)*, 112 Atl. 783.

**Sec. 814. Fire insurance — valued policy.**

A statute providing that "no company shall take a risk on any property . . . at a ratio greater than three-fourths of the value of the property insured, and when taken, its value shall not be questioned in any proceeding" is held to be something more than what is usually regarded as a valued policy statute in that it contains an inhibition against every company in taking a risk at a greater value than specified and estops the company after a valid policy is issued from disputing that the subject matter of the insurance was of a value at the time the policy was issued not only equal to the amount of the insurance written thereon, but one-fourth more as well. Representation, however, in this respect if falsely made with a fraudulent intent would it is held have a different effect. In this connection the court said: "It seems to be entirely clear that the statute is designed only to conclude the matter of the value of the subject of insurance stipulated in a policy contract fairly entered into with respect to such valuation. In other words, false and fraudulent representations of fact, not mere expressions of opinion, designedly made with sinister motive relative to the value of the property as an inducement to the contract of insurance fixing the valuation, if believed and acted upon by the insurer so as to cause the company to issue a policy considerably in excess of the true value of the property at the time, should be regarded, not only as material to the risk, but sufficient to render the contract void from its inception. In this view such matter may be shown in defense notwithstanding the valued policy statute."<sup>31</sup>

**Sec. 815. Collision insurance — in general.**

Insurance policies are written upon motor vehicles to indemnify the owner from injuries to the machine sustained

31. *Farber v. American Automobile Ins. Co.*, 191 Mo. App. 307, 177 S. W. 675. See also as to valued policy, *Zackwith v. Hanover F. Ins. Co.* (Mo. App.), 225 S. W. 135.

**Evidence of value.**—Where, in a policy of automobile insurance, the plaintiff's car was "valued at the sum insured," but the plaintiff alleged and

sought to prove the actual value of the car by evidence of what it cost him, and also of what it cost his vendor, he cannot on appeal urge that the valuation stated in the policy is controlling. *Hoffman v. Prussian Nat. Ins. Co.*, 181 N. Y. App. Div. 412, 168 N. Y. Suppl. 841.

from collisions with other vehicles or obstructions. The burden is upon the assured to show that the object with which the machine collided was one within the terms of the policy.<sup>32</sup> A recovery may be had under such a policy for injuries caused to an automobile by the falling of the scoop of a steam shovel.<sup>33</sup>

### Sec. 816. Collision insurance — collision with stationary objects.

Policies of the type under consideration generally permit a recovery for injuries occasioned by a collision with either a moving or a stationary body.<sup>34</sup> In fact the expression "collision with" as used in a policy, may be deemed equivalent to "striking against" so that the owner will be entitled to a recovery for striking a stationary object, though the policy is not explicit on the point.<sup>35</sup> And the stationary body may be

32. *Rouse v. St. Paul F. & M. Ins. Co.* (Mo. App.), 219 S. W. 689; *Hardenbergh v. Employers' Liability Assur. Corp.*, 80 Misc. (N. Y.) 522, 141 N. Y. Suppl. 502.

**Unlawful transportation of liquors.**—*Cohen v. Chicago Bonding & Ins. Co.* (Minn.), 178 N. W. 485.

33. *Universal Service Co. v. American Ins. Co.* (Mich.), 181 N. W. 1007.

34. See *Cantwell v. General Accident, etc., Assur. Corp.*, 205 Ill. App. 335.

**"Object" defined.**—In construing an automobile against a collision with any other automobile, vehicle or object, the court said:

"We cannot concede to the view that the word 'object' as used in the policy should be construed to mean 'some object similar to an automobile or vehicle.' We are inclined to the view, and so hold, that the word 'object' should be construed in the ordinary and usual acceptance of the word, and that the rule of ejusdem generis is not applicable. The word

'object' in its proper significance implies that which is visible or tangible, and as here used should be construed in the broad, common, and usual acceptance of the word. We are more confirmed in our view that the rule of ejusdem generis was not intended to apply to this provision of the policy by the words used in the policy itself; for, while the policy covered damage to the automobile by being in collision with any other automobile, vehicle, or object, it specifically excludes 'damage caused by striking any portion of the roadbed, or by striking the rails or ties of street, steam, or electric railroads,' and if the contention of the appellant that the word 'object' was intended to cover only 'some object similar to an automobile or vehicle' were correct, then there would be no need for setting out in the policy the specific exception above noted." *Rouse v. St. Paul F. & M. Ins. Co.* (Mo. App.), 219 S. W. 689.

35. *Lepman v. Employers' Liability Assur. Corp.*, 170 Ill. App. 379.



either land or water.<sup>36</sup> Thus, a recovery has been allowed where a machine ran off a bridge and was precipitated into the water below.<sup>37</sup> But, when the injury is caused by turning in the ditch at the side of the road to pass another vehicle, and in returning to the center one of the wheels collapsed and there was no proof of an object in the road to cause the collapse, the insurer cannot recover.<sup>38</sup> And where one side of the machine settles in the ground until it overturns, there is no collision within the meaning of the policy.<sup>39</sup>

**Sec. 817. Collision insurance — exception for damage in striking portion of road.**

Insurance policies against injuries from collision, generally except damage caused "by striking any part of the roadbed." The guttering and sidewalk along a highway are not a part of the thoroughfare within the meaning of such an exception.<sup>40</sup> And the owner can recover for damages arising from striking an embankment outside of the traveled part of the roadbed.<sup>41</sup> But it is held that the curbing or curbstone of a street is such a "portion of the roadbed" and such an "impediment consequent upon the condition thereof" as to preclude one whose automobile has been damaged by collision therewith from recovering therefor upon a policy insuring the automobile against loss or damage "caused solely by collision with another object, either moving or stationary," but "excluding . . . all loss or damage caused by striking any portion of the roadbed or any impediment consequent upon the condition thereof."<sup>42</sup> Under a policy containing such an exception, there can be no recovery for an injury caused by running off the main road and down an embankment into a river.<sup>43</sup>

36. *Harris v. American Casualty Co.*, 83 N. J. Law, 641. 85 Atl. 194, 44 L. R. A. (N. S.) 70, Ann. Cas. 1914 B. 846.

37. *Harris v. American Casualty Co.*, 83 N. J. Law, 641, 85 Atl. 194, 44 L. R. A. (N. S.) 70, Ann. Cas. 1914 B. 846.

38. *Hardenbergh v. Employers' Liability Assur. Corp.*, 80 Misc. (N. Y.) 522, 141 N. Y. Suppl. 502.

39. *Bell v. American Ins. Co.* (Wis.), 181 N. W. 733.

40. *Stix v. Travelers' Indemnity Co.*, 175 Mo. App. 171, 157 S. W. 870.

41. *Rouse v. St. Paul, F. & M. Ins. Co.* (Mo. App.), 219 S. W. 689.

42. *Gibson v. Georgia L. Ins. Co.*, 17 Ga. App. 43, 86 S. E. 335.

43. *Wettengil v. United States Lloyds*, 157 Wis. 433, 147 N. W. 360, Ann. Cas. 1915 A. 626.

**Sec. 818. Collision insurance — exception in case of upset of machine.**

Collision policies sometimes except damage from a collision due wholly or in part to upsets. And it has been held that an insurer may recover for injuries to a machine running off a bridge and "colliding" with the water below, as the landing upside down in the water was the result of a collision.<sup>44</sup> But where the upset was at the edge of a bank when the driver was attempting to make a quick turn, it was held that the damages were the result of falling over the bank, not the result of a collision.<sup>45</sup>

**Sec. 819. Collision insurance — damage while in garage.**

Where an automobile standing in a garage was damaged by the second floor of the garage falling on it, it was held that the accident was not the result of "collision" contemplated by the policy.<sup>46</sup>

44. *Harris v. American Casualty Co.*, 83 N. J. L. 641, 85 Atl. 194, 44 L. R. A. (N. S.) 70, Ann. Cas. 1914 B. 846.

45. *Stuht v. United States Fidelity & Guaranty Co.*, 89 Wash. 93, 154 Pac. 137.

46. *O'Leary v. St. Paul Fire & Marine Ins. Co.* (Tex. Civ. App.), 196 S. W. 574, where it was said: "The proposition of appellant is as follows: 'The word "collision" includes within its meaning—when it is used in a policy of insurance on a vehicle, which policy expressly provided that it shall not be considered a collision when the vehicle is damaged by striking any portion of the roadbed, or the rails, or ties of street, steam, or electric railroads—the falling of any object upon the vehicle while the vehicle is stationary.' On the other hand, it is contended that the alleged collision in which the automobile was damaged

was not such as was contemplated by the terms of the policy. We have read the clause of the policy carefully, and have arrived at the conclusion that the contention of appellant is not sound, and that this court would not be justified in holding that the alleged collision, in which the automobile was damaged, was such as was contemplated by the terms of the policy. The car was in a garage. The second floor of the building or garage falling upon the car caused the damage. Surely it cannot be said that it was the intention of the parties, as ascertained from the terms of the policy, that the word 'collision' was broad enough to cover such damage as occurred in the instant case, and that appellee would be called upon to pay a loss caused by the falling of a building upon the car while the car was being left in the same."

**Sec. 820. Collision insurance — amount of recovery.**

Where a collision policy provides that the insurer shall not be liable in any event for more than the actual cost of suitable repairs to the property injured, the measure of damages is held to be the actual cost of repairs.<sup>47</sup> In some states a collision insurance policy is a "valued" policy.<sup>48</sup>

**Sec. 821. Collision insurance — recovery for damage against third person though insured.**

In case of an injury to a motor vehicle occasioned by the negligence of a third person, in an action by such owner against the negligent party, the fact that the plaintiff had the machine insured against the injury in question and that the insurance company has paid the damage, is not admissible for the purpose of reducing the plaintiff's damage in the action at bar.<sup>49</sup> The mere inquiry of counsel as to whether the plaintiff had collision insurance, may be sufficient to justify a new trial, although the objection to the question was sustained, the jury instructed to disregard it, and the counsel was reprimanded.<sup>50</sup>

**Sec. 822. Collision insurance — subrogation of insurer.**

The insurance policy, as well as the common law doctrine of the Law of Insurance, permit the insurer to be subrogated to the rights of the assured as against third persons causing the injury for which the insurance company must recompense the owner of the vehicle. In some states, the owner may maintain the action against the negligent party in his own name as plaintiff but to the use of the insurance company.<sup>51</sup> If the assured defeats the right of subrogation, he may be precluded from recovery of the insurance moneys. Where a policy insuring against loss on an automobile for collision

47. *Lepman v. Employer's Liability Assur. Corp.*, 170 Ill. App. 379.

48. *Wolff v. Hartford F. Ins. Co.* (Mo. App.), 223 S. W. 810.

49. *Hill v. Condon*, 14 Ala. App. 332, 70 So. 208.

50. *Aqua Contracting Co. v. United*

*Rys. Co. of St. Louis* (Mo. App.), 203 S. W. 481.

51. *Southern Garage Co. v. Brown*, 187 Ala. 484, 65 So. 400; *Wyker v. Texas Co.*, 201 Ala. 583, 79 So. 7. See also *Everhard v. Dodge Bros.*, 202 Mich. 48, 167 N. W. 953.

contains a subrogation clause, it is held that, if, after a loss within the terms of the policy the insured effects a settlement with, and releases the wrongdoer, the legal effect is to destroy the insurer's right of subrogation and will therefore discharge the latter from its obligation to pay him to the full extent to which he has defeated the insurer's remedy of subrogation. The legal effect of the settlement being to give a full and complete release to the wrongdoer, the insured is thereby precluded from maintaining an action on the policy.<sup>52</sup> Where an automobile collided with a street car causing injury both to the machine and to the owner, the maintenance of an action by the owner against the street railway company for the *personal* injuries sustained, does not bar an action by the insurance company under its right of subrogation against the railway company for the injury to the *machine*.<sup>53</sup>

### Sec. 823. Indemnity insurance — nature and validity of insurance.

Another form of insurance which is generally applied to motor vehicles is indemnity insurance whereby the insurer agrees to hold the owner of the machine harmless from actions maintained against him for injuries occasioned to third persons by the operation of the machine. The validity of such insurance is sustained, when written by an insurance company having authority to insure such risk.<sup>54</sup> It is not, however, "insurance on automobiles."<sup>55</sup>

### Sec. 824. Indemnity insurance — authority of company to write.

Not every insurance company is authorized to enter into contracts of insurance of the special form known as indemnity insurance.<sup>56</sup> This class of insurance is not "insurance

52. Maryland Motor Car Co. v. Hazard (Tex. Civ. App.), 168 S. W. 1011.

53. Underwriters v. Vicksburg Traction Co., 106 Miss. 244, 63 So. 455.

54. Gould v. Brock, 221 Pa. St. 38, 69 Atl. 1122; Tinline v. White Cross Ins. Co., 151 L. T. Jour. (Eng.), 434.

55. American Automobile Ins. v. Palmer, 174 Mich. 295, 140 N. W. 557.

56. See American Fidelity Co. v. Bleakley, 157 Iowa. 442, 138 N. W. 508; State v. New Jersey Indemnity Co. (N. J.), 113 Atl. 491.

on automobiles," and a company may not have authority to write indemnity insurance, though it can effect insurance on automobiles.<sup>57</sup>

**Sec. 825. Indemnity insurance — stipulation to defend "suits."**

The word suit as applied to legal controversies is held to mean in its technical sense a proceeding in equity and in its broader sense includes the prosecution of a demand or claim generally where the party suing claims to obtain something to which he has a right, a mode authorized by law to redress civil injuries. Such a meaning is to be given to this word as used in a policy which contains a stipulation that the insurer will defend any suits which may at any time be brought against the assured on account of injuries sustained in the operation of his automobile.<sup>58</sup>

**Sec. 826. Indemnity insurance — assumption of defense of action.**

In an action for injuries from the operation of a motor vehicle, an indemnity company will not be restrained from appearing with its own counsel and defending the action on behalf of the defendant.<sup>59</sup> An indemnity company, by assuming

57. *American Automobile Ins. v. Palmer*, 174 Mich. 295, 140 N. W. 557.

58. *Patterson v. Standard Accident Ins. Co.*, 178 Mich. 288, 144 N. W. 491, 51 L. R. A. (N. S.) 583, Ann. Cas. 1915 A. 632.

59. *Could v. Brock*, 221 Pa. St. 38, 69 Atl. 1122, wherein it was said: "There was a time when all insurance, and especially of life, was looked upon with suspicion and disfavor, but it was only because regarded as a species of wagering contract. That time has long gone by. And, with the intelligent study of political economy bringing the recognition of the fact that even the most apparently disconnected and sporadic occurrences are subject to at

least an approximate law of averages. the insurance against loss from any such occurrence has been recognized as a legitimate subject of protection to the individual by a guaranty of indemnity from some party undertaking to distribute and divide the loss among a number of others for a premium giving them a prospect of profit. There is nothing in this case that even remotely discloses the taint of maintenance, even at common law, much less of the principle of maintenance as administered at the present day with a clearly defined limitation to cases of actually malicious, dangerous or illegal intermeddling with other parties' litigation."

the defense of an action, which is settled on the recommendation of its own attorney, is generally liable under the policy.<sup>60</sup> Where a casualty company by letter assumes the defense of an accident action against the owners of an automobile which it had insured, under a reservation of policy rights and without assuming any liability for any judgment that might be recovered in the action, the reservation of the rights means only that the company will assume the defense of the action from such liability, if any, as it must assume under the policy.<sup>61</sup> But the indemnity company, by assuming the defense to the action, does not waive the objection that the vehicle was operated in violation of law by a person under the age limit, where the insured falsely represented to the company the immature driver was accompanied by a duly licensed chauffeur and that there was no violation of the law.<sup>62</sup>

#### **Sec. 827. Indemnity insurance — indemnity of partners.**

Where a policy was issued to the members of a partnership, it has been held not to cover a loss which might come to either member as individuals through the operation of the automobile by another partnership composed of themselves and another to which the automobile had been loaned.<sup>63</sup>

#### **Sec. 828. Indemnity insurance — action against officer of insured corporation.**

Where an indemnity policy is issued to a corporation owning a motor vehicle, and provides for indemnity to the corporation only for a judgment rendered against such corporation, the insurance company is not liable to pay a judgment rendered against a stockholder of such corporation for negligence in the operation of the machine while conveying such

60. *Hartigan v. Casualty Co. of America*, 97 Misc. 464, 161 N. Y. Suppl. 145, reversed on other grounds, 227 N. Y. 175, 124 N. E. 789. See also *Fullerton v. U. S. Casualty Co.*, 184 Iowa 219, 167 N. W. 700.

61. *Hartigan v. Casualty Co. of America*, 97 Misc. (N. Y.) 464, 161 N.

Y. Suppl. 145.

62. *Morrison v. Royal Indemnity Co.*, 180 N. Y. App. Div. 709, 167 N. Y. Suppl. 732.

63. *Hartigan v. Casualty Co. of America*, 227 N. Y. 175, 124 N. E. 789, reversing, 97 Misc. 464, 161 N. Y. Suppl. 145.

stockholder, and the fact that the assured employs counsel to defend the action does not change the result.<sup>64</sup>

### **Sec. 829. Indemnity insurance — age of driver.**

Indemnity insurance policies generally except from their operation cases of injury which result from the operation of the vehicle by an infant under a certain age, such as sixteen years, for example. Or they may provide for no liability in case the machine is driven in violation of law, and under such a provision a valid regulation prohibiting persons under eighteen to operate machines may have the effect of relieving the company from the results of a particular injury.<sup>65</sup> If, for any reason, the regulation prescribing the age of the driver is invalid, its violation is not a "violation of law," and the insurer is not thereby relieved from liability.<sup>66</sup> In the absence of such a clause in a policy, it has been held that the fact that the owner authorized and procured a violation of the criminal laws in respect to the age of the driver does not preclude a recovery on the policy, when there is no allegation that the violation of the statute was the proximate cause of the accident.<sup>67</sup> Where the child under the prescribed age had been running the machine, but prior to the accident in question, the owner had resumed control thereof with the exception that the child was allowed to sound the horn, the injury may be covered by the policy.<sup>68</sup> Where a policy is to indemnify the owner of an automobile against loss for bodily injuries inflicted upon others, provided that the insurer is not

64. *Rock Springs Distilling Co. v. Employers' Indemnity Co.*, 160 Ky. 317, 169 S. W. 730, wherein it was said: "If the distilling company had not defended the suit brought by Hazel against Rosenfeld, clearly there would have been no liability of the indemnity company for the payment of the judgment against Rosenfeld. To allow the distilling company, by its voluntary act of defending the suit, to bring within the policy a loss for which the insured would not otherwise be liable would be to impose upon the insurer a risk it did not assume."

65. *Morrison v. Royal Indemnity Co.*, 180 N. Y. App. Div. 709, 167 N. Y. Suppl. 732; *Royal Indemnity Co. v. Schwartz* (Tex. Civ. App.), 172 S. W. 581. See also, *Mannheimer Bros. v. Kansas Casualty & Surety Co.* (Minn.), 180 N. W. 229.

66. *Royal Indemnity Co. v. Schwartz* (Tex. Civ. App.), 172 S. W. 581.

67. *Messersmith v. American Fidelity Co.*, 187 N. Y. App. Div. 35, 175 N. Y. Suppl. 169.

68. *Williams v. Nelson*, 228 Mass. 191, 117 N. E. 189.

to be liable while the automobile is driven "by any person under the age fixed by law" or under the age of sixteen in any event, such clause is to be construed as referring solely to the minimum age, not less than sixteen at which one may lawfully drive a motor vehicle. It is therefore held that where a statute permits a person sixteen years of age or over, although not licensed, to operate a motor vehicle, if accompanied by a licensed operator, that age must be regarded as the minimum fixed by law, and the insurer cannot escape liability because, at the time of the accident in question, the operator, who was an unlicensed person over sixteen, was not accompanied by a licensed operator.<sup>69</sup>

### **Sec. 830. Indemnity insurance — change of use of machine.**

Where a policy of indemnity insurance against loss and expense resulting from claims for damages by reason of the ownership, maintenance or use of an automobile truck, after containing a general warranty that the truck was to be used for "delivery" purposes, recited that: "None of the automobiles herein described are rented to others or used to carry passengers for a consideration, actual or implied, except as follows;" and no exceptions were stated, said provision should be construed as a warranty merely that the truck was not rented at the time the policy took effect.<sup>70</sup>

### **Sec. 831. Indemnity insurance — notice to insurer of accident.**

Indemnity policies generally provide that the insured shall give notice to the insurer of an accident from which liability may arise. Such a requirement must receive compliance by the assured, or his indemnity will fail.<sup>71</sup> When the policy provides for "immediate" notice, a reasonable construction must be given to the word "immediate."<sup>72</sup> If it is not apparent at the time of the occurrence that the accident was

<sup>69.</sup> Brock v. Travelers' Ins. Co., 88 Conn. 308, 91 Atl. 279.

<sup>70.</sup> Mayor, Lane & Co. v. Commercial Casualty Ins. Co., 169 N. Y. App. Div. 772, 155 N. Y. Suppl. 75.

<sup>71.</sup> Chapin v. Ocean Accident & G.

Corp., 96 Neb. 213, 147 N. W. 465, 52 L. R. A. (N. S.) 227.

<sup>72.</sup> Chapin v. Ocean Accident & G. Corp., 96 Neb. 213, 147 N. W. 465, 52 L. R. A. (N. S.) 227.



within the terms of the policy, but subsequent facts suggest that liability arise, then notice within a reasonable time is sufficient.<sup>73</sup> But a three months' delay in giving notice of the accident to an insurer whose office was but twenty-five or thirty miles away is unreasonable.<sup>74</sup> And a delay of ten days, during which period an action was commenced against the insured, has been held to avoid the policy.<sup>75</sup> The fact that the insurer undertook to defend the suit after a delayed notice, is not a waiver of the delay.<sup>76</sup> Where the policy requires the assured to give immediate written notice to the insurer upon the occurrence of an accident with the fullest information obtainable and further requires him to give like evidence with full particulars if a claim is made on account of such accident, it is necessary for the assured to give notice in each case of accident in order to preserve the benefit of the policy, although the accident being slight, he has no immediate reason to suppose that a claim would be made against him by the person insured.<sup>77</sup>

**Sec. 832. Indemnity insurance — failure of insured to co-operate with insurer.**

Where the policy requires the insured to co-operate with the insurance company in defending actions, a failure to comply with such requirement may preclude a recovery against the company. This result may happen when the assured fails to set up the contributory negligence of the person injured.<sup>78</sup> But the assured is not required to set up a defense which is clearly untenable.<sup>79</sup>

73. Chapin v. Ocean Accident & G. Corp., 96 Neb. 213, 147 N. W. 465, 52 I. R. A. (N. S.) 227.

74. Oakland Motor Car Co. v. American Fidelity Co., 190 Mich. 74, 155 N. W. 729.

75. Haas Tobacco Co. v. American Fidelity Co., 178 N. Y. App. Div. 267, 165 N. Y. Suppl. 230.

76. Oakland Motor Car Co. v. American Fidelity Co., 190 Mich. 74, 155 N.

W. 729.

77. Haas Tobacco Co. v. American Fidelity Co., 178 N. Y. App. Div. 267, 165 N. Y. Suppl. 230.

78. Collins Exr's v. Standard Accident Ins. Co., 170 Ky. 27, 185 S. W. 112.

79. Collins Exr's v. Standard Accident Ins. Co., 170 Ky. 27, 185 S. W. 112.

**Sec. 832a. Indemnity insurance — interference with negotiations for compromise.**

An indemnity policy may forbid the interference by the insured with negotiations for compromise between the indemnity company and the injured person. But the fact that the insured tells the injured person that he was insured and would try to get a settlement for him and that a lawyer coming to see him represented the company, is not sufficient to avoid the policy for "interference."<sup>80</sup>

**Sec. 833. Indemnity insurance — necessity of trial of action.**

A provision of an indemnity policy that no action shall lie against the insurer to recover for any loss or expense to the assured under the policy, unless it shall be brought for loss or expense actually sustained "after actual trial of the issue" is satisfied where the assured refrains from settling an action against him until after a complete record of the facts relating to his liability has been made by the presentation of all of the evidence, especially where the insurer has broken his contract by refusing to defend the action brought against the assured.<sup>81</sup> When the assured settles an action before judgment, he assumes the risk in an action against the insurer of showing not only a liability covered by the policy, but the amount of the liability, and the recovery against the insurer may be limited by the loss sustained, even though the evidence may show that the settlement was for less than the liability. Hence, in an action by an assured against the insurer to recover the amount paid by the plaintiff in settlement of an action after the close of the evidence, but before judgment, it is error for the court to hold as a matter of law that the settlement is binding on the assured, without other proofs.<sup>82</sup>

80. *Hopkins v. American Fidelity Co.*, 91 Wash. 680, 158 Pac. 535.

81. *Mayor, Lane & Co. v. Commercial Casualty Ins. Co.*, 169 N. Y. App.

Div. 772, 155 N. Y. Suppl. 75.

82. *Mayor, Lane & Co. v. Commercial Casualty Ins. Co.*, 169 N. Y. App. Div. 772, 155 N. Y. Suppl. 75.

**Sec. 834. Indemnity insurance — consent of insurer to settlement.**

Where an assured settles a claim for damages without the consent of the insurance company, in violation of a provision of the policy of indemnity insurance that "the assured may settle any case at the company's expense if the company shall have previously given its consent in writing," the company is released from all liability to the assured.<sup>83</sup> But it has been held that, where the insurer fails to perform its contract duty to defend an action brought against the assured, it waives the right to the benefit of provisions precluding the assured from settling without its consent and limiting its liability to losses sustained by the assured by judgment after the trial of the issues.<sup>84</sup> Where a policy indemnifying an assured against liability for personal injuries resulting from the operation of an automobile required the insurer to defend actions brought against the assured, and prohibited the latter from assuming any liability or settling any claim without the written consent of the insurer, and after judgment had been rendered against the assured in an action which the insurer defended, the latter induced the assured to refrain from prosecuting an appeal by assurance that it would take such appeal itself, because the verdict was against the evidence and because reversible errors had been committed, the insurer by neglecting to take such appeal became liable to the assured for the amount paid by him in settling the judgment in excess of a sum paid by the

<sup>83</sup> *Kennelly v. London Guarantee & Accident Co., Ltd.*, 184 N. Y. App. Div. 1, 171 N. Y. Suppl. 423. See also, *Utterback-Gleason Co. v. Standard Accident Ins. Co.*, 193 N. Y. App. Div. 646, 184 N. Y. Suppl. 862.

**Settlement by owner.**—Where by the terms of a policy, by which defendant agreed to indemnify plaintiff up to a certain fixed amount against accidents occurring in relation to the operation of his automobile, and in the event of a suit against him to defend the same, defendant is under no duty to settle a claim, and where

during the life of the policy the plaintiff, in an action for damages brought by one injured through the operation of his automobile, settles the claim in an amount a part of which defendant refused to pay, it is not liable to plaintiff for the amount which he contributed to the settlement of the claim in excess of that paid by defendant. *Levin v. New England Casualty Co.*, 101 Misc. (N. Y.) 402, 166 N. Y. Suppl. 1055.

<sup>84</sup> *Mayor, Lane & Co. v. Commercial Casualty Ins. Co.*, 169 N. Y. App. Div. 772, 155 N. Y. Suppl. 75.

insurer, and this is true, although the amount of the judgment exceeded the amount of the policy.<sup>85</sup> In case of a collision between two vehicles, the fact that the indemnity company insuring one makes a settlement and pays a sum of money to the other, does not estop insured from maintaining an action against the other for the injuries he has sustained to his machine.<sup>86</sup>

**Sec. 835. Indemnity insurance — amount of recovery by assured.**

Under indemnity policies written according to the usual form, the insured is liable to pay to the assured the reasonable expenses incurred by the latter in defending the action brought against him by the third person.<sup>87</sup> Thus, if the owner is required to pay, or has become liable to pay, attorney fees to defend himself on the action, a reasonable fee may be charged against the insurance company.<sup>88</sup> A clause limiting the company's liability to the actual intrinsic value of the property damaged or destroyed, which should not be greater than the actual cost of the repair or replacement thereof, is not construed so as to relieve the company from liability to an assured who is compelled to pay for the depreciation in an injured vehicle, in addition to the cost of repairs.<sup>89</sup>

**Sec. 836. Indemnity insurance — evidence of insurance in action against insured.**

In an action against the owner or operator of a motor vehicle by a person injured from the operation thereof, evi-

85. *McAleenan v. Massachusetts Bonding Ins. Co.*, 173 N. Y. App. Div. 100, 159 N. Y. Suppl. 401, affirmed 219 N. Y. 563, 114 N. E. 114. See also *McAleenan v. Massachusetts Bonding & Ins. Co.*, 179 N. Y. App. Div. 34, 166 N. Y. Suppl. 185; *McAleenan v. Massachusetts Bonding & Ins. Co.*, 190 N. Y. App. Div. 657, 180 N. Y. Suppl. 287.

86. *Burham v. Williams*, 198 Mo. App. 18, 194 S. W. 751.

87. *Mayor, Lane & Co. v. Commercial Casualty Ins. Co.*, 169 N. Y. App. Div. 772, 155 N. Y. Suppl. 75.

88. *Christison v. St. Paul Fire & Marine Ins. Co.*, 138 Minn. 51, 163 N. W. 980; *Royal Indemnity Co. v. Schwartz* (Tex. Civ. App.), 172 S. W. 581.

89. *Christison v. St. Paul Fire & Marine Ins. Co.*, 138 Minn. 51, 163 N. W. 980.

dence should not be received to show that the defendant was insured against liability for the accident.<sup>90</sup> If evidence of the indemnity is brought out without objection, the court should charge the jury that they should not consider the fact in reaching their verdict.<sup>91</sup> The plaintiff's counsel should not, in the presence of the jury, offer to prove that the defendant carried indemnity insurance.<sup>92</sup> Even the misconduct of counsel in asking about the defendant's insurance, though objection to the question is sustained, may constitute error.<sup>93</sup> But the admission of such evidence is not reversible error when it is brought out by the defendant.<sup>94</sup> It may be improper for the plaintiff's attorney to ask the jury upon their qualifying questions which indicate that the defendant is insured.<sup>95</sup> The error, however, is not generally beyond cure.<sup>96</sup> And, if the plaintiff's counsel is acting in good faith, it is proper for him to state to the court that he understands an indemnity company is interested in the case and to ask that the jury be qualified on the point as to whether any of them have any interest in such company.<sup>97</sup> And certain admissions made by the defendant at the time of the accident in question may be

90. *Livingstone v. Dole*, 167 Iowa 639, 167 N. W. 639; *Akin v. Lee*, 206 N. Y. 20, 99 N. E. 85, Ann. Cas. 1914 A. 947; *Griessel v. Adeler*, 183 N. Y. App. Div. 816, 171 N. Y. Suppl. 183; *Tincknell v. Ketchman*, 78 Misc. (N. Y.) 419, 139 N. Y. Suppl. 620; *Conover v. Bloom*, (Pa.) 112 Atl. 752; *Seranton Gas & Water Co. v. Weston*, 63 Pa. Super. Ct. 570; *Bianchi v. Millar*, (Vt.) 111 Atl. 524.

91. *Blalack v. Blacksher*, 11 Ala. App. 545, 66 So. 863.

92. *Martin v. Lilly*, 188 Ind. 139, 121 N. E. 443.

93. *Tincknell v. Ketcham*, 78 Misc. (N. Y.) 419, 139 N. Y. Suppl. 620. See also *Smith v. Yellow Cab Co.*, (Wis.) 180 N. W. 125, where it was thought that the error did not require a reversal under the circumstances of that case.

94. *Ward v. Teller Reservoir & I. Co.*, 60 Colo. 47, 153 Pac. 219; *McNamara v. Leipzig*, 180 N. Y. App. Div. 515, 167 N. Y. Suppl. 981, 8 A. L. R. 480. See also *Uithoven v. Snyder*, (Mich.) 182 N. W. 80.

**On redirect examination of plaintiff.**

A judgment for a plaintiff will not necessarily be reversed because it is developed casually on his redirect examination that the defendant was insured, the inquiry in question having been directed to matters developed on his cross-examination. *Granini v. Cerini*, 100 Wash. 687, 171 Pac. 1007.

95. *Citizens Co. v. Lee*, 182 Ala. 561, 62 So. 199.

96. *Baldarachi v. Leach*, (Cal. App.) 186 Pac. 1060.

97. *Beatty v. Palmer*, 196 Ala. 67, 71 So. 422.

received, though incidentally they disclose the fact that he carried indemnity insurance.<sup>98</sup>

### **Sec. 837. Indemnity insurance — action by injured person against insurance company.**

An action cannot generally be maintained by the injured person directly against the indemnity company insuring the owner of a vehicle against liability, although the owner is insolvent and the indemnity company has defended the action against such owner.<sup>99</sup> But a statute which permits the injured person to bring an action directly against the indemnity company, is a proper exercise of legislative power, if not retroactively applicable to insurance policies already in force.<sup>1</sup> An

98. *Magee v. Vaughan*, 212 Fed. 278, 134 C. C. A. 388.

**Evidence that a defendant, in an action for negligence, is insured in a casualty company is incompetent; and it is reversible error in an action to recover for injuries to a plaintiff, who was run into by an automobile, to admit testimony that the defendant stated, in a conversation after the accident, that he was insured against such accidents.** *Akin v. Lee*, 206 N. Y. 20, 99 N. E. 85, Ann. Cas. 1914 A. 947.

**Knowledge by juror of insurance.**—The fact that a juror during a recess heard it mentioned that an insurance company was interested in the case, may authorize, but does not compel, a new trial. *Lounsbury v. McCormick*, (Mass.) 129 N. E. 598.

99. *Goodman v. Georgia, etc., Co.*, 189 Ala. 130, 66 So. 649; *Luger v. Wendell*, (Wash.) 199 Pac. 760.

1. *Lorando v. Gethro*, 228 Mass. 181, 117 N. E. 185, wherein it was said: "No constitutional right of the insurer or of the assured is violated by enabling one, who has recovered a judgment against the latter on a liability, against loss from which he is protected by contract with the insurer, to bring an action in his own name. Such a judgment creditor has a direct

interest in the performance of the undertakings in the contract of casualty insurance. It may be that the only source from which his debtor can secure money enough to pay his judgment will be from the proceeds of that insurance contract. . . . The statute is reasonable in its purpose and effect. Its obvious design is to afford to the assured of modest resources the direct benefit of his insurance. It well might be a practical impossibility for an assured who has complied with every other term of his contract and has paid all premiums demanded by the insurer, first to pay the loss and damage for which he was liable and against which he was insured. The man without capital or credit might be powerless to meet his obligation and put himself in position to recover against the insurer. The man of slender resources or doing a considerable business on small capital might be forced into bankruptcy, and get little or no benefit from the insurance for which he had paid. The persons injured by accidents, for which such classes of assured might be liable, would be in effect remediless as to practical results for the damages sustained by them. It well might be thought by the legislature a sound

important feature of such a statute is to give to the person injured a certain beneficial interest in the proceeds of that policy. It does not enlarge or modify in any respect the substantial liability created by the contract of insurance. It merely enables the person suffering the initial damages, out of which grows the loss to the assured, to acquire a lien against the loss arising under the policy, and to enforce it in his own name. When a statute is in force, giving special force and effect to a particular contract, parties who enter into such a contract are held to contemplate and assent to the force and effect attributed to it by such statute.<sup>2</sup> The statute may, however, not apply to a husband's action for injury to his wife.<sup>3</sup>

**Sec. 838. Theft insurance — conversion without intent to commit crime.**

Certain insurance companies are authorized to insure the owners of motor vehicles against loss by theft.<sup>4</sup> To recover under such a policy, it is necessary for the assured to prove that the machine in question was taken under such circum-

public policy that casualty insurance should become an effective instrumentality for both the assured and the injured, and not be a snare to the assured and a barren hope to the injured. If the legislature believed this, it reasonably might decide to frame the terms of policies of casualty insurance and to provide means for their enforcement to the end that these results might be avoided, and to declare that policies lacking these requisites should not be written, or if written should be ineffective as to these terms. When confessedly the general subject of insurance is under legislative control, there is a broad latitude of choice as to the means which may be employed to reach results thought to be desirable. The principle here declared and the decisions upon which it rests do not derogate in any degree from the right of freedom of reasonable contract and the right to acquire and possess property which are among the

essential guarantees of our Constitution."

2. *Lorando v. Gethro*, 228 Mass. 181, 117 N. E. 185.

3. *Williams v. Nelson*, 228 Mass. 191, 117 N. E. 189.

4. **Pleadings** in action on policy insuring against theft. See *Troy Automobile Exchange v. Home Ins. Co.* 102 Misc. (N. Y.) 331, 169 N. Y. Suppl. 796.

**Transfer of machine.**—When the owner sold the machine covered by the policy, and purchased a new one, a loss before the company transfers the insurance to the new car, is not covered. *Palmer v. Bull Dog Auto Ins. Co. Assoc.*, 294 Ill. 287, 128 N. E. 499.

**Conditional owner.**—See *Ballard v. Globe, etc., Ins. Co.*, (Mass.) 129 N. E. 290.

**Waiver of notice of theft.**—See *Stone v. American Mutual Auto Ins. Co.*, (Mich.) 181 N. W. 973.

stances that the taking would constitute the crime of larceny. When the taking, although unlawful and tortious, merely constitutes a trespass or civil wrong, the insurance company is not liable for its loss.<sup>5</sup> If taken under a *bona fide* claim of right, it is not a crime, and not within the protection of the insurance.<sup>6</sup> Or, if the taking of the machine is done with the *animo revertendi*, the loss is not within the policy.<sup>7</sup> Thus, where employees of a shop where the machine had been left for repainting took it for the purpose of a "joy ride," it was held that there was no criminal intent to deprive the owner of it permanently and that the car was not stolen within the intention of such a policy.<sup>8</sup> But under a policy insuring against loss or damage "by theft, robbery or pilferage" there was held to be a loss within the terms of the policy where one who borrowed the machine for a specific purpose and to go to a specific place, went beyond that place and never returned the car but abandoned it in a remote section of another State in a badly damaged condition without any notice to the owner, from which place it was not recovered for several weeks after.<sup>9</sup> The word "pilferage" in such a policy means petty larceny.<sup>10</sup>

5. *Georgia*.—Hartford Ins. Co. v. Wimbush, 12 Ga. App. 712, 78 S. E. 265; Gunn v. Globe & Rutgers F. Ins. Co. (Ga. App.), 101 S. E. 691.

*Indiana*.—Michigan Ins. Co. v. Willis, 57 Ind. App. 256, 106 N. E. 725.

*Montana*.—Valley Mercantile Co. v. St. Paul Fire & M. Ins. Co., 49 Mont. 430, 143 Pac. 559, L. R. A. 1915 B. 327.

*New York*.—Rush v. Boston Ins. Co., 88 Misc. 48, 150 N. Y. Suppl. 457.

*Washington*.—Stuht v. Maryland M. C. Ins. Co., 90 Wash. 576, 156 Pac. 557.

6. Rush v. Boston Ins. Co., 88 Misc. (N. Y.), 48, 150 N. Y. Suppl. 457.

7. Felgar v. Home Ins. Co., 207 Ill. App. 492; Stuht v. Maryland M. C. Ins. Co., 90 Wash. 576, 156 Pac. 557.

8. Valley Mercantile Co. v. St. Paul Fire & M. Ins. Co., 49 Mont. 430, 143

Pac. 559, L. R. A. 1915 B. 327.

9. Federal Ins. Co. v. Hiter, 164 Ky. 743, 176 S. W. 210.

10. Stuht v. Maryland M. C. Ins. Co., 90 Wash. 576, 156 Pac. 557. "The words 'theft,' 'robbery' and 'pilferage' are well understood. They were used in this policy in their common and ordinary meaning. If the automobile was stolen, or if it was robbed or pilfered of any of its accessories, or of personal effects left therein, to the amount of \$25, then the insurance company would be liable." Stuht v. Maryland M. C. Ins. Co., 90 Wash. 576, 156 Pac. 557. "Pilfering" has but one meaning, and is some form of stealing. Felgar v. Home Ins. Co., 207 Ill. App. 492.



**Sec. 839. Theft insurance — larceny by trick or device.**

A policy insuring the owner of an automobile against theft, robbery or pilferage by any person or persons other than those in the employment, service or household of the insured, has been held not to cover a common-law larceny of the automobile by trick or device. Hence, the insured cannot recover on such policy where he merely alleges and proves that he delivered the automobile to third persons for the purpose of sale and that they, through a conspiracy to steal automobiles, converted the car to their own use and stole the same. The alleged larceny was under the form and guise of a business transaction conducted by the insured himself and was not within the terms of the policy.<sup>11</sup>

**Sec. 840. Theft insurance — by persons not in service of owner.**

Provisions in policies insuring against theft generally provide that the company shall not be liable when the property is stolen by one "in the employment, service or household of the assured." This may preclude a recovery when the machine is stolen by the owner's nephew, who was visiting the owner.<sup>12</sup> But a theft by an employee of a public garage keeper at whose garage the car is kept, has been held to be a loss within the policy.<sup>13</sup> Where the garage in which plaintiff's automobile was cared for, was under the control of a corporation of which plaintiff was president, evidence that the caretaker of the garage was implicated in the theft of the auto-

11. *DeLafield v. London & Lancashire F. Ins. Co.*, 177 N. Y. App. Div. 477, 164 N. Y. Suppl. 221.

12. *Rydstrom v. Queen Ins. Co. of America* (Md.), 112 Atl. 586, wherein it was said: "The policy, as the language clearly indicates and means, was to insure against theft, robbery, etc., 'except by a person or persons in the assured's household,' and if the theft was committed by a person or persons in the assured's household, the company would not be liable. The object and purpose of an exception like the

one we are here dealing with in this policy was to guard the company against liability for such thefts as we have in this case, and to prevent fraud and collusion by and between the assured and persons in a household or in the assured's services or employment."

13. *Schmid v. Heath*, 173 Ill. App. 649.

14. *Callahan v. London & Lancashire Fire Ins. Co.*, 98 Misc. (N. Y.) 589, 163 N. Y. Suppl. 322

mobile, which was thereafter and while in his possession wrecked in a collision, does not establish that the damage was done by one in the employment or service of plaintiff within the meaning of such a policy.<sup>14</sup>

**Sec. 841. Theft insurance — stealing proceeds of sale of automobile.**

Where the owner of an automobile transferred possession of an automobile to another for the purpose of sale, and the latter sold it and appropriated the proceeds to his own use, it was held that the insurance company was not liable to the former owner.<sup>15</sup>

**Sec. 842. Theft insurance — sufficiency of proof of theft.**

The burden is upon the assured of showing that the loss of the automobile was occasioned through the larceny of some person other than those persons in his employment, service, household; but the necessary facts can be shown by circumstantial evidence.<sup>16</sup> It may be a question for the jury, or the facts may be uncontroverted so that no jury question is presented.<sup>17</sup> The plaintiff is not required to prove his claim beyond a reasonable doubt, as would be required in a criminal prosecution for the theft of the machine.<sup>18</sup> Where the plaintiff, in an action upon a policy insuring his automobile against theft, proves that, after he had driven it aboard a ferryboat close up to the front, put on the emergency brake and stopped

15. *Siegel v. Union Assur. Soc.*, 153 N. Y. Suppl. 661, wherein the court said, *per* Finelite, J.: "All dominion over said car had been transferred to R. W. Lewis, Incorporated, for the moment, and the said R. W. Lewis, Incorporated, having disposed of the automobile the same day without awaiting further instructions from the plaintiff on the following morning and appropriating the proceeds thereof to its own use and benefit, the plaintiff putting the automobile in possession of a person who has disposed of it and appropriated the proceeds, I fail to see,

nor can the law hold, that the defendant under its policy is liable for a theft, larceny, or pilferage. The plaintiff failing to submit proper proof under the policy, no liability exists, and the court was justified in dismissing the complaint."

16. *Kansas City Regal Auto Co. v. Old Colony Ins. Co.*, 187 Mo. App. 514, 174 S. W. 153.

17. *Stone v. American Mutual Auto Ins. Co. (Mich.)*, 181 N. W. 973.

18. *Kansas City Regal Auto Co. v. Old Colony Ins. Co.*, 187 Mo. App. 514, 174 S. W. 153.

the engine, he went into the cabin before the boat started and a few minutes later when the boat was on the river came out and the machine was gone, the chain at the rear of the boat lying loose on the deck and the gate at the rear half open, he makes out a *prima facie* case and is entitled to recovery.<sup>19</sup>

### Sec. 843. Theft insurance — amount of damage.

A policy of the character under discussion is construed to cover all damage resulting or which, in the contemplation of the parties, might result, from theft, which would include damages caused by reckless driving or handling of the car and storage of the same, or any use which destroyed its value in whole or in part. If, following the theft, the car should be recovered intact, in the same condition it was before the theft, plaintiff's only damage would be expenses incurred in recovering the car and, perhaps, in addition, the value of its use during the period between the theft and the recovery of the car. If the car were damaged or destroyed while in the custody of the thief, plaintiff's damage would include also the diminution or loss of value of the car thus stolen.<sup>20</sup> If, after being stolen, it is wrecked and totally destroyed, the insurer is liable for its value.<sup>21</sup> These policies may contain a provision for the arbitration of differences over the value of the property. A provision in a policy of insurance, that if there is a difference as to the value of the property no right of action should exist until after an appraisal, is waived by proof that plaintiff, during an endeavor to adjust the loss, was told by defendant's authorized representative that they "would not do a damn thing" as is also a provision of the policy which required sixty days to elapse, after notice of loss, before suit is brought.<sup>22</sup> The recovery of the property may affect the sum

19. *Chepakoff v. National Ben Franklin Fire Ins. Co. of Pittsburgh*, 97 Misc. (N. Y.) 330, 161 N. Y. Suppl. 283.

Larceny by discharged employee.— See *Pask v. London & Lancashire Fire Ins. Co.*, 211 Ill. App. 27.

20. *Callahan v. London & Lanca-*

*shire Fire Ins. Co.*, 98 Misc. (N. Y.) 589, 163 N. Y. Suppl. 322.

21. *Callahan v. London & Lancashire Fire Ins. Co.*, 98 Misc. (N. Y.) 589, 163 N. Y. Suppl. 322.

22. *Callahan v. London & Lancashire Fire Ins. Co.*, 98 Misc. (N. Y.) 589, 163 N. Y. Suppl. 322.

to which the insured is entitled. Under some policies, if the machine is not recovered within sixty days after the loss, the insured can collect the entire insurance moneys, although the machine is recovered before the institution of a suit therefor.<sup>23</sup>

#### **Sec. 844. Theft insurance — subrogation of insurer.**

The insurance company, after payment of loss under a policy against theft, is entitled to be subrogated to the rights of the owner. That is, he is entitled to recover damages of the wrongdoer. Moreover, where the car was in the hands of bailee at the time of the theft, if the insurance company can show negligence on the part of such bailee which contributed to the theft, he may recover of such bailee.<sup>24</sup>

#### **Sec. 845 — Accident insurance.**

An injury resulting from slipping and falling while cranking an automobile is "accidental" within the meaning of an accident policy.<sup>25</sup> And, if one slips while pulling a tire off a machine, the resulting injury may be deemed "accidental."<sup>26</sup> Where an accident policy provides for a double indemnity "if the bodily injury is sustained by the assured . . . while in or on a public conveyance . . . provided by a common carrier for passenger service" one who is injured while riding in an automobile which he had hired from a liveryman and which was operated by a driver furnished by the latter, who served any applicant, is held to be riding in a public conveyance as that term is used in the foregoing clause.<sup>27</sup> Similarly, indemnity can be recovered if one is injured while riding in a taxicab, for a taxicab is a common car-

23. *O'Connor v. Maryland Motorcar Ins. Co.*, 187 Ill. 204, 122 N. E. 489, 3 A. L. R. 787. See also *O'Connor v. Maryland Motorcar Co.*, 211 Ill. App. 549.

24. *Stevens v. Stewart - Warner Speedometer Corp.*, 223 Mass. 44, 111 N. E. 771.

25. *Preferred Accident Ins. Co. v. Patterson*, 213 Fed. 595, 130 C. C. A. 175.

26. *Lickleider v. Iowa State Traveling Men's Assoc.*, 184 Iowa 423, 168 N. W. 884.

27. *Fidelity & Casualty Co. v. Joiner* (Tex. Civ. App.), 178 S. W. 806.

rier.<sup>28</sup> And a railroad attorney, while riding in an automobile constructed so as to run on the rails, may be considered as a passenger in a public conveyance.<sup>29</sup>

**29.** U. S. Casualty Co. v. Elleson, 65 Colo. 252, 176 Pac. 279.

**28.** Anderson v. Fidelity & Casualty Co., 228 N. Y. 475, 127 N. E. 584, 9 A. L. R. 1544, *affirming*, 183 App. Div. 170, 170 N. Y. Suppl. 431; Primrose v.

Casualty Co., 232 Pa. 210, 81 Atl. 212, 37 L. R. A. (N. S.) 618. See also Turner v. Fidelity & Casualty Co., 274 Mo. 1078, 202 S. W. 1078. And see section 132.

## CHAPTER XXX.

## SALES OF MOTOR VEHICLES.

## SECTION 846. Scope of chapter.

- 847. Capacity of parties to sale — infants.
- 848. Capacity of parties to sale — agents.
- 849. Capacity of parties to sale — municipal corporations.
- 850. Capacity of parties to sale — private corporations.
- 851. Delivery.
- 852. Validity of sale — violation of motor vehicle laws.
- 853. Validity of sale — machine to be used for unlawful purpose.
- 854. Validity of sale — statute of frauds.
- 855. Validity of sale — seller not owning machine.
- 856. Fraud and deceit.
- 857. Warranties — in general.
- 858. Warranties — *carcat emptor*.
- 859. Warranties — “seller’s talk.”
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- 861. Warranties — guaranty of satisfaction.
- 862. Warranties — warranty of future service.
- 863. Warranties — implied warranty of fitness.
- 864. Warranties — effect of express contract on implied warranty.
- 865. Warranties — damages.
- 866. Warranties — parol evidence to show warranty.
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- 868. Warranties — statements of agent.
- 869. Remedies of seller.
- 870. Remedies of purchaser — in general.
- 871. Remedies of purchaser — rescission of contract.
- 872. Remedies of purchaser — recovery of purchase price.
- 873. Tax on sales.
- 874. Tax on dealers.

## Sec. 846. Scope of chapter.

This chapter is intended to cover the law of the sales of motor vehicles, their parts, and accessories. It includes such topics as the capacity of parties to buy and sell automobiles, warranties and their breach, and the rights of the parties to a contract of sale. In another chapter is discussed the questions which arise out of claims against a vehicle in the nature of liens or contracts of conditional sale.<sup>1</sup> So, the questions as to whether the purchaser or seller of a vehicle is liable for the injuries occasioned by the negligent handling of the machine to another traveler.<sup>2</sup>

1. Chapter XXXI.

2. See sections 647, 648, 665.

**Sec. 847. Capacity of parties to sale — infants.**

The purchase by an infant of a motor vehicle, is voidable. That is, within a reasonable time after reaching his majority he may disaffirm the contract and recover what he has paid or parted with pursuant to such contract, if he return what he received.<sup>3</sup> The infant has the right of disaffirmance although the contract of sale states that he is at least twenty-one years of age.<sup>4</sup> And it has been held that depreciation in the value of the property returned cannot be shown to defeat or reduce the recovery. On disaffirming the contract and returning the article purchased during infancy, the money paid thereon may be recovered, though the value of its use while the infant had it may exceed the payment made upon it.<sup>5</sup> The infant should account for any damage to the car that was caused by his tortious acts, but he cannot be compelled to account for damages caused by his ignorance or unskillfulness in operating the car.<sup>6</sup> And an infant who sells a vehicle may rescind the same and recover the property.<sup>7</sup> It is the privilege of the minor only to disaffirm the sale or contract, and, until he does so, the other party is bound by it. The minor, when he becomes of age, may regard the contract as beneficial, and choose to affirm it. If, however, he elects to disaffirm it, he annuls it on both sides, *ab initio*, and the parties revert to the same situation as if the contract had not been made. Until some notice is given by the minor of his purpose to annul the contract, or he does some act significant of that intention, the other party is bound, and cannot reclaim the property nor treat the contract as void or voidable.<sup>8</sup> If a guardian uses the trust funds to purchase an automobile for his personal use and the seller has knowledge of the wrongful use of the funds, both the guardian and

3. *Raymond v. General Motoreycle Co.*, 230 Mass. 54, 119 N. E. 359; *Reynolds v. Garber-Buick Co.*, 183 Mich. 157, 149 N. W. 985; *Stanhope v. Shambow*, 54 Mont. 360, 170 Pac. 752; *Wooldridge v. Lavoie* (N. H.), 104 Atl. 346.

4. *Raymond v. General Motoreycle Co.*, 230 Mass. 54, 119 N. E. 359.

5. *Reynolds v. Garber-Buick Co.*, 183 Mich. 157, 149 N. W. 985.

6. *Wooldridge v. Lavoie* (N. H.), 104 Atl. 346.

7. *Smott v. Ryan*, 187 Ala. 396, 65 So. 828.

8. *Smott v. Ryan*, 187 Ala. 396, 65 So. 828.

the seller are liable for a conversion of the funds; and the surety on the guardian's bond may be subrogated and may maintain an action against the seller therefor.<sup>9</sup>

### Sec. 848. Capacity of parties to sale — agents.

One dealing with an agent is bound to be on his guard as to the extent of the agent's authority.<sup>10</sup> The mere fact that one has possession of an automobile and claims to have the right to sell it, does not give a good title thereto as against the rightful owner who has given no authority to sell it.<sup>11</sup> An agent having power to make a sale of a vehicle is deemed to have implied authority from his principal to make such warranties in respect thereto as the law would imply had the sale been made by the principal personally, and in addition has implied authority to make in the name of the principal such warranties of the quality and condition of the property as are usually and customarily made in like sales of similar property at the time and place.<sup>12</sup> If a selling agent represents that a second hand car is a new machine, the principal may be liable to the purchaser.<sup>13</sup> It is well settled that neither the fact of agency nor the extent of his authority can be proved by the declarations of the alleged agent; but when an agent makes a contract or does any act representing his principal, his declarations made at the time explanatory of the act are in some jurisdictions admissible in evidence on behalf of either party.<sup>14</sup> The original absence of authority in an agent may be cured by a subsequent ratification of his acts by the prin-

9. *American Surety Co. v. Vaun*, 135 Ark. 291, 205 S. W. 646.

10. *Hutchinson v. Scatt* (Cal. App.), 169 Pac. 415; *Canales v. Earl*, N. Y. Law Journal, Jan. 21, 1918; *Holmes v. Tyner* (Tex. Civ. App.), 179 S. W. 887; *Piper v. Oakland Motor Co.* (Vt.), 109 Atl. 911. See also *Hoyt v. Schillo, etc., Co.*, 185 Ill. App. 628.

An agent having possession of an automobile for sale cannot, without dissolving the agency, exercise adverse powers to the agency. *Watson v. Herman*, 118 Miss. 264, 79 So. 92.

11. *Pierce v. Fioretti*, 140 Ark. 306, 215 S. W. 646; *Stults v. Miltenberger*, 176 Ind. 561, 96 N. E. 581.

12. *Nixon Mining Drill Co. v. Burk*, 132 Tenn. 481, 178 S. W. 1116. See also *International Harvester Co. v. Lawyer* 56 Okla. 207, 155 Pac. 617; *Farnham v. Akron Tire Co.*, 98 Wash. 484, 167 Pac. 1081.

13. *Antieich v. Motor Car Inn Garage* (Miss.), 87 So. 279.

14. *Western Investment & Land Co. v. First Nat. Bank*, 23 Colo. App. 143, 128 Pac. 476.



incipal, but the ratification will not take place until the principal is fully advised of the agent's transactions.<sup>15</sup> Agency, in some cases, is a question of fact for the jury.<sup>16</sup>

**Sec. 849. Capacity of parties to sale — municipal corporations.**

Municipal corporations are generally allowed to purchase motor vehicles for the use of various departments of the municipal government.<sup>17</sup> Thus, the power to purchase and use motor vehicles for police and fire purposes is unquestioned. And an automobile may be purchased for the use of those officials charged with the maintenance of the public highways.<sup>18</sup> Thus, in one case justifying the purchase of an automobile for use by a body charged with the superintendence of the public highways, it was said: "With the more recent demands for better roads and more secure bridges and ferries in all sections of the country—in the rural or country districts, and often at points remote from the county site or market places, as well as in urban localities—greater engineering skill and improved machinery and facilities are necessary, in the construction and maintenance of these public agencies. If a board of revenue or court of county commissioners may employ skilled architects to make plans for county ferries, bridges, and buildings, it may provide for like superintendence and inspection. So also, if the necessary material, equipment, and labor, for the proper construction and maintenance of the public roads, bridges, and ferries may be purchased or engaged, and the services of a competent engineer or inspector are required to construct or supervise such public improvements, there can be no doubt of the right to contract therefor. And if the right exists to contract for this in-

15. *Hutchinson v. Seatt.* 35 Cal. App. 171, 169 Pac. 415.

16. *Denby Motor Truck Co. v. Mears* (Tex. Civ. App.), 229 S. W. 994.

**Ratification.**—A father may ratify the unauthorized act of his son in purchasing an automobile, so that he will become liable for the purchase price. *Dillon v. Patterson*, 22 Ga. App. 209, 95 S. E. 733.

17. *Vale v. Boyle*, 179 Cal. 180, 175 Pac. 787; *Burns v. City of Nashville*, 142 Tenn. 541, 221 S. W. 828.

18. *Ensler Motor Co. v. O'Rear*, 196 Ala. 481, 71 So. 704; *Hollis v. Weisinger*, 142 Ky. 129, 134 S. W. 176; *Porter v. Fletcher*, 153 N. Y. App. Div. 470, 138 N. Y. Suppl. 557. Compare *Miles Auto Co. v. Dorsey*, 163 Ky. 692, 174 S. W. 502.

spection and supervision, then the right to maintain, and to transport such inspectors from one portion of the county to another, in the discharge of this public service, cannot be doubted.<sup>19</sup>

### **Sec. 850. Capacity of parties to sale — private corporations.**

An automobile company will be bound by the representations of its general sales manager made in the sale of a machine.<sup>20</sup> And an officer of a corporation, such as the secretary, for example, may generally purchase an automobile in the name of the company for use in its business.<sup>21</sup> A person occupying the offices of president and general manager of a corporation may buy a motor vehicle in its behalf.<sup>22</sup>

### **Sec. 851. Delivery.**

The machine delivered by the seller of a motor vehicle must correspond with one ordered by the purchaser. Where the contract is for an automobile "fully equipped as per catalogue," and the catalogue shows the machine with a particular equipment of tires and rims, the car tendered must be similarly equipped, although the printed specifications there do

19. *Ensley Motor Co. v. O'Rear*, 196 Ala. 481, 71 So. 704.

20. *Joslyn v. Cadillac Automobile Co.*, 177 Fed. 863, 101 C. C. A. 77.

21. *Meister & Sons Co. v. Wood & Tatum Co.*, 26 Cal. App. 584, 147 Pac. 981.

22. *Western Investment & Land Co. v. First National Bank* 23 Colo. App. 143, 128 Pac. 476, wherein it was said: "The public would be absolutely without protection in dealing with corporations if it were not for the rule that their executive and managing officers, or agents, by whatever name called, possess implied power to bind the corporation by acts and contracts done and made in the conduct of ordinary business; and, such being the law, an innocent stranger dealing with a corporation through such an agent will not be affected by any limitation of

the agent's authority, contained in the by-laws and of which he has no knowledge. And the appointment of such general manager carries with it an implication of authority on the part of such agent to represent himself as possessing the full powers usually ascribed to such an office. . . . The foregoing principles apply with peculiar force when, as in the instant case, the offices of president and general manager unite in one man, so that he becomes, in effect, the corporation itself so far as the public is concerned. It has been repeatedly held in this State that a manager of a private corporation in such business as the sale of lumber at retail had no authority, by virtue of his employment merely, to borrow money on the credit of his company, or to give its note therefore."

not require such equipment, as the cuts in the catalogue are a part thereof as much as the specifications.<sup>23</sup> Where under a contract for the sale of machines to be delivered at specified dates, and the seller was not obliged to deliver until the buyer indicated the particular type of body to be placed on the cars and the color they were to be painted, the buyer cannot hold the seller for a breach of the contract where he has failed to specify such particulars as he desired.<sup>24</sup> Where a contract for the sale of an automobile provides for delivery on or before a certain date, and that in the event of delivery not being made within a specified time after such date, the purchaser might cancel the order and demand a return of the deposit paid, the purchaser by calling in the seller and making inquiries concerning possible delivery several months after the date fixed, waives his right to a delivery on the specified date.<sup>25</sup> If the purchaser extends the time of delivery, he cannot before the expiration of the extended period rescind the sale for failure of delivery.<sup>26</sup> In some cases delivery is essential to the passing of title to a vehicle sold; in other cases delivery is not necessary; and whether the title passes in a given case is to be determined from the facts of the particular transaction.<sup>27</sup> Where it is the intention of the parties that title to the machine shall not pass until inspection and acceptance and payment of the purchase price, the title does not pass until such payment.<sup>28</sup> Ordinarily, the purchaser of a machine is to be allowed an opportunity of inspecting it before title passes, and a delivery which affords no opportunity for inspection may be insufficient to pass title.<sup>29</sup> Where title

23. *John Hemwall Automobile Co. v. Michigan Avenue Trust Co.*, 195 Ill. App. 407.

24. *Murphy v. Moon Motor Car Co.*, 147 N. Y. App. Div. 91, 131 N. Y. Suppl. 873.

25. *Griggs v. Renault Selling Branch, Inc.*, 179 N. Y. App. Div. 845, 167 N. Y. Suppl. 355.

**Rescission of contract on account of delayed delivery.**—*Boland v. Smith* (Cal. App.), 190 Pac. 825.

26. *Albright v. Stegeman Motor Car*

*Co.*, 168 Wis. 537, 170 N. W. 951.

27. *Kentucky Motor Car Co. v. Darenkamp*, 162 Ky. 219, 172 S. W. 524; *Harshman v. Smith* (N. Dak.), 176 N. W. 3. See also, *Minnick v. Denver Motor Co.* (Tex. Civ. App.), 227 S. W. 365.

28. *Half Co. v. Jones* (Tex. Civ. App.), 169 S. W. 906.

29. *Lange v. Interstate Sales Co.* (Tex. Civ. App.), 166 S. W. 900.

**When title passes.**—When goods are transferred by one person to another

has passed, the purchaser may recover damages of the railroad for its delay in delivering the machine or for damages occasioned thereto.<sup>30</sup>

### **Sec. 852. Validity of sale — violation of motor vehicle laws.**

Under a statute providing that unless a motor vehicle is registered with the State officials within ten days after its sale, the sale is invalid, a contingent condition subsequent is attached to every sale, so that the agreement becomes abortive if the new owner does not properly register the machine. The sale in such a case being invalid, the law leaves the parties where it found them, and the former owner can replevin the machine or recover its value, but he cannot recover on a note given for its purchase price.<sup>31</sup> In some states it is required as a preventative of theft that the seller of a second-hand machine cannot offer it for sale without having in his physical possession the tax collector's receipt for the license fee.<sup>32</sup>

Modern statutes, in some states, require that upon the sale of a used machine, it shall have thereon the manufacturer's serial number, and that the original bill of sale shall be assigned to the purchaser. Such a regulation is constitutional.<sup>33</sup>

### **Sec. 853. Validity of sale — machine to be used for unlawful purpose.**

It has been held that the fact that the manager of a newspaper purchasing an automobile intended to give it away in

for sale and disposition by the latter, the question whether the relation of the parties is that of principal and agent, or of vendor and vendee, is determined by the nature of the transaction, and not by the name which they give to it. If in such case the transferee upon delivery to him acquires absolute dominion over the goods, with the right to sell and dispose of them at such prices and upon such terms as he shall see fit and becomes bound to pay a stipulated sum for them, either at a specified time or upon the happening of any future event, as, for instance, when he shall have sold them, he becomes the pur-

chaser of the same and the title thereto at once passes to him. *Fulton Motor Truck Co. v. Gordon, etc., Co.* (Neb.), 181 N. W. 162.

30. *Patterson v. Chicago, etc., R. Co.*, 95 Minn. 57, 103 N. W. 621; *Armstrong v. Chicago, etc., Ry. Co.*, 35 S. Dak. 398, 152 N. W. 696; *Houston, etc., Ry. Co. v. Iverson* (Tex. Civ. App.), 196 S. W. 908.

31. *Swank v. Moison*, 85 Oreg. 662, 166 Pac. 962.

32. *Overland Sales Co. v. Pierce* (Tex. Civ. App.) 225 S. W. 284.

33. *Stein v. Scarpa* (N. J.), 114 Atl. 245.

a popularity contest conducted by the paper and that such contest was possibly a lottery, did not affect the validity of the contract between the newspaper and the former owner.<sup>34</sup>

#### **Sec. 854. Validity of sale — statute of frauds.**

Statutes of frauds have been enacted in every state requiring that contracts for the sale of personal property over a certain value to be in writing signed by the party sought to be bound by the contract, unless a part of the purchase price is paid or a part of the property is delivered. The exact phraseology differs in some of the States. The value of motor vehicles generally exceeds the prescribed value so that executory contracts for the sale of such machines are usually within the terms of the statute.<sup>35</sup> But, according to the general practice of dealers, a part of the purchase price is required at the time of the sale, and hence the statute is satisfied.<sup>36</sup> A completed contract is established when it appears that a party signed a blank order for a particular machine and gave a check for a substantial part of the purchase price, although it was understood that he was to send another check for the same amount in place of the check given, the substitution being to enable him to furnish a check properly numbered out of his own check book.<sup>37</sup> The clause of the statute requiring agreements to answer for the debt, etc., of another to be in writing does not extend to an agreement whereby two persons become joint promisors and co-debtors of the seller; and, hence when a machine is sold to a son, but the father jointly promises with the son to pay the purchase price, the father may be liable though the agreement is not reduced to writing.<sup>38</sup>

#### **Sec. 855. Validity of sale — seller not owning machine.**

The fact that a dealer or other person agreeing to sell a motor vehicle is not an owner of one, does not necessarily in-

34. *Watkins v. Curry*, 103 Ark. 414, 417, 144 N. W. 887.  
147 S. W. 43.

35. *Poplin v. Brown*, 200 Mo. App. 255, 205 S. W. 411.

37. *American Auto Co. v. Perkins*, 83 Conn. 520, 77 Atl. 954.

36. *Meyer v. Shapton*, 178 Mich.

38. *Bryant v. Panter* (Oreg.), 178 Pac. 989.

validate the contract. In case even of the non-existence of a thing which is the subject of an executory contract of sale, the agreement may be enforceable, and it becomes the duty of the vendor to produce or acquire it.<sup>39</sup> Where the owner of a motor vehicle stands by and permits another to sell the machine without objection, the owner will generally be estopped to dispute the title of the purchaser. But such estoppel does not arise unless the purchaser by his reliance on the conduct of the parties suffered substantial loss or altered his condition for the worse.<sup>40</sup> In some States one who procures an automobile by fraudulent purchase cannot convey a good title to a third person as against the original owner.<sup>41</sup> In other States, the third person, if a purchaser in good faith and for value, acquires a good title.<sup>42</sup>

### Sec. 856. Fraud and deceit.

If false representations of material facts are made in the sale or purchase of a motor vehicle, the innocent party may be entitled to recover damages on the theory of fraud or deceit.<sup>43</sup> Thus, a false representation as to the age or model or length of time a motor vehicle has been in use, is actionable.<sup>44</sup>

39. *Meyer v. Shapton*, 178 Mich. 417, 144 N. W. 887.

40. *Martin v. Brown*, 199 Ala. 250, 74 So. 241.

41. *Knapp v. Lyman* (Cal. App.), 186 Pac. 385.

42. *Patterson v. Indiana Investment, etc., Co.* (Ind. App.), 131 N. E. 19; *Linn v. Reid* (Wash.), 196 Pac. 13.

43. *Luckenback v. Smith*, 14 Cal. App. 139, 111 Pac. 266; *Checkly v. Joseph Lay Co.*, 171 Ill. App. 252; *Jones v. Magoon*, 119 Minn. 434, 138 N. W. 686; *Darby v. Weber Implement Co.* (Mo. App.), 208 S. W. 116. See also *Fleming v. Gerlinger Motor Car Co.*, 86 Oreg. 195, 168 Pac. 289. "To maintain his right to diminish the stipulated price of the car by the amount of damages he sustained in consequence of the fraud, it devolved upon defendant to show: First, that false representations of material facts

were made to him; second, that he believed them to be true; third, that his reliance on them was an act of ordinary prudence; and, fourth, that they influenced his action. If any of these elements is unsustained by proof, the whole defense must fail." *Morbrose Investment Co. v. Flick*, 187 Mo. App. 528, 174 S. W. 189.

**Conveyance in fraud of creditors.**—*Prickett v. Peterson* (N. Dak.), 179 N. W. 718.

44. *Luckenback v. Smith*, 14 Cal. App. 139, 111 Pac. 266; *Munn v. Anthony* (Cal. App.), 171 Pac. 1082; *Knight v. Bentel* (Cal. App.), 179 Pac. 406; *Conroy v. Coughlon Auto Co.*, 181 Iowa 916, 165 N. W. 200; *Ross v. Reynolds*, 112 Me. 223, 91 Atl. 952; *Avery Co. v. Staples Mercantile Co.* (Tex. Civ. App.), 183 S. W. 43; *Great Western Motors, Inc., v. Hibbard* (Wash.), 192 Pac. 958.

The sale of a used car as a new one furnishes ground for legal relief to the purchaser.<sup>45</sup> A representation that a motor vehicle is in good running condition, may be a statement of a fact or an expression of opinion, according to the understanding of the parties.<sup>46</sup> Where a purchaser contracts for a new motor vehicle in good condition, and the one delivered is not such and the seller knows the condition of the machine at the time he receives the consideration from the purchaser, the purchaser may rescind the sale and recover the purchase money,<sup>47</sup> or recover damages.<sup>48</sup> And a misrepresentation as to the horse power of the machine may be ground for affording the purchaser relief.<sup>49</sup> And, too, where a prospective purchaser is led to believe that a third person desires to purchase the machine in question, there may be a charge of fraud.<sup>50</sup> The rule of *caveat emptor* imposes the duty on the purchaser of giving the machine a reasonable inspection, and he cannot rely on the statements of the vendor as to obvious defects, but as to hidden defects he may rely on the representations of the vendor.<sup>51</sup> Thus, a purchaser may rely on a statement that

45. *Antieich v. Motor Car Inn Garage* (Miss.), 87 So. 279.

46. *Ross v. Reynolds*, 112 Me. 223, 91 Atl. 952.

47. *Taylor v. First Nat. Bank*, 25 Wyo. 204, 167 Pac. 707.

48. *Great Western Motors, Inc., v. Hibbard* (Wash.), 192 Pac. 958.

49. *Joslyn v. Cadillac Automobile Co.*, 177 Fed. 863, 101 C. C. A. 77; *Half v. Jones* (Tex. Civ. App.), 169 S. W. 906.

50. *Kanaman v. Hubbard* (Tex. Civ. App.), 160 S. W. 304.

51. *Morbrose Investment Co. v. Flick*, 187 Mo. App. 528, 174 S. W. 189. "The rule of *caveat emptor* imposed on defendant, who had an opportunity of inspecting the car before buying it, the duty of making a reasonable examination, and, as to those defects which would have been discoverable to one in his situation who observed reasonable care, he cannot complain of the false representations of

soundness. Where a vendee, by neglect and indifference to his own interest, permits himself to be overreached, the law affords him no redress, because of his own conduct is blameworthy. If he has the opportunity, he must investigate; if the article is before him and its defects are apparent, he may not rely on the statement of the vendor that the article is sound, but must look for himself. If he can read, he must read the contract of sale before its execution, and may not take the vendor's word as to its contents. In short, the vendee must make reasonable use of opportunity, and his failure to do this leaves him remediless, no matter what the conduct of the vendor may be. *Caveat emptor* does not apply to hidden defects which are not open to discovery by a vendee who exercises reasonable care in the examination and testing of the subject matter of the negotiation. As to such defects he is entitled to rely upon

the car has been rebuilt, but not on a statement as to the exterior of the car, such as the painting, etc.<sup>52</sup> The purchaser of the vehicle may be the party who is guilty of fraud, as where he makes false statements as to the consideration which he is giving for the machine, and, in such a case the seller may recover of the buyer the difference between the value of the vehicle and of the property taken in exchange therefor.<sup>53</sup> In an action for deceit, it is generally necessary for the complaining party to show that the representations were false to the knowledge of the opposing party; but in an action for the rescission of the contract, it is sufficient if it is shown that the representations were in fact false and that he had a right to rely on them and did so rely, and was thereby deceived into entering into the contract.<sup>54</sup> To entitle one to a rescission of the sale, however, the misrepresentation must be one which worked damage to the complaining party.<sup>55</sup> When a party seeks to recover damages for fraud, he must generally show that the fraudulent representations results in a pecuniary injury to him; but, where the fraud is relied upon as a defense to the enforcement of an executory contract, it is sometimes held that if the false representations relate to a material fact the law implies that the defrauded party has suffered an injury sufficient to defeat a recovery.<sup>56</sup> The fact that the bill of sale for the automobile states that the instrument contains the entire agreement between the parties, and that no representations, warranties, or conditions, other than those appearing in the bill of sale, shall be binding on the parties, does not preclude the purchaser from introducing parol evidence to show fraudulent representations made by

representations of soundness made by the vendor, and the latter will not be heard to say that the vendee should not have believed him." *Morbrose Investment Co. v. Flick*, 187 Mo. App. 528, 174 S. W. 189.

52. *Morbrose Investment Co. v. Flick*, 187 Mo. App. 528, 174 S. W. 189.

53. *Van Vliet-Fletcher Auto Co. v. Crowell*, 171 Iowa, 64, 149 N. W. 861;

*Hinckley v. Starrett*, 91 Kans. 181, 137 Pac. 18.

54. *Half Co. v. Jones* (Tex. Civ. App.), 169 S. W. 906; *Smith v. Columbus Buggy Co.*, 40 Utah, 580, 123 Pac. 580. See also *Checkly v. Joseph Lay Co.*, 171 Ill. App. 252.

55. *Alamo Auto Sales Co. v. Herms* (Tex. Civ. App.), 184 S. W. 740.

56. *Case Threshing Machine Co. v. Webb* (Tex. Civ. App.), 181 S. W. 853.



the vendor.<sup>57</sup> When the purchaser has been fraudulently imposed upon by the vendor of an automobile, but nevertheless makes a payment upon and gives a renewal note for the consideration after discovery of the fraud, he thereby waives the fraud and affirms the contract.<sup>58</sup>

### Sec. 857. Warranties — in general.

Warranties in the sale of chattels are divided into two classes, express warranties and implied warranties. To create an express warranty, it is not necessary that the word "warrant" be used; nor is any other precise form of expression required by the law.<sup>59</sup> Any affirmation of the quality or condition of the thing sold, not uttered as a matter of opinion or belief, made by the seller at the time of the sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty.<sup>60</sup> Whether a statement is a warranty may be a matter of intention. The test for determining the question is said to be whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion, or his judgment, upon a matter of which the vendor has no special knowl-

57. *Tiffany v. Times Square Auto Co.*, 168 Mo. App. 729, 154 S. W. 865; *Case Threshing Machine Co. v. Webb* (Tex. Civ. App.), 181 S. W. 853; *Avery Co. v. Staples Mercantile Co.* (Tex. Civ. App.), 183 S. W. 43. But see *Munn v. Anthony* (Cal. App.), 171 Pac. 1082.

58. *Adams v. Overland Automobile Co.* (Tex. Civ. App.), 202 S. W. 207.

59. *Denver Suburban Homes & Water v. Frigate* (Colo.), 168 Pac. 33; *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617. "No special form of words is necessary to create a warranty. An averment at the time of the sale is a warranty, provided the jury find from the evidence on the trial it was so intended; and such intention may be reached as an inference or deduction from the facts and

circumstances in connection with all the evidence on the trial, and when such deduction is made, if it rests upon proper and sufficient evidence, it becomes proof as a fact of warranty." *Denver Suburban Homes & Water v. Frigate*, 163 Colo. 423, 168 Pac. 33.

**Capacity of truck.**—See *Oldfield v. International Motor Co.* (Md.), 113 Atl. 632.

60. *Hackett v. Lewis* (Cal. App.), 173 Pac. 111; *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617; *Summers v. Provo Foundry & Machine Co.*, 53 Utah, 320, 178 Pac. 916.

**Carrying capacity of truck.**—Statements by the seller as to the carrying capacity of a truck, may constitute an express warranty. *Hackett v. Lewis* (Cal. App.), 173 Pac. 111.

edge, and on which the buyer may also be expected to have an opinion and to exercise his judgment.<sup>61</sup> Where a machine is warranted against defects in manufacture and workmanship, an agreement by the seller to overhaul the car without cost after a trip is not a part of the warranty, but is a special agreement.<sup>62</sup> A warranty made after the contract of sale is completed is inoperative unless there is a new consideration to support it.<sup>63</sup> Where a vehicle is purchased from a dealer who does not stand in the relation of agent to the manufacturer, and at the time of the sale he delivers to the purchaser the manufacturer's warranty of the machine which is conditioned upon the purchaser registering the sale with the manufacturer, and the purchaser fails to perform the conditions, and the dealer makes no express warranties, the purchaser has no remedy for alleged breach of warranty.<sup>64</sup>

### Sec. 858. Warranties — *caveat emptor*.

The rule of *caveat emptor* — let the buyer beware — is applicable in the sale of motor vehicles, as well as of other articles of personal property. In the absence of an express warranty or a warranty which is implied by the law under some circumstances, the rule of *caveat emptor* applies. It is a general rule that if an article is sold for any and all purposes for which it is adapted, and not by a manufacturer or producer for a particular purpose, and it is open to inspection by the buyer, the rule of *caveat emptor* applies.<sup>65</sup> But in the case of a sale with an express warranty of condition, the doctrine of *caveat emptor* does not apply.<sup>66</sup> Hence, under such a warranty, where the purchaser had no knowledge of the defects in the machine, the fact that he had an opportunity to examine the machine and failed to exercise his opportunity, will not bar him from relief for a violation of the warranty.<sup>67</sup>

61. International Harvester Co. v. Lawyer, 56 Okla. 207, 155 Pac. 617.

62. Warren v. Renault Freres Selling Branch, 195 Ill. App. 117.

63. Underwood v. Colburn Motor Car Co., 166 N. C. 458, 82 S. E. 855.

64. Simmons v. Ruggles (Tex. Civ.

App.), 176 S. W. 152.

65. Woods v. Nichols, 92 Kans. 258, 140 Pac. 862.

66. Klock v. Newbury, 63 Wash. 153, 114 Pac. 1032.

67. Klock v. Newbury, 63 Wash. 153, 114 Pac. 1032.

**Sec. 859. Warranties — “seller’s talk.”**

Some latitude is allowed automobile salesmen in giving opinions and praise of their machines, before their statements will be held to constitute a warranty.<sup>68</sup> A mere puffing statement by the seller as to the quality of an article sold or exchanged is generally regarded as an expression of opinion and of itself does not constitute a warranty.<sup>69</sup> Thus, statements by an automobile agent that the machine had been run as a demonstrating car about 500 miles and was in first class condition, is thought to be merely “seller’s talk.”<sup>70</sup> So, too, representations relative to a demonstrating car that it was in first class condition, as good as new car, and that it was guaranteed to go eleven miles to a gallon of gasoline on the average, do not constitute a guaranty.<sup>71</sup> And a statement that tires on a car “are good for two thousand miles,” may be regarded merely as the opinion of the vendor.<sup>72</sup> Similarly, a statement that tires on an automobile are “as good as new.” is not a statement of a present existing fact made to induce the purchase, but is merely the expression of an opinion.<sup>73</sup> Likewise, in the case of a sale of an automobile to a rural mail carrier, a statement that it would give swifter and better service than the horse the carrier was using is only an expression of opinion or belief on which the purchaser may use an independent judgment, and must be regarded as mere commendation and not as a warranty.<sup>74</sup> In some cases the question whether statements are intended and understood as warranties, or simply as selling arguments, is determined from the circumstances of the case, but the burden of showing that the statements were intended as a warranty is upon the purchaser.<sup>75</sup> Under the Uniform Sales Act, which has been

68. *Warren v. Walter Automobile Co.*, 50 Misc. 605, 99 N. Y. Suppl. 396.

69. *Woods v. Nichols*, 92 Kans. 258. 140 Pac. 862; *International Harvester Co. v. Lawyer*, 56 Okla. 207. 155 Pac. 617.

70. *Morley v. Consolidated Mfg. Co.*, 196 Mass. 257, 81 N. E. 993.

71. *Smith v. Bolster*, 70 Wash. 1, 125 Pac. 1022. Compare *Brown v. Mc-*

*Gehee*, 136 Ark. 597, 207 S. W. 37.

72. *Woods v. Nichols*, 92 Kans. 258. 140 Pac. 862.

73. *Warren v. Walter Automobile Co.*, 50 Misc. 605, 99 N. Y. Suppl. 396.

74. *Farris v. Alfred*, 171 Ill. App. 172.

75. *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361;

enacted in many States, any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchase the goods relying thereon, but no affirmation of the value of goods or any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.<sup>76</sup>

**Sec. 860. Warranties — machine sold on “usual warranty.”**

In an action by the purchaser of an automobile for a breach of warranty in the sale which he claims was sold under the “usual warranty,” the burden is upon him to show what the “usual warranty” was.<sup>77</sup>

**Sec. 861. Warranties — guaranty of satisfaction.**

Motor vehicles are sometimes sold under a guaranty that they shall give satisfaction. Under a guaranty of this nature, a purchaser who is dissatisfied with his purchase may return the machine and recover the payment made thereon.<sup>78</sup> A guaranty of this nature will survive the acceptance of the machine by the purchaser and allow him a reasonable time to become dissatisfied.<sup>79</sup> A determination by the purchaser made

76. *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361; *Summers v. Provo Foundry & Machine Co.*, 53 Utah 320, 178 Pac. 916.

77. *Johnson v. Studebaker Corp.*, 160 Ky. 567, 169 S. W. 992, wherein it was said: “Plaintiff might have shown by the officers who were authorized agents of the company what the usual guaranty was at the time of his purchase; or he might have shown that its authorized agents at that particular time, in making sales of defendant's automobiles, were giving a particular guaranty. This, however, he failed to do. The mere fact that he or two former purchasers had been told by Mrs. Smith that the guaranty

on a machine like the one he purchased was for one year is not, in the absence of evidence tending to show that Mrs. Smith was an authorized agent of the defendant, and in the face of positive evidence to the effect that she was not an authorized agent, competent to prove what the usual guaranty was.”

78. *Roeder v. Kenmore Mfg. Co.*, 181 Ill. App. 463; *Walker v. Grout Bros. Automobile Co.*, 124 Mo. App. 628, 102 S. W. 25; *Dochtermann, etc., Co. v. Fiss, Doerr & Carroll Horse Co.*, 155 App. Div. 162, 140 N. Y. Suppl. 72.

79. *Bedford v. Hol-Tan Co.*, 143 N. Y. App. Div. 372, 128 N. Y. Suppl. 578.

in good faith that the warranty has not been fulfilled is usually conclusive.<sup>80</sup>

### **Sec. 862. Warranties — warranty of future service.**

A representation that a motor vehicle will give a certain degree of service for a given period, may or may not be a warranty, depending on the form of the statement. A statement of this class is not merely a prediction of the service which may be expected.<sup>81</sup> In some cases it may be construed as warranty.<sup>82</sup> An automobile vendor by such an agreement warrants that the machine is in a fit condition for use and that it will run the given period when used as contemplated by the parties, with proper care and use, if the purchaser makes the necessary repairs incident to such use.<sup>83</sup> Or, if not a warranty, it may be construed as an agreement to furnish certain repairs and equipment thereto so as to keep the machine in proper running condition during the term. The distinction may be important, for the purchaser would have the right to rescind the sale in case of a breach of warranty, but would not have such privilege if the contract were construed merely as an agreement to keep the machine in repair.<sup>84</sup> A guaranty that the automobile will be free from defects for a year carries with it necessarily a contract of warranty that the automobile is at the time of the sale of sufficiently good workmanship and materials to run a year under ordinary and proper use without manifesting defects.<sup>85</sup> Where the provisions of the contract of an automobile company in respect to the repairing or replacing of parts of the car which might break in

80. *Half v. Jones* (Tex. Civ. App.), 169 S. W. 906.

81. *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361.

82. *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361; *Beecroft v. Van Schaick*, 104 N. Y. Suppl. 458.

83. *Jones v. Keefe*, 159 Wis. 584, 150 N. W. 954. "Plaintiffs, by their guaranty for one year, agreed, not merely to make repairs, but that the automobile was so well constructed as

to be capable of standing proper use for one year, ordinary wear and tear excepted, and that they would become answerable for any defect that might occur during that time not due to improper use of the car by defendant." *Miller v. Zander*, 85 Misc. 499, 147 N. Y. Suppl. 479.

84. *Miller v. Zander*, 85 Misc. (N. Y.) 499, 147 N. Y. Suppl. 479.

85. *Miller v. Zander*, 85 Misc. (N. Y.) 499, 147 N. Y. Suppl. 479.

normal service had expired by limitation and the only part of the agreement that remained in force was a provision for an overhauling of the car, it was decided that there was no liability to furnish new parts, except in the course of overhauling, which it was to do at its factory.<sup>86</sup> Statements that the machine can be driven over the roads in a certain vicinity may constitute an express warranty.<sup>87</sup>

### Sec. 863. Warranties — implied warranty of fitness.

It is a general rule in the law of sales that when machinery is sold for a particular purpose and the purchaser trusts to the judgment or skill of the manufacturer or dealer, there is an implied warranty that the property shall be reasonably fit for the purposes for which it is to be applied.<sup>88</sup> This doctrine is applied whether the subject of the contract is already manufactured and in stock, or is to be made on the purchaser's order.<sup>89</sup> So, too, in the case of a sale of automobile chains by sample, the seller warrants by implication that the chains are fit for the purpose they are intended to serve.<sup>90</sup> But where the purchaser selects his own machine and assumes the propriety of his selection, and the dealer delivers him the selected machine, there is no warranty that it is fit for the purchaser's

86. *Barry v. American Locomotive Automobile Co.*, 113 N. Y. Suppl. 826.

87. *International Harvester Co. v. Lawyer*, 56 Okla. 207, 155 Pac. 617.

88. *Indiana*.—*Hart-Kraft Motor Co. v. Indianapolis Motor Car Co.*, 183 Ind. 311, 109 N. E. 39.

*Kentucky*.—*International, etc., Co. v. Bean*, 159 Ky. 842, 169 S. W. 549; *International Harvester Co. v. Porter*, 160 Ky. 509, 169 S. W. 993.

*Michigan*.—*Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591.

*Missouri*.—*Boulware v. Victor Auto Mfg. Co.*, 152 Mo. App. 567, 134 S. W. 7; *Harvey v. Buick Motor Co.* (Mo. App.), 177 S. W. 774.

*New Jersey*.—*Berg v. Rapid Motor Vehicle Co.*, 78 N. J. Law. 724, 75 Atl. 933.

*Oregon*.—*Bouchet v. Oregon Motor*

*Car Co.*, 78 Oreg. 230, 152 Pac. 888.

89. *Berg v. Rapid Motor Vehicle Co.*, 78 N. J. Law. 724, 75 Atl. 933.

90. *Steering Wheel Co. v. Fee Elec. Car Co.*, 174 Mich. 512, 140 N. W. 1016, wherein the court said: "There seems to be in the authorities no disagreement that the rule in such cases is that there is an implied warranty of the reasonable fitness of the article for the use intended, and from a careful examination of the cases upon the subject it is apparent that no distinction can be made in the application of this rule between cases of this class and cases where the machinery or other articles are ordered from manufacturers for a certain specified purpose, where reliance is had upon the skill and judgment of such manufacturer."

purposes.<sup>91</sup> Nor will a warranty be implied in the sale of a second hand machine.<sup>92</sup> And there is no implied warranty as to the length of time that the crank shaft on the machine will stand the strain of use.<sup>93</sup> An implied warranty of this nature does not require more than reasonable fitness for the purpose. Absolute perfection is not implied.<sup>94</sup> And it has been held that when the sale is by a dealer, not by the manufacturer, there is no implied warranty as to latent defects.<sup>95</sup> It is the duty of the purchaser under an implied warranty to inspect the property purchased within a reasonable time after its delivery.<sup>96</sup>

#### Sec. 864. Warranties — effect of express contract on implied warranty.

In some States it is held that, when there is a written contract for the sale of a motor vehicle, which contains certain express warranties relative to the machine, there is no room for the law to imply other warranties.<sup>97</sup> In other States an implied warranty of fitness is given effect, though the contract

91. Flaherty v. Maine Motor Carriage Co. 117 Me. 376, 104 Atl. 627.

92. Lamb v. Otto (Cal.), 197 Pac. 147.

93. Morley v. Consolidated Mfg. Co., 196 Mass. 257, 81 N. E. 993, wherein it was said: "We are also of opinion that there was no implied warranty as to the length of time this crank shaft would stand the strain of use. The subject of sale was an automobile. Even if it be assumed that the plaintiff had the right to think the sale was made by the manufacturer, still the machine was not made especially for the plaintiff, but on the contrary was one which had been considerably used, and it was bought by him at what he knew was a sum below the usual price for a new machine of the same kind. If it be said that he had the right to suppose it was fit to run the answer is that it was fit to run. Every part essential to the running of the machine was there at the time of the

purchase,—in other words the machine was an automobile in running order, and, after the purchase, was actually used by the plaintiff nearly if not quite two months before the shaft broke. If the shaft had been stronger it might have lasted for a longer time. There is no claim of fraud. Under these circumstances we think that there was no implied warranty as to the length of time the shaft would last, but as to that the doctrine of *caveat emptor* is applicable."

94. Harvey v. Buick Motor Co. (Mo. App.), 177 S. W. 774.

95. Hoyt v. Hainsworth Motor Co. (Wash.), 192 Pac. 919.

96. Buick Motor Co. v. Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591.

97. United Motor Atlanta Co. v. Paxon Bros., 14 Ga. App. 172, 80 S. E. 704; Payne v. Chal-Max Motor Co. (Ga. App.), 104 S. E. 453; Mull v. Touchberry, 112 S. Car. 422, 100 S. E. 152.

is in writing and specifies other warranties by the seller.<sup>98</sup> "An express warranty, to exclude an implied warranty, must be of such a character as to make it apparent that the express warranty contains all the obligations assumed by the warrantor."<sup>99</sup> Both warranties may exist without conflict, when the implied warranty is wholly independent of the matter contemplated by the express one or where the express warranty relates only to some particular quality of the car.<sup>1</sup> But an implied warranty has been given effect, even when the contract expressly provides that, "This express warranty excludes all implied warranties."<sup>2</sup> But generally a warranty will not be implied when the contract is written and contains certain warranties and then provides that no others are to be implied.<sup>3</sup>

### Sec. 865. Warranties — damages.

As a general rule, in case of a breach of warranty in the sale of a motor vehicle or other personal property, the measure of the purchaser's damage is the difference between the actual value of the machine and the value if it had been as represented.<sup>4</sup> The burden is upon the purchaser to show that

98. *Hart-Kraft Motor Co. v. Indianapolis Motor Car Co.*, 183 Ind. 311, 109 N. E. 39; *International, etc., Co. v. Bean*, 159 Ky. 842, 169 S. W. 549; *Boulware v. Victor Auto Mfg. Co.* 152 Mo. App. 567, 134 S. W. 7. "It must be borne in mind that the warranty of fitness for a particular use, which is implied by law where a manufacturer sells machinery for a purpose made known to him by the buyer thereof, relying on the skill and judgment of the manufacturer in selecting machinery adapted thereto, is a warranty which attaches itself to the contract of sale, independent of any express representation by the manufacturer of the suitability of the machinery for such use. It attaches by implication of law as a direct result of the communication by the buyer to the manufacturer of the nature of the in-

tended use." *International, etc., Co. v. Bean*, 159 Ky. 842, 169 S. W. 549.

99. *Boulware v. Victor Auto Mfg. Co.*, 152 Mo. App. 567, 134 S. W. 7.

1. *Hart-Kraft Motor Co. v. Indianapolis Motor Car Co.*, 183 Ind. 311, 109 N. E. 39.

2. *International, etc., Co. v. Bean*, 159 Ky. 842, 169 S. W. 549.

3. *Oldfield v. International Motor Co. (Md.)*, 113 Atl. 632.

4. *California*.—*Moss v. Smith*, 185 Pac. 385.

*Georgia*.—*Ceylona Co. v. Selden Truck Sales Co.*, 23 Ga. App. 275, 97 S. E. 882.

*Illinois*.—*Overall v. Chicago Motor Car Co.*, 183 Ill. App. 276.

*Kentucky*.—*Studebaker Corp. of America v. Miller*, 169 Ky. 90, 183 S. W. 256.

*Maryland*.—*White Automobile Co.*



he has sustained damage through the breach of the warranty;<sup>5</sup> and he cannot recover without competent evidence of the value of the machine with the defects.<sup>6</sup> The price actually paid, however, is strong *prima facie* evidence of its value if it had corresponded with the warranty.<sup>7</sup> But the price received at a private sale a year later, is inadmissible to show the value at the time of the warranty.<sup>8</sup> Where the warranty is to supply without charge any part of the automobile which is shown to be defective, the proper measure of damages is the cost of supplying such defective part plus the loss or damage which is shown to be the natural and proximate results of the breach.<sup>9</sup> If the vendor, after being notified by the purchaser that the car is not in the condition as warranted, authorizes the purchaser to make repairs to the machine and agrees to pay therefor, the purchaser may be entitled to recover the cost of such repairs.<sup>10</sup> But, ordinarily, the purchaser cannot recover both the cost of repairs and the difference in value, for that would constitute double damages.<sup>11</sup>

*v. Dorsey*, 119 Md. 251, 86 Atl. 617; *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361.

*New York*.—*Isaacs v. Wanamaker*, 189 N. Y. 122, 81 N. E. 763; *Bedford v. Hol-Tan Co.*, 143 N. Y. App. Div. 372, 128 N. Y. Suppl. 578; *Miller v. Zander*, 85 Misc. (N. Y.) 499, 147 N. Y. Suppl. 479.

*North Carolina*.—*Underwood v. Colburn Motor Car Co.*, 166 N. C. 458, 82 S. E. 855.

*Texas*.—*Lewis v. Farmers & Mechanics Nat. Bank* (Civ. App.), 204 S. W. 888.

*Utah*.—*Studebaker Bros. of Utah v. Anderson*, 50 Utah 319, 167 Pac. 663.

5. *Overall v. Chicago Motor Car Co.*, 183 Ill. App. 276.

**Defects from operation.**—The purchaser cannot recover on the warranty, when the failure of the car to run properly is due to his own careless

operation rather than to defects in the machine. *Conner v. Schnell & Weaver* (Tex. Civ. App.) 210 S. W. 753.

6. *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617; *Burley v. Shinn*, 80 Wash. 240, 141 Pac. 326, Ann. Cas. 1916 B. 96.

7. *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617.

8. *Bedford v. Hol-Tan Co.*, 143 N. Y. App. Div. 372, 128 N. Y. Suppl. 578.

9. *Rosshach v. Fincher Motor Car Co.*, 178 Ill. App. 559.

10. *Bakersfield & V. R. Co. v. Fairbanks M. & Co.*, 20 Cal. App. 412, 129 Pac. 610; *Underwood v. Colburn Motor Car Co.*, 166 N. Car. 458, 82 S. E. 855.

11. *Studebaker Corp. of America v. Miller*, 169 Ky. 90, 183 S. W. 256. Compare *Underwood v. Colburn Motor Car Co.*, 166 N. Car. 458, 82 S. E. 855.

**Sec. 866. Warranties — parol evidence to show warranty.**

The general rule is, that, when a written contract for the sale of property contains the entire agreement between the parties, parol evidence of contemporaneous agreements is inadmissible to vary the written agreement.<sup>12</sup> Thus, it is held that, where a machine is sold under a written contract, plain and unambiguous in its terms and containing a statement that there have been no verbal understandings, agreements, promises or agreements except those specified therein, parol evidence of representations as to the age and condition of the car, alleged to have been made by the vendor in negotiating the sale, is not admissible.<sup>13</sup> And where a written contract for the sale of an automobile was explicit and unambiguous as to the horse power of the machine, the purchaser cannot, in the absence of fraud or deceit, recover for the breach of an alleged oral warranty to the effect that the motor would develop greater power.<sup>14</sup> But, if the written instrument on its face, is not the final repository of the entire agreement, parol evidence may be received to show the other portions of the contract.<sup>15</sup> Thus, where the guarantee on the sale is stated to be "as per cat.," the purchaser may show the nature of the guarantee by oral evidence.<sup>16</sup> And a mere order for a machine, though containing certain express warranties, will not exclude oral evidence tending to show facts which will raise an implied warranty of fitness.<sup>17</sup> Greater latitude is allowed to show fraud in the sale of the machine than is allowed to prove a breach of warranty.<sup>18</sup>

12. *Federal Truck & Motors Co. v. Tompkins* (Ark.), 231 S. W. 553; *Lamb v. Otto* (Cal.), 197 Pac. 147; *Hogan v. Anthony* (Cal. App.), 198 Pac. 47; *Studebaker Corp. of America v. Miller*, 169 Ky. 90, 183 S. W. 256; *Hebard v. Cutler*, 91 Vt. 218, 99 Atl. 879.

**Consideration of contract.**—Where a contract for the sale of an automobile provides for a money consideration, the purchaser cannot show by parol that the seller agreed to take a second

hand machine as a part of the purchase consideration. *Rafferty v. Butler*, 133 Md. 430, 105 Atl. 530.

13. *Jones v. Keefe*, 159 Wis. 584, 150 N. W. 954.

14. *Colt v. Demarest & Co.*, 159 App. Div. 394, 144 N. Y. Suppl. 557.

15. *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617; *Bouchet v. Oregon Motor Car Co.*, 78 Ore. 230, 152 Pac. 888.

16. *Craig v. Chicago Coach & Carriage Co.*, 172 Ill. App. 564.

**Sec. 867. Warranties — waiver of breach of warranty.**

The unconditional acceptance of property that has been delivered at a later date or in a less quantity than is stipulated in the contract, may constitute a waiver of such breach of the contract.<sup>19</sup> But, the purchaser is entitled to accept a machine though it is not in agreement with the warranty, and later he may sue for the damages.<sup>20</sup> Hence, the mere acceptance of the machine is not a waiver of the breach.<sup>21</sup> But a retention of the property without complaint for an unreasonable time after a discovery of the breach of a warranty, may constitute a waiver of the breach.<sup>22</sup> Provision is made for this situation in the Uniform Sales Law adopted in many States to the effect that, if after the acceptance of goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor. But, where the machine is repeatedly sent to the place of business of the seller for repairs, so that he was thus apprised of the difficulties in its use and operation, the provision of the Uniform Sales Law does not bar the purchaser's remedy.<sup>23</sup> The giving or renewal of a note for the purchase price of a motor vehicle, with knowledge of defects therein, will constitute, as a general rule, a waiver of any breach of warranty arising from such defects; but this rule is not applicable where the seller, as a consideration for the renewal of the note, promised to make the warranty good and guaranteed that the defects would be remedied and it was upon this promise that the renewal note was made.<sup>24</sup> The making of a partial payment or the giving of notes for the purchase price

17. *Boulware v. Victor Auto Mfg. Co.*, 152 Mo. App. 567, 134 S. W. 7. Compare *Hebard v. Cutler*, 91 Vt. 218, 99 Atl. 879. And see section 863.

18. See section 867.

19. *Staver Carriage Co. v. American, etc., Mfg. Co.*, 188 Ill. App. 634.

20. Section 870.

21. *Staver Carriage Co. v. American, etc., Mfg. Co.*, 188 Ill. App. 634; *Greissing v. Oakland Motor Co.*, 204 Mich. 116, 169 N. W. 842; *Mobile Auto Co.*

*v. Sturges & Co.*, 107 Miss. 848, 66 So. 205; *Bedford v. Hol-Tan Co.*, 143 N. Y. App. Div. 372, 128 N. Y. Suppl. 578; *Miller v. Zander*, 85 Misc. (N. Y.) 499, 147 N. Y. Suppl. 479.

22. *Bonds v. Marsh*, 202 Ala. 155, 79 So. 630; *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591.

23. *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361.

24. *Lockett v. Rawlins*, 13 Ga. App. 52, 78 S. E. 780.

of a vehicle, is not a waiver of a breach of warranty, unless an intent to waive such breach is shown.<sup>25</sup>

### **Sec. 868. Warranties — statements of agent.**

Statements made by an agent in selling a motor vehicle may be binding upon his principal.<sup>26</sup> But the declarations of the agent are not admissible for the purpose of showing his authority from the principal. An agent having the power to sell a motor vehicle will generally have implied power to make such warranties as are usually made in the sale of similar machines.<sup>27</sup> The actual authority of the agent in respect to making warranties may be shown by the principal, although the latter may be bound by unauthorized statements of the agent when they are within his apparent authority.<sup>28</sup>

### **Sec. 869. Remedies of seller.**

The seller of a motor vehicle or of accessories and equipment is entitled to recover from the purchaser the agreed price; or, in the absence of a specific agreement as to price, he may recover the reasonable value of the property.<sup>29</sup> The seller cannot recover the purchase price, unless he has performed the conditions of the contract to be performed by him. Thus, if the machine offered for delivery is not in accord with the specifications of the one purchased and the buyer refuses to accept it, the seller cannot recover the purchase price.<sup>30</sup> Strict compliance with the contract is required in such cases, for the rule of substantial performance which is applied in cases of building contracts, does not aid the vendor of a

25. *International Harvester Co. v. Lawyer*, 56 Okla. 207, 155 Pac. 617.

26. *Lewis v. Pope Motor Car Co.*, 202 N. Y. 402, 95 N. E. 815; *Checkley v. Joseph Lay Co.*, 171 Ill. App. 252. And see section 848.

27. *International Harvester Co. v. Lawyer*, 56 Okla. 207, 155 Pac. 617.

28. *Lewis v. Farmers & Mechanics Nat. Bank* (Tex. Civ. App.), 204 S. W. 888.

29. *Lugiani v. Landan Economic*

*Syphor Co.*, 38 Cal. App. 146, 175 Pac. 648; *Hardy v. Sparks* (Ga. App.), 101 S. E. 399; *McNabb v. Juergens* (Iowa), 180 N. W. 758; *Overland Sales Co. v. Kaufman*, 76 Misc. (N. Y.) 230, 134 N. Y. Suppl. 599.

**Variance in proof.**—See *Duke v. Automobile Supply Co.*, 21 Ga. App. 608, 94 S. E. 915.

30. *Cole v. Manville*, 149 N. Y. App. Div. 43, 133 N. Y. Suppl. 574.

motor vehicle.<sup>31</sup> Where a corporation selling a motor vehicle agreed to take a part of the purchase price out of the dividends paid by the corporation on stock held by the purchaser, the transaction was sustained, and the trustee in bankruptcy of the corporation could not recover the purchase price from the purchaser.<sup>32</sup> If the purchaser wrongfully refuses to accept the car when offered for delivery, the seller, under the common law rule, has three courses, any one of which he may pursue. First, he may sell the car and hold the purchaser for the remainder of the purchase price, if any; second, he may tender the car and sue for the purchase price unpaid; third, he may retain the car and sue for the difference between the market price and the contract price.<sup>33</sup> In an action by an automobile company to recover damages resulting from fraud and deceit in securing a release or cancellation of an order for an automobile, it was held that a recovery for loss of profits was erroneous; that the measure of damages was the difference between the market price and the contract price; and that plaintiff was entitled to nominal damages only, it appearing that the automobile had a standard price and was sold at that price to a third party soon after defendant procured a cancellation of his order.<sup>34</sup> If the contract has been

31. *Cole v. Manville*, 149 N. Y. App. Div. 43, 133 N. Y. Suppl. 574.

32. *Hathaway v. Vaughan*, 162 Mich. 269, 127 N. W. 337.

33. *Ridden v. Lynch*, 133 N. Y. Suppl. 468; *Schuenemann v. Wollaeger Co. (Wis.)*, 176 N. W. 59. See also *Bennett v. Potter*, 16 Cal. App. 183, 116 Pac. 681; *Faulk v. Richardson*, 63 Fla. 135, 57 So. 666. "It is well settled by a long line of decisions in this state that, upon the refusal of a buyer to accept personal property which he has contracted to purchase from the vendor, the vendor has the choice of three remedies: First, the vendor may, if the contract has been so far performed by him that the property is ready for delivery before he has notice of the buyer's intention to decline acceptance, treat the property as belong-

ing to the buyer, hold it after tender, subject to the latter's order, and recover the full agreed price; second, the vendor may sell the property for the buyer's account as his agent, taking the requisite steps to protect the latter's interest and obtain the best price available, and then recover the difference between the proceeds of the sale and the agreed price; and, third, the vendor may treat the sale as ended by the buyer's default or refusal to accept the goods and treat the property as his and recover the actual loss sustained, which is ordinarily the difference between the agreed price and the market price." *Weber Motor Car Co. v. Roberts (Mo. App.)*, 219 S. W. 994.

34. *Chalmers Motor Co. v. Maibaum*, 186 Ill. App. 147.

rescinded by mutual consent of the parties, the rescission constitutes a defense to an action for the purchase price.<sup>35</sup>

### Sec. 870. Remedies of purchaser — in general.

In case of a breach of warranty in the sale of a motor vehicle, the purchaser generally has two remedies. First, he may return the chattel within a reasonable time after discovery of the breach and recover the payment made therefor.<sup>36</sup> Or, secondly, he may retain the property and sue for damages resulting from the breach.<sup>37</sup> And, in an action by the seller for the purchase price, he can set up the breach and the rescission of the contract as a defense, or he may retain the machine and counterclaim for damages for breach of the warranty.<sup>38</sup> Similarly, in case of a purchase induced by fraudu-

35. *Megeath v. Ashworth* (Utah), 196 Pac. 338.

36. Section 871.

37. *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617; *Mobile Auto Co. v. Sturgess & Co.*, 107 Miss. 848, 66 So. 205; *Cox v. Imes* (Mo. App.), 219 S. W. 399; *Bedford v. Hol-Tan Co.*, 143 N. Y. App. Div. 372, 128 N. Y. Suppl. 578. "The remedies of a purchaser of chattels for a breach of his contract are well settled in this State. In the case of an executed contract for the sale of a chattel with a warranty, there being no contract right or obligation to return the chattel if it does not prove to be as warranted, the purchaser, in the absence of fraud, cannot rescind the sale and reject the chattel. His sole remedy is an action or counterclaim for damages for the breach of the warranty. *Minneapolis Harvester Works v. Bonnallie*, 29 Minn. 373, 13 N. W. 149; *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. 5; *Mulcahy v. Dieudonne*, 103 Minn. 352, 115 N. W. 536. If, however, the warranty is fraudulent, the purchaser may, within a reasonable time, rescind the contract, return the property, and recover back the purchase price, or affirm the con-

tract and maintain an action for damages. *Marsh v. Webster*, 16 Minn. 375 (418). Where, however, the contract of sale of a chattel is executory or conditional, the purchase, although it be warranted, has the right to make a trial of it, reasonable as respects both time and manner, and to reject it, if it does not fulfill the warranty or condition, by so notifying the seller. He need not return it, but he will be deemed to have accepted it if he does not exercise his right of rejection within a reasonable time, or if he does any act in relation to it inconsistent with its ownership by the seller. *McCormick Harvesting Machine Co. v. Chesrown*, 33 Minn. 32, 21 N. W. 846; *Rosenfield v. Swenson*, 45 Minn. 190, 47 N. W. 718; *Benjamin. Sales*, 212. What is a reasonable time is ordinarily a question of fact; but, where one conclusion can reasonably be drawn from the undisputed evidence, it is a question of law." *Wirth v. Fawkes*, 109 Minn. 254, 123 N. W. 661. And see section 865.

38. *Bedford v. Hol-Tan Co.*, 143 N. Y. App. Div. 372, 128 N. Y. Suppl. 578; *Philadelphia Motor Tire Co. v. Horowitch*, 190 N. Y. App. Div. 771.

lent representations, the purchaser may rescind the sale on discovery of the fraud, or he may sue for the damages he has sustained.<sup>39</sup> Where the seller of an automobile receives a note for a part of the purchase price and negotiates such note to a holder in due course, in an action thereon by such holder against both the seller and the purchaser of the machine, the latter cannot set up a cross-petition against his co-defendant for breach of warranty in the sale.<sup>40</sup> If the seller fails to deliver the purchased property, the purchaser may have a remedy for damages.<sup>41</sup>

### Sec. 871. Remedies of purchaser — rescission of contract.

The purchaser of a motor vehicle is entitled to rescind the purchase, where it was induced by fraudulent representations on the part of the seller.<sup>42</sup> And in some States he can rescind the sale after discovery of the breach of a warranty inducing the sale.<sup>43</sup> But, in other States, it has been held that the pur-

180 N. Y. Suppl. 661; *Sotille v. Stokes*, 111 N. C. 481, 98 S. E. 334; *Studebaker Bros. of Utah v. Anderson*, 50 Co., 177 Fed. 863, 101 C. C. A. 77; *Utah*, 319, 167 Pac. 663.

39. *Joslyn v. Cadillac Automobile Co.*, 177 Fed. 863, 101 C. C. A. 77; *Munn v. Anthony* (Cal. App.), 171 Pac. 1082; *Boyd v. Buick Automobile Co.*, 182 Iowa 306, 165 N. W. 908; *Jones v. Norman* (Mo. App.), 228 S. W. 895.

40. *Fulton Bank v. Mathew*, 161 Iowa 634, 143 N. W. 400.

41. *A. R. G. Bus Co. v. White Auto Co.* (Cal. App.), 198 Pac. 829; *McLaren v. Marmon-Oldsmobile Co.* (N. J.), 113 Atl. 236; *Denby Motor Truck Co. v. Mears* (Tex. Civ. App.), 229 S. W. 994.

42. *Joslyn v. Cadillac Automobile Co.*, 177 Fed. 863, 101 C. C. A. 77; *Brown v. McGehee*, 136 Ark. 597, 207 S. W. 37; *Knight v. Bentel* (Cal. App.), 179 Pac. 406; *Conroy v. Coughlon Auto Co.*, 181 Iowa 916, 165 N. W. 200; *Conroy v. Coughlon Auto Co.*, 186

Iowa 671, 171 N. W. 10; *Kanaman v. Hubbard* (Tex. Civ. App.), 160 S. W. 304; *Fuller v. Cameron* (Tex. Civ. App.), 209 S. W. 711; *Smith v. Columbus Buggy Co.*, 40 Utah 580, 123 Pac. 580; *Taylor v. First Nat. Bank*, 25 Wyo. 204, 167 Pac. 707.

**Damage.**—To entitle one to rescind a sale on the ground of fraud, the misrepresentation on which he relies must be one which resulted in his damage. *Alama Auto Sales Co. v. Herms* (Tex. Civ. App.) 184 S. W. 740.

43. *International, etc., Co. v. Bean*, 159 Ky. 842, 169 S. W. 549; *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617; *Miller v. Zander*, 85 Misc. (N. Y.) 499, 147 N. Y. Suppl. 479; *Halif Co. v. Jones* (Tex. Civ. App.), 169 S. W. 906; *Studebaker Bros. of Utah v. Anderson*, 50 Utah 319, 167 Pac. 663. See also *Isaacs v. Wanamaker*, 71 Misc. 55, 127 N. Y. Suppl. 346.

**Contract for repairs.**—In a particular case, the contract of sale by allowing the seller an opportunity to make

chaser is not entitled to a rescission merely because the machine delivered does not fulfill the warranty.<sup>44</sup> The right to rescind a sale does not depend upon a trust relation between the parties, but may be exercised in the absence of such a relation.<sup>45</sup> One wishing to rescind the purchase must tender the machine to the seller within a reasonable time or he will lose his right of rescission.<sup>46</sup> What is a reasonable time must in each case depend on the circumstances, and is usually regarded as a question for the jury;<sup>47</sup> though if it clearly appears that the offer to return was not made within a reasonable time, the question becomes one of law for the court.<sup>48</sup> If the purchaser retains and uses the machine after discovery of the situation, he may be deemed to have waived his right to a rescission of the contract and thereafter his only remedy will

repairs, may preclude a rescission on account of repairs covered by the contract. *Berman v. Langley* (Me.), 109 Atl. 393.

44. *Rimmele v. Huebner*, 190 Mich. 247, 157 N. W. 10.

45. *Kanaman v. Hubbard* (Tex. Civ. App.), 160 S. W. 304.

46. *Kentucky*.—*International, etc., Co. v. Bean*, 159 Ky. 842, 169 S. W. 549; *International Harvester Co. v. Brown*, 182 Ky. 435, 206 S. W. 622.

*Maryland*.—*White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617.

*Massachusetts*.—*Collins v. Skillings*, 224 Mass. 275, 112 N. E. 938.

*New York*.—*Miller v. Zander*, 85 Misc. 499, 147 N. Y. Suppl. 479.

*Texas*.—*Flint v. Newton* (Civ. App.), 136 S. W. 820; *Houston Motor Car Co. v. Brashear* (Civ. App.), 158 S. W. 233; *Simmons v. Ruggles* (Civ. App.), 176 S. W. 152; *Avery Co. v. Staple Mercantile Co.* (Civ. App.), 183 S. W. 43; *Alamo Auto Sales Co. v. Herms* (Civ. App.), 184 S. W. 740.

*Utah*.—*Smith v. Columbus Buggy Co.*, 40 Utah 580, 123 Pac. 580; *Summers v. Provo Foundry & Machine Co.* (Utah), 178 Pac. 916.

47. *Joslyn v. Cadillac Automobile Co.*, 177 Fed. 863, 101 C. C. A. 77;

*Conroy v. Coughlon Auto Co. (Iowa)*, 165 N. W. 200; *International, etc., Co. v. Bean*, 159 Ky. 842, 169 S. W. 549; *International Harvester Co. v. Brown* (Ky.), 206 S. W. 622; *Smith v. Columbus Buggy Co.*, 40 Utah, 580, 123 Pac. 580. "While a party is bound to act promptly, if he would rescind, upon discovery of the fraud, how soon this must be depends on the facts of each particular case. One is not bound to suspect fraud, in the absence of anything to arouse suspicion. He may rely upon having been dealt with fairly until the discovery of evidence tending to show the contrary, and the degree of diligence in following up the clues uncovered by such evidence depends so much upon circumstances that no unvarying rule can well be laid down. Nor can it be said with certainty within what time after the perpetration of fraud has been ascertained, or in the exercise of ordinary diligence should have been ascertained, an election to rescind must be exercised, save that this must be done at once, or within a reasonable time thereafter." *Conroy v. Coughlon Auto Co.*, 181 Iowa 916, 165 N. W. 200.

48. *International Harvester Co. v. Brown*, 182 Ky. 435, 206 S. W. 622.



be for damages.<sup>49</sup> The time within which the right is to be exercised must be computed from the discovery of the fraud or the defect on which rescission is based, and not from the date of the sale; but the buyer must use reasonable diligence to ascertain the facts, especially if there is anything to put him on inquiry.<sup>50</sup> If the purchaser uses the machine for a considerable period and depreciates its value, he cannot go into equity and ask for a rescission without offering to reimburse the seller for the use of the machine and the injury which has been occasioned thereto.<sup>51</sup> A right of rescission may be lost if the property while in the hands of the purchaser has been damaged to such an extent that the parties cannot be placed in *statu quo*,<sup>52</sup> though in some cases subsequent repairs will obviate the objection.<sup>53</sup> But a delay occasioned by an attempt to put the machine in proper working order, will not prejudice the right of rescission.<sup>54</sup> Diligence in rescission

49. *Hogan v. Anthony* (Cal. App.), 198 Pac. 47; *Houston Motor Car Co. v. Brashear* (Tex. Civ. App.), 158 S. W. 233. "The purchaser of an article who wishes to rescind the contract of sale cannot play fast and loose in the matter. He is not allowed to go on and derive all possible benefit from the transaction and then claim the right to be relieved from his own obligations by a rescission or refusal to perform on his part. If, after the discovery of the misrepresentation, he conducts himself with reference to the transaction as though it still were subsisting and binding, he will not thereafter be permitted to impeach the validity of the contract by seeking to rescind it or to escape performance of his covenants. Having ratified the contract by using the truck in his business after he discovered the falsity of defendant's representation, plaintiff could stand upon his contract and recover any damages that he may have sustained by reason of the fraud, but he may not repudiate his obligations by seeking to rescind the contract that he thus has affirmed. *Hogan v. An-*

*thony* (Cal. App.), 198 Pac. 47.

50. *Smith v. Columbus Buggy Co.*, 40 Utah, 580, 123 Pac. 580.

51. *Alamo Auto Sales Co. v. Herms* (Tex. Civ. App.), 184 S. W. 740.

52. *Summers v. Provo Foundry & Machine Co.*, 53 Utah 320, 178 Pac. 916; *Burley v. Shinn*, 80 Wash. 240, 141 Pac. 326, Ann. Cas, 1916 B. 96; *Noel v. Garford Motor Truck Co.* (Wash.), 191 Pac. 828.

53. *Noel v. Garford Motor Truck Co.* (Wash.), 191 Pac. 828.

54. *Noel v. Garford Motor Truck Co.* (Wash.), 191 Pac. 828. And see *International, etc., Co. v. Bean*, 159 Ky. 842, 169 S. W. 549, wherein it was said: "What is a reasonable time within which the offer to rescind may be made may depend upon a number of circumstances, and in each particular case of this kind the circumstances may be different. It was a duty which appellee owed to appellant company to try to make the machine do the work for which he purchased it; and unless he held it such a length of time as would indicate that he was satisfied

is a relative question. What is unreasonable delay in a given case must depend upon particular circumstances.<sup>55</sup> The purchaser of a second-hand automobile is not bound to rescind his contract upon the first discovery of some imperfection or misrepresentation. He is entitled to time for inquiries, experiments and tests. He can waive imperfections or misrepresentations first discovered, and yet afterwards be entitled to rescind upon the discovery of others. Suggestions from the vendor or his agent to make further inquiries or trials, would also extend the time for rescission. Where an auto is purchased upon the representation that it is a model of a certain year and in perfect working order, and upon trial, the machine proves to be unworkable and is damaged by reason of its imperfections through no fault of the purchaser, the purchaser may rescind his contract and is not liable for the purchase price. To accomplish a rescission of the contract there must be a return of the machine to the vendor. But this is a right which the vendor may waive. And where the vendor gives the purchaser to understand that it would be useless to attempt to return the machine, no return is necessary. The law does not require useless acts or words, and taking the vendor at his word, the purchaser may place the machine where he pleases, at least until the vendor withdraws his refusal to accept it.<sup>56</sup> And, in an action to rescind the sale of an automobile for breach of a warranty, the facts that the purchaser expended some money for repairs to the car and repeatedly called upon the seller to put it in order before he elected to rescind is held not to show an election on the part

with it, or that he was merely detaining it for the service he was deriving from it, such holding was not unreasonable. The evidence shows that he did not use it every day of the time he retained it, for he was working on it and trying to get it into shape to serve his purposes; that he was in good faith giving it a fair trial, and not merely keeping it for the use he was making of it, for it was a losing proposition from the beginning, the trouble, repairs, and upkeep exceeding

the profit derived from its use. The chancellor was therefore right in determining that appellee made his offer to rescind within a reasonable time." See also, *Jones v. Norman* (Mo. App.), 228 S. W. 895.

55. *Noel v. Garford Motor Truck Co.* (Wash.), 191 Pac. 828.

56. *Pitcher v. Webber*, 103 Me. 101, 68 Atl. 593. See also *Boyd v. Buick Automobile Co.*, 182 Iowa 306, 165 N. W. 908.

of the purchaser to keep the car, it appearing that such repairs did not effect a material change in the car or substantially alter its condition. Voluntary acts on the part of the purchaser of a chattel under a warranty of condition which will operate as an estoppel of the right to rescind must be such as to affect the seller and cause a change in his condition with reference to property making it inequitable to enforce the remedy. Offering the seller an opportunity to make good his warranty, does not change the situation of the seller with reference to the property and so far from being censurable and the waiver of rights under the contract, it is said that the practice is commendable.<sup>57</sup> When the article desired to be tendered is of such bulk and weight that it cannot be taken into the bodily presence of the person to whom it is desired to tender it, it is said that it may be deposited in some public warehouse or with some concern making it a business to store and keep such articles and give the person to whom it is desired to be tendered a written order on the depository for its delivery. So where the purchaser of an automobile desired to rescind the sale for breach of warranty, the delivery of the car to a garage and the giving to the seller of a written order for it was held sufficient.<sup>58</sup>

### **Sec. 872. Remedies of purchaser — recovery of purchase price.**

Where the purchaser has exercised his right of rescinding the contract for fraud or for breach of warranty, he is generally entitled to recover any payments he may have made for the machine.<sup>59</sup> The fact that the seller of the machine has not received the purchase price of the machine, or that part thereof has been disbursed to agents as commissions, does not affect the right of the purchaser to recover the entire purchase price which he has paid.<sup>60</sup> And, where the seller fails to deliver the machine according to his agreement, the pur-

57. *Klock v. Newbury*, 63 Wash. 153, 114 Pac. 1032.

58. *Klock v. Newbury*, 63 Wash. 153, 114 Pac. 1032.

59. *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617; *Jones v.*

*Norman* (Mo. App.), 228 S. W. 895; *Beecroft v. Van Schaick*, 104 N. Y. Suppl. 458; *Taylor v. First Nat. Bank*, 25 Wyo. 204, 167 Pac. 707.

60. *Half Co. v. Jones* (Tex. Civ. App.), 169 S. W. 906.

chaser may recover any payment he has made to the seller.<sup>61</sup> Or, if the contract for the sale of a car is mutually abandoned, the purchaser is entitled to recover any deposit he may have made with the seller, so long as there is no agreement making another disposition of such money.<sup>62</sup> Where the machine which is sold is absolutely worthless, the purchaser may recover the purchase price without returning it to the vendor.<sup>63</sup>

### Sec. 873. Tax on sales.

A State may levy a tax against sales of motor vehicles made by a dealer in the State to a resident thereof, although the machines are manufactured in another State and the purchaser pays the freight from the point of manufacture. The tax is not an interference with interstate commerce.<sup>64</sup>

### Sec. 874. Tax on dealers.

A tax on dealers of automobiles may be valid;<sup>65</sup> and it may be graduated according to the population of the county where they solicit orders for machines. A statute imposing a tax of this nature has been construed in Alabama as requiring the dealer to pay a tax only in the county of his principal business, although he solicits orders in other counties.<sup>66</sup> A statute of similar import, in *Georgia*, however, has been construed as requiring the dealer to pay one tax in each county in which he operates;<sup>67</sup> but, the tax having been paid in the county, any number of employees of such dealer can solicit sales therein without paying additional taxes.<sup>68</sup> A statute requiring the licensing of dealers may not apply to dealers

61. *John Hemwall Automobile Co. v. Michigan Avenue Trust Co.*, 195 Ill. App. 407; *Sandruck v. Wilson*, 117 Md. 624, 84 Atl. 54; *Washburn v. Ranier Co.*, 130 N. Y. App. Div. 42, 114 N. Y. Suppl. 424.

62. *Lane v. McLay*, 91 Conn. 185, 99 Atl. 498; *Ridder v. Lynch*, 133 N. Y. Suppl. 468.

63. *Avery Co. v. Staple Mercantile Co.* (Tex. Civ. App.), 183 S. W. 43. See also *Wells v. Walker* (Wash.), 186

Pac. 857.

64. *Banker Bros. Co. v. Pennsylvania*, 222 U. S. 210, 32 S. Ct. 38.

65. *Bethlehem Motors Corp. v. Flynt*, 178 N. C. 399, 100 S. E. 693.

66. *Patterson v. State*, 16 Ala. App. 483, 79 So. 157.

67. *Moore v. State*, 148 Ga. 457, 97 S. E. 76; *Moore v. State*, 22 Ga. App. 797, 97 S. E. 458.

68. *Moore v. State*, 22 Ga. App. 797, 97 S. E. 458.

in second-hand machines.<sup>69</sup> But a specific statute may be aimed at such dealers.<sup>70</sup> If a statute imposes a privilege tax on automobile dealers and another such tax on dealers in automobile accessories, it may be subject to a construction that permits a garage to pay a dealers' tax without also paying a tax as a dealer in accessories.<sup>71</sup>

69. *State v. Barber* (N. Car.), 104 S. E. 760. See also *In re Licenses to Sell Used Motor Vehicles* (Iowa), 179 N. W. 609; *Matter of Retail Dealer's License* (Iowa), 183 N. W. 440.

70. *Ex parte Higgins* (Cal. App., 195 Pac. 740.

71. *Stockell v. Hailey* (Tenn.), 229 S. W. 382.

## CHAPTER XXXI.

## LIENS.

## SECTION 875. Repairs—in general.

876. Repairs—filing notice of lien.

877. Repairs—priority of lien.

878. Repairs—loss of lien by surrender of possession.

879. Repairs—loss of lien by excessive demand.

880. Repairs—assignment of lien.

881. Storage.

882. Chattel mortgages—in general.

883. Chattel mortgages—filing or recording.

884. Chattel mortgages—recovery by mortgagor for injuries to machine.

885. Conditional sales—in general.

886. Conditional sales—filing of instrument.

887. Conditional sales—levy on interest of vendee.

888. Conditional sales—right of vendee to maintain action for injuries.

889. Conditional sales—retaking the machine by vendor.

890. Lien for injuries caused by machine.

**Sec. 875. Repairs—in general.**

Under the common law, a mechanic has a lien on personal property for the value of repairs made thereto.<sup>1</sup> This lien is affirmed by statute in many States, and permits the repairman to retain a motor vehicle which he has repaired until his

1. *J. M. Lowe Auto Co. v. Winkler*, 127 Ark. 433, 191 S. W. 927; *Vaught v. Knue*, 64 Ind. App. 467, 115 N. E. 108; *Winton Co. v. Meister*, 133 Md. 318, 105 Atl. 301; *Broom & Son v. Dale & Sons*, 109 Miss. 52, 67 So. 659; *Butterworth v. Soltz*, 199 Mo. App. 507, 204 S. W. 50. See also *Connell v. Hogg (Cal)*, 186 Pac. 134; *Milgrim v. Coon*, 93 Misc. 78, 156 N. Y. Suppl. 54. "Automobiles are a species of vehicles which were unknown at common law, but little doubt can be entertained that in the absence of a statute on the subject wheelwrights and mechanics repairing other kinds of vehicles would be entitled to a lien on an automobile." *J. M. Lowe Auto Co. v. Winkler*, 127 Ark. 433, 191 S.

W. 927.

**Partnership.**—One member of a partnership making repairs to a motor vehicle is not entitled to a judgment establishing a lien on the vehicle, in the absence of evidence showing an assignment of the lien from the partnership to the member. *Stoecker & Price, etc. Co. v. Erving (Mo. App.)*, 204 S. W. 29.

**Infant.**—A contract between an infant and a garage keeper, whereby the infant agrees to pay for the storage of his automobile and for supplies and repairs, may be disaffirmed by him, and he may recover possession of the machine, despite the claim of the lien by the garage keeper. *La Rose v. Nichols*, 91 N. J. L. 355, 103 Atl. 390.

charges are satisfied.<sup>2</sup> This right is said to exist on principles of natural equity and commercial necessity.<sup>3</sup> The owner of a machine who is in debt for repairs may also make a valid pledge of the machine to his creditor.<sup>4</sup> A lien may attach for a tire with which a machine is equipped.<sup>5</sup> And when an artisan puts a body on a chassis, he may have a lien on the chassis.<sup>6</sup> And statutes may extend the lien so it will apply for supplies furnished for the operation of the machine,<sup>7</sup> although at the time the supplies are furnished the claimant does not have possession of the machine.<sup>8</sup> The statutes on the subject, however, may have the effect of abrogating the common

**2. Arkansas.**—Weber Implement & Automobile Co. v. Pearson. 200 S. W. 273.

**Georgia.**—Knauff v. Yarbray, 21 Ga. App. 94, 94 S. E. 75.

**Indiana.**—Shore v. Ogden, 55 Ind. App. 394, 103 N. E. 852; Vaught v. Knue, 64 Ind. App. 467, 115 N. E. 108.

**Iowa.**—Duffy v. Hardy, Auto Co., 180 Iowa, 745, 163 N. W. 370.

**Massachusetts.**—Doody v. Collins, 223 Mass. 332, 111 N. E. 897.

**Mississippi.**—Broom & Son v. Dale & Sons, 109 Miss. 52, 67 Mo. 659.

**New York.**—Gilbert v. Bishop. 78 Misc. 560, 138 N. Y. Suppl. 689.

**Tennessee.**—Shaw v. Webb, 131 Tenn. 173, 174 S. W. 273.

**Texas.**—McBride v. Beakley (Civ. App.), 203 S. W. 1137; City Nat. Bank of Wichita Falls v. Laughlin (Civ. App.), 210 S. W. 67.

**Utah.**—Westminster Inv. Co. v. McCurtain, 39 Utah, 544, 118 Pac. 564.

**Justice of peace** has jurisdiction to enforce lien in some cases. West Point Motor Car Co. v. McGhee (Miss.), 84 So. 690.

**3. Broom & Son v. Dale & Sons,** 109 Miss. 52, 67 So. 659.

**4. Umsted Auto Co. v. Henderson Auto Co.,** 137 Ark. 40, 207 S. W. 437.

**5. Gardner v. LeFevre,** 180 Mich. 219, 146 N. W. 653. But see, as to new casings, Weber Implement & Au-

tomobile Co. v. Pearson (Ark.), 200 S. W. 273.

**6. Kansas City Auto School Co. v. Holker, etc. Mfg. Co. (Mo. App.),** 182 S. W. 759, wherein it was said: "It is urged that the body of an automobile is an entirely separate, distinct and independent article from its chassis and, as the labor or expense must be bestowed or performed on the identical or specific thing left in the artisan's possession, there could be no lien in this case. But, while we do not question the principle of law involved, we deny its application to the facts of this case. The making and fixing of the body on the chassis necessarily involved some work on the latter in order to fasten it permanently thereto. The work, if well done and according to contract, certainly added value to the chassis and made it a completed and entire instrumentality. The evidence, even from the plaintiff's side, was to the effect that an automobile body is no more a separate and distinct part of an automobile than a buggy body is a separate and distinct part of a buggy. Neither is complete without a body of some sort."

**7. Vaught v. Knue,** 64 Ind. App. 467, 115 N. E. 108.

**8. Frank v. Daily,** 92 N. J. L. 118, 105 Atl. 9.

law lien and thus requiring the repairman to proceed in accordance with the statute in order to protect his rights.<sup>9</sup> The statutory lien may apply only when the material or labor is furnished under a written memorandum signed by the owner.<sup>10</sup> Under a statute authorizing a lien for repairs on personal property, one does not have a lien for services in going after and bringing in a motor vehicle preparatory to repairs.<sup>11</sup> Where a plaintiff's automobile, which had been damaged in a collision, was delivered to the defendant to make repairs upon his agreement to wait for payment until the insurance money was collected, such agreement is a material part of the contract under which he obtained possession of the machine, and he has no lien thereon for repairs; and, in the absence of proof in replevin to recover possession of the automobile that the insurance on the automobile had been collected, or that plaintiff had neglected or refused to take the necessary steps for its collection, defendant's counterclaim for repairs should have been dismissed as premature, but without prejudice.<sup>12</sup>

### Sec. 876. Repairs — filing notice of lien.

Modern statutes relative to liens on chattels sometimes require that the lienor shall file a notice of his lien within a certain time after the completion of the work.<sup>13</sup> This time ordinarily begins to run from the completion of the repairs, and the fact that the owner in the meantime used the car for testing it does not change the rule.<sup>14</sup> Where upon different dates and as separate transactions labor or material is furnished for the repair of a motor vehicle, a single lien statement may be filed therefor, provided the item first furnished was so furnished within the limited period of the date of filing

9. *J. M. Lowe Auto Co. v. Winkler*, 127 Ark. 433, 191 S. W. 927.

10. *Butterworth v. Soltz*, 199 Mo. App. 507, 204 S. W. 50.

11. *Orr v. Jackson Jitney Car Co.*, 115 Miss. 140, 75 So. 945.

12. *Pezenik v. Greenburg*, 94 Misc.

Rep. 192, 157 N. Y. Suppl. 1093.

13. *J. M. Lowe Auto Co. v. Winkler*, 127 Ark. 433, 191 S. W. 927; *Pierce-Arrow Sales Co. v. Irwin*, 86 Ore. 683, 169 Pac. 129.

14. *Pierce-Arrow Sales Co. v. Irwin*, 86 Ore. 683, 169 Pac. 129.



the statement.<sup>15</sup> Under some statutes the failure to file the lien will preclude the lienor from foreclosing the lien as a chattel mortgage, but does not destroy his right to retain possession of the machine until his lien is satisfied.<sup>16</sup>

### Sec. 877. Repairs — priority of lien.

In some cases, it has been held that the lien of a repairman on a motor vehicle, while in his possession, is superior to the title of a mortgagee or conditional vendor of such property.<sup>17</sup> But in other jurisdictions, a contrary view has been taken.<sup>18</sup> The theory on which the priority of the lien for repairs is sustained, is that the chattel mortgagee or vendor, by permitting the property to remain in control of the mortgagor or purchaser, gives the latter implied authority to have necessary repairs made thereto and to afford the repairman a superior lien therefor.<sup>19</sup> A statute permitting such divesting of the

15. *Reed v. Horton*, 135 Minn. 17, 159 N. W. 1080.

16. *Willys Overland Co. v. Evans* (Kans.) 180 Pac. 235.

17. *Weber Implement & Automobile Co. v. Pearson* (Ark.), 200 S. W. 273; *Davenport v. Grundy Motor Sales Co.*, 28 Cal. App. 409, 152 Pac. 932; *Etchen v. Dennis & Son Garage* (Kan.), 178 Pac. 408; *Willys Overland Co. v. Evans* (Kan.), 180 Pac. 235; *Broom & Son v. Dale & Sons*, 109 Miss. 52, 67 So. 659. Compare *Orr v. Jackson Jitney Car Co.*, 115 Miss. 140, 75 So. 945.

18. *Baughman Automobile Co. v. Emanuel*, 137 Ga. 354, 73 S. E. 511, 38 L. R. A. (N. S.) 97; *Shaw v. Webb*, 131 Tenn. 173, 174 S. W. 273; *Holt v. Schwarz* (Tex. Civ. App.), 225 S. W. 856; *Dallas County State Bank v. Crismon* (Tex. Civ. App.), 231 S. W. 857; *Scott v. Mercer Garage, etc. Co.* (W. Va.), 106 S. E. 425. Compare *City Nat. Bank of Wichita Falls v. Laughlin* (Tex. Civ. App.), 210 S. W. 67. "It should perhaps be noted, by way of parenthesis, that a distinction is taken by the authorities between such

a claim of a mechanic and the common-law lien of an innkeeper on a chattel held in possession as conditional vendee by a guest. To such a chattel brought upon his premises, the lien attaches in favor of the innkeeper, provided he had no notice of the nature and extent of the guest's title when the property was brought into the inn. In such case the common-law imposed upon the innkeeper the obligation to receive the guest and his baggage, and that liability is deemed sufficient to give rise to a coextensive lien. So to speak, by way of recompense for the enforced obligation, the lien is held to attach to the property regardless of the true ownership." *Shaw v. Webb*, 131 Tenn. 173, 174 S. W. 273.

**Gasoline furnished by garageman.**—The lien of a garageman for gasoline furnished by him for a truck is inferior to the claim of a conditional vendor. *Partlow-Jenkins Motor Car Co. v. Stratton* (Ind. App.), 124 N. E. 470.

19. *Weber Implement & Automobile Co. v. Pearson* (Ark.), 200 S. W. 273; *Etchen v. Dennis & Son Garage*

security of a mortgagee or conditional vendor, is not unconstitutional.<sup>20</sup> But the priority of the lien may be lost where the repairman voluntarily delivers possession of the machine to the owner, although there is an agreement between the owner and the garageman that the delivery shall not divest the lien.<sup>21</sup> Under a statute giving a garage keeper a lien upon an automobile for repairs made "at the request or with the consent of the owner, whether such owner be a conditional vendee or a mortgagor remaining in possession or otherwise" the words "or otherwise" are to be construed as embracing things of the same kind or class with which they are connected and are held not to extend to a lessee or sublessee; and therefore, it is held that the consent or knowledge of either a lessee or a sublessee of an automobile that repairs are being made by a garage owner will not avail the latter so as to give him a lien upon the automobile.<sup>22</sup> And the consent of the owner is not to be inferred merely from the fact that the head of the owner's repair department had on several occasions visited claimant's garage while the machine was there, seen the work done on it and, in addition, furnished the two parts for a portion of the machine.<sup>23</sup>

### **Sec. 878. Repairs — loss of lien by surrender of possession.**

A common law lien in favor of one making repairs to a chattel is lost when he voluntarily surrenders possession of the property.<sup>24</sup> And it is held that the lien is not revived

(Kan.), 178 Pac. 408; *Broom & Son v. Dale & Sons*, 109 Miss. 52, 67 So. 659; *City Nat. Bank of Wichita Falls v. Laughlin* (Tex. Civ. App.), 210 S. W. 67.

<sup>20</sup> *Davenport v. Grundy Motor Sales Co.*, 28 Cal. App. 409, 152 Pac. 932.

<sup>21</sup> *Thourot v. Delahye Import Co.*, 69 Misc. (N. Y.) 351, 125 N. Y. Suppl. 827. See also *Rehm v. Viall*, 185 Ill. App. 425.

<sup>22</sup> *Lloyd v. Kilpatrick*, 71 Misc. (N. Y.) 19, 127 N. Y. Suppl. 1096. See also *Hamilton Motor Car Co. v. Heine-man*, 69 Pitts. Leg. Jour. (Pa.) 205.

<sup>23</sup> *Lloyd v. Kilpatrick*, 71 Misc. (N.

Y.) 19, 127 N. Y. Suppl. 1096.

<sup>24</sup> *Alexander v. Mobile Auto Co.*, 200 Ala. 586, 76 So. 944; *Weber Implement & Automobile Co. v. Pearson* (Ark.), 200 S. W. 273; *Crueible Steel Co. of America v. Polack Tyre & Rubber Co.* (N. J.), 104 Atl. 324; *Abeytia v. Gibbions Garage* (N. Mex.), 195 Pac. 515; *Shaw v. Webb*, 131 Tenn. 173, 174 S. W. 273; *Ford Motor Co. v. Freeman* (Tex. Civ. App.), 168 S. W. 80; *White v. Texas Motor Car & Supply Co.* (Tex. Civ. App.), 203 S. W. 441; *McBride v. Bakley* (Tex. Civ. App.), 203 S. W. 1137.

when the machine again comes into the possession of the same repairman to make repairs which are paid for.<sup>25</sup> And the same effect may result from statutory liens.<sup>26</sup> On the other hand, statutory provisions may continue the lien although the lienor has voluntarily lost the possession of the property,<sup>27</sup> and although the car has passed into the hands of an innocent purchaser for value who had no notice of the repairman's lien.<sup>28</sup> Particular statutes, however, may be so construed that such a lien cannot be enforced as against a *bona fide* purchaser.<sup>29</sup> Such a statute is constitutional although no system is provided for filing or recording the lien when the property has passed from the possession of the repairman.<sup>30</sup> One who has sold and set a tire to the machine of another, may be an "automobile repairer" within a statute giving a lien to such persons although they have parted with possession.<sup>31</sup>

### Sec. 879. Repairs — loss of lien by excessive demand.

The right to hold a just lien on property in one's possession may be lost by insisting on a payment of other charges which are not liens, but a lienor's right based on services giving a lawful lien may not fail though the jury's verdict falls

25. *Alexander v. Mobile Auto Co.*, 200 Ala. 586, 76 So. 944; *Ford Motor Co. v. Freeman* (Tex. Civ. App.), 168 S. W. 80; *White v. Texas Motor Car & Supply Co.* (Tex. Civ. App.), 203 S. W. 441.

26. *Morfa v. Rhodes*, 213 Ill. App. 354; *Vaught v. Knue*, 64 Ind. App. 467, 115 N. E. 108; *Maxton Auto Co. v. Rudd* (N. C.), 97 S. E. 477.

**Loss of possession through fraud** does not disturb the right to the lien. *Griffith v. Reddick* (Cal App.), 182 Pac. 984. Where the owner of the machine gives a check for the amount of repairs thereon and thereby induces the repairman to surrender possession of the machine, but thereafter he stops payment on the check, the repairman can maintain an action to recover possession of the machine in order that his lien will again attach. *Maxton*

*Auto Co. v. Rudd*, 176 N. C. 497, 97 S. E. 477.

27. *Crucible Steel Co. of America v. Polack Tyre & Rubber Co.*, 92 N. J. L. 221, 104 Atl. 324; *Courts v. Clark*, 84 Ore. 179, 164 Pac. 714; *Pierce-Arrow Sales Co. v. Irwin*, 86 Ore. 683, 169 Pac. 129; *McBride v. Beakley* (Tex. Civ. App.), 203 S. W. 1137.

28. *Frank v. Daily*, 92 N. J. L. 118, 105 Atl. 9.

29. *Abeytia v. Gibbons Garage* (N. Mex.), 195 Pac. 515; *Lanterman v. Luby* (N. J.), 114 Atl. 325.

30. *Crucible Steel Co. of America v. Polack Tyre & Rubber Co.*, 92 N. J. L. 221, 104 Atl. 324; *Frank v. Daily*, 92 N. J. L. 118, 105 Atl. 9.

31. *Courts v. Clark*, 84 Ore. 179, 164 Pac. 714. See also *Gardner v. Le Fevre*, 180 Mich. 219, 146 N. W. 653.

short of the amount claimed.<sup>32</sup> Thus, where a motor car company reduces its claim for repairs to an automobile, and the owner makes no tender of such amount, but offers a lesser amount, the insistence by the company on receiving the amount of its reduced claim of lien does not cause the company to lose its lien because subsequently a verdict is rendered against the owner for an amount less than the reduced sum claimed.<sup>33</sup>

### **Sec. 880. Repairs — assignment of lien.**

Where a lienor has possession of the property and transfers his debt and gives the possession of the property to the transferee, the owner is not prejudiced, and the assignee acquires the right to enforce the lien.<sup>34</sup>

### **Sec. 881. Storage.**

A garage keeper who stores the machine of one of his customers under an arrangement which permits the customer to take the machine away and use it whenever he desires so to do, is not entitled, under the common law, to claim a lien thereon for his storage charges and to retain the machine until such claim is satisfied.<sup>35</sup> But statutory provisions have been enacted in many jurisdictions which allow the garage keeper a lien in such cases.<sup>36</sup> But it is held that a statutory lien for storage is inferior to a prior chattel mortgage on the vehicle, although the mortgagee knew that the mortgagor was keeping the machine in a public garage.<sup>37</sup> A statute giving priority to the garage man over a prior chattel mortgage has

32. *Duffy v. Hardy Auto Co.*, 180 Iowa, 745, 163 N. W. 370.

**Delay.**—An unreasonable delay by a repairman in making the repairs, may cause him to lose his lien. *Huffaker v. Avert* (Colo.), 197 Pac. 897.

33. *Macumber v. Detroit Cadillac Motor Car Co.*, 173 App. Div. 724, 159 N. Y. Suppl. 890.

34. *Gardner v. LeFevre*, 180 Mich. 219, 146 N. W. 653; *Triple Action Spring Co. v. Goyena*, 93 Misc. (N. Y.)

171, 156 N. Y. Suppl. 1064; *Goyena v. Berdoniay*, 154 N. Y. Suppl. 103.

35. *Rehm v. Viell*, 185 Ill. App. 425; *Smith v. O'Brien*, 46 Misc. (N. Y.) 325, 94 N. Y. Suppl. 673, affirmed 103 App. Div. 596, 92 N. Y. Suppl. 1146.

36. *Doody v. Collins*, 223 Mass. 332, 111 N. E. 897; *Gage v. Callanan*, 113 N. Y. Suppl. 227; *Cuneo v. Freeman*, 137 N. Y. Suppl. 885.

37. *Adler v. Godfrey*, 153 Wis. 186, 140 N. W. 1115.

been thought unconstitutional.<sup>38</sup> A lien for the storage of a motor vehicle, when one exists, may be lost by a voluntary surrender of the machine to the owner.<sup>39</sup> A lien on a motor vehicle for storage can arise only under a contract between the garage keeper and the owner for the storage thereof. If, when a garage is sold, the new owner continues in possession of the stored machines, he is not entitled to a lien thereon, unless there is an assignment of the lien of the former owner.<sup>40</sup>

### Sec. 882. Chattel mortgages — in general.

A motor vehicle is personal property which may be the subject of a chattel mortgage. Mere inaccuracies in the description of property covered in a chattel mortgage are not fatal, if the subject is so described that it can be readily identified by the exercise of ordinary care, and even by the aid of extrinsic evidence, in case there is sufficient in the writing to put one, acting reasonably, on inquiry.<sup>41</sup> A description of the vehicle is generally sufficient if it gives the name and year

38. *Jensen v. Wileox Lumber Co.* (Ill.), 129 N. E. 133, followed *Thurber Art Galleries v. Rienzi Garage* (Ill.), 130 N. E. 747.

39. *Norfa v. Rhodes*, 213 Ill. App. 354; *Greene v. Fankhauser*, 137 App. Div. (N. Y.) 124, 121 N. Y. Suppl. 1004, holding that a defendant who caused the arrest of a person who seized and withheld his automobile to enforce the payment of a debt was justified in causing his arrest, although section 548 of the Penal Code provides that it is a good defense to an indictment for larceny that the property was appropriated openly under a claim of title preferred in good faith even though the claim be untenable, if the person appropriating the machine asserted no lien thereon and that moreover he could not assert a lien where possession was unlawfully obtained. The court said: "It may well be that if the plaintiff had the lawful possession of the automobile and erroneously, but in good faith, asserted ownership

or a lien thereon, the provisions of this section would relieve him of the charge of larceny in detaining the property; but he asserted no lien, and if it might be inferred that this was the theory upon which he was withholding the property, still the section would not apply, for if it applies to the assertion of a right to a lien at all it must relate only to a case where the possession has been obtained lawfully. If this be not so, then a creditor is at liberty to seize the personal property of his debtor anywhere and detain it until the account is settled, and if he acts in good faith, believing that he had a right to, he would not be subject to a criminal prosecution."

40. *White v. Texas Motorear & Supply Co.* (Tex. Civ. App.), 203 S. W. 441.

41. *Adler v. Godfrey*, 153 Wis. 186, 140 N. W. 1115; *Iowa Savings Bank v. Graham* (Iowa), 181 N. W. 771.

**Equitable lien.**—An instrument insufficient to constitute a chattel mort-

of model.<sup>42</sup> A mortgage given on machines, when it is within the contemplation of the parties that the mortgagor shall have the right to expose them for sale in the ordinary course of business, may be void.<sup>43</sup> Thus, if one loans a dealer money with which to purchase cars for sale and a chattel mortgage is given for his security, a purchaser of a machine from the dealer will generally acquire a good title as against the mortgagee.<sup>44</sup> The attachment of a "Form-a-Truck" to a mortgaged Ford chassis does not cause the "Form-a-Truck" to lose its identity, and a mortgage placed thereon before the attachment is good as against a prior mortgage on the chassis.<sup>45</sup> The rights of a chattel mortgagee of an automobile are not divested under some statutes for the confiscation of vehicles used in the illegal transportation of liquors, where the statute does not expressly provide for the confiscation of such rights and where the mortgagee has no knowledge of the illegal use of the machine.<sup>46</sup> Where there is no "danger" or equivalent clause in the mortgage, the mortgagee does not have the right to retake the machine immediately after he sold it to the mortgagor.<sup>47</sup>

gage, may, nevertheless create an equitable lien on the machines. *Fletcher v. American Nat. Bank* (Ind. App.), 128 N. E. 685.

42. *Clark v. Ford*, 179 Ky. 797, 201 S. W. 344; *Wright v. Lindsay*, 92 Vt. 335 Atl. 148.

43. *J. I. Case Threshing Machine Co. v. Lipper* (Tex. Civ. App.), 181 S. W. 236. See also *Border Nat. Bank v. Coupland*, 240 Fed. 355.

44. *Cudd v. Rogers*, 111 S. Car. 507, 98 S. E. 796; *O'Neil v. Cheatwood* (Va.), 102 S. E. 596.

45. *Hallerman v. Dothan Foundry & Machine Co.* (Ala. App.), 82 So. 642.

46. *Shrouder v. Sweat*, 148 Ga. 378, 96 S. E. 881, *Seignious v. Limehouse*, 107 S. Car. 545, 93 S. E. 193. *Com-*

pare as to additional sales, *H. A. White Auto Co. v. Collins*, 136 Ark. 81, 206 S. W. 748. And see *U. S. v. One Saxon Automobile*, 257 Fed. 251, allowing the confiscation as against the mortgage of a machine used to defraud the federal government of the tax on liquors. And see section 941 for a complete discussion of this point.

**Rights of purchaser.**—If the mortgage is properly filed, a purchaser has generally no greater rights as against the mortgagee than the original mortgagor possessed. *First Nat. Bank of Everett v. Northwest Motor Co.*, 108 Wash. 167, 183 Pac. 81.

47. *Sansone v. Studebacker Corp.* (Kans.), 187 Pac. 673.

**Sec. 883. Chattel mortgages — filing or recording.**

Under the statutes in force in most States, a chattel mortgage is invalid against creditors or subsequent purchasers or mortgagees in good faith, unless it is properly filed, or recorded as required by the statutes.<sup>48</sup> A purchaser having actual knowledge of the lien is not generally in a position to object to the failure to file the instrument.<sup>49</sup> But under some statutes, one suing for personal injuries received from the operation of the machine and levying an attachment on the machine, cannot take advantage of the omission to file or record.<sup>50</sup> Though the instrument is in form a conditional sale, if it is in fact given as security, the laws of some States require its filing in accordance with the regulations concerning chattel mortgages.<sup>51</sup> A pledge need not generally be filed, and hence it may be material to determine whether a particular transaction is a pledge or a chattel mortgage.<sup>52</sup>

**Sec. 884. Chattel mortgages — recovery by mortgagor for injuries to machine.**

The fact that the owner of a motor vehicle has incumbered the machine with a chattel mortgage does not destroy his right to maintain an action for injuries thereto occasioned by the acts of a third person. And this right is not impaired because the chattel mortgage is subsequently foreclosed and the property sold to another.<sup>53</sup>

<sup>48.</sup> *Colorado*.—*Flora v. Julesburg Motor Co.*, 193 Pac. 545.

*Kentucky*.—*Jewell v. Cecil*, 177 Ky. 822, 198 S. W. 199.

*Massachusetts*.—*Worcester Morris Plan Co. v. Mader*, 128 N. E. 777.

*Michigan*.—*Young v. Phillips*, 202 Mich. 480, 168 N. W. 549.

*New Jersey*.—*Rapoport v. Rapoport Exp. Co.*, 90 N. J. Eq. 519, 107 Atl. 822; *David Straus Co. v. Commercial Delivery Co.*, 113 Atl. 604.

*Texas*.—*Self Motor Co. v. First State Bank of Crowell* (Tex. Civ. App.), 226 S. W. 428.

<sup>49.</sup> *Rossman v. Ward* (Mich.), 178 N. W. 41.

<sup>50.</sup> *Clark v. Ford*, 179 Ky. 797, 201 S. W. 344. Compare *Jewell v. Cecil*, 177 Ky. 822, 198 S. W. 199.

<sup>51.</sup> *Young v. Phillips*, 202 Mich. 480, 168 N. W. 549; *Willys-Overland Co. of Cal. v. Chapman* (Tex. Civ. App.), 206 S. W. 987.

<sup>52.</sup> *Darragh v. Elliotte*, 215 Fed. 340.

**Delivery.**—There must be a delivery of the machine to constitute a pledge. *Fletcher Am. Nat. Bank v. McDermid* (Ind. App.), 128 N. E. 685; *Hastings v. Lincoln Trust Co.* (Wash.), 197 Pac. 627.

<sup>53.</sup> *Geren v. Hallenbeck*, 66 Oreg. 104, 132 Pac. 1164.

**Sec. 885. Conditional sales — in general.**

Where, upon the sale of a motor vehicle, the vendor reserves title to the machine until the payment of the purchase price, the transaction is ordinarily termed a conditional sale.<sup>54</sup> But, in case of an automobile agency, when the manufacturer reserves title to the machines until they are sold by the dealer, the transaction between the manufacturer and dealer is not a conditional sale, but is merely a bailment.<sup>55</sup> In some States, conditional contracts of sale are not sustained as against third persons innocently purchasing the property from the vendee.<sup>56</sup> The validity of a sale to a third person is generally determined by the law of the place of the sale; and hence where such sale is in a State which refuses to recognize the validity of conditional sales, the title of the third person will be good, though the original conditional contract was made in a State where it was valid.<sup>57</sup> But the validity of the contract may not be sustained in another State where it contravenes the settled policy of such State.<sup>58</sup> A machine sold under

54. *McArthur Bros. Co. v. Hogihara* (Ariz.), 194 Pac. 336; *Winton Co. v. Meister*, 133 Md. 318, 105 Atl. 301; *Russell v. Martin*, 232 Mass. 379, 122 N. E. 447; *Worcester Morris Plan Co. v. Mader* (Mass.), 128 N. E. 777; *Studebaker Bros. Co. v. Watcher* (Nev.), 195 Pac. 334.

**Time of payment.**—If the contract does not specify the time for payment its filing is not constructive notice to third parties and a *bona fide* purchaser acquires a title superior to the vendor. *Ford Motor Co. v. Maeder* (Wis.), 177 N. W. 39.

**Description of property.**—A conditional sale of an automobile may be ineffective if it does not describe the property so that it can be identified. *Kenner Co. v. Peters*, 141 Tenn. 55, 206 S. W. 188.

**Sufficiency of vendor's signature to instrument.**—*Kennerly v. Northwestern Junk Co.*, 108 Wash. 565, 185 Pac. 636.

**Parol transaction.**—If the condi-

tional sale is not evidenced by writing, it may be void as against third persons. *Lyon v. Nourse* (Wash.), 176 Pac. 359.

**Form of lease.**—An instrument in the form of a lease of a truck may be construed as a conditional sale. *Rapopot v. Rapopot Exp. Co.*, 90 N. J. Eq. 519, 107 Atl. 822.

**Attachment in action by vendor on contract.** See *Standard Auto Sales Co. v. Lehman* (Cal. App.), 186 Pac. 178. **Conditional contract of sale distinguished.** *Firestone Tire & Rubber Co. v. Anderson* (Iowa), 180 N. W. 273.

55. *Federal Rubber Co. v. King*, 12 Ga. App. 261, 76 S. E. 1083. And see section 785.

56. *Jones v. Kunkle*, 65 Pitts. Leg. Jour. (Pa.) 667.

57. *Fuller v. Webster*, 5 Boyce's (28 Del.) 538, 95 Atl. 335.

58. *Chambers v. Consolidated Garage Co.* (Tex. Civ. App.), 210 S. W.



a conditional sale may be registered in the name of the purchaser as an "owner."<sup>59</sup> The right of the conditional vendor under the contract, as the owner of the property, is inconsistent with any claim he may have for a lien on the machine for repairs.<sup>60</sup>

**Sec. 886. Conditional sales — filing of instrument.**

Under modern statutes regulating contracts of conditional sale, the vendor must file the instrument or it is invalid as against subsequent purchasers in good faith from the vendee,<sup>61</sup> and, under some statutes, as against the creditors of the vendee.<sup>62</sup> If not filed, the sale may be deemed absolute against one taking a chattel mortgage on the property without knowledge of the conditional nature of the contract.<sup>63</sup> But one who is being prosecuted for removing and secreting personal property held under a conditional sale, is not in a position to attack the validity of the sale and secure his release merely because the instrument was not filed.<sup>64</sup> And a purchaser from a third party who had no interest in the vehicle, cannot complain of the failure to record the mortgage.<sup>65</sup>

**Sec. 887. Conditional sales — levy on interest of vendee.**

It has been held that the interest of a conditional vendee in the machine is not one which is subject to levy and sale under an execution.<sup>66</sup>

565, affirmed 231 S. W. 1072. See also *Jerome. etc. Co. v. Stephens* (Mo. App.), 224 S. W. 1036.

59. *Brown v. New Haven Taxicab Co.*, 92 Conn. 252, 102 Atl. 573; *Downey v. Bay State St. Ry. Co.*, 225 Mass. 281, 114 N. E. 207; *Hurnanen v. Nicksa*, 228 Mass. 346, 117 N. E. 323. And see chapter VIII. as to the registration of vehicles.

60. *Alexander v. Mobile Auto Co.*, 200 Ala. 586, 76 So. 944.

61. *Becker v. La Core* (Mich.), 179 N. W. 344.

62. *Rapoport v. Rapoport Exp. Co.*

90 N. J. Eq. 519, 107 Atl. 822.

63. *Young v. Phillips* (Mich.), 168 N. W. 549; *Warley v. Metropolitan Motor Car Co.*, 72 Wash. 243, 130 Pac. 107.

64. *State v. Brummett*, 98 Wash. 182, 167 Pac. 120.

65. *Johnston v. Brown Bros. Co.* (Mo. App.), 231 S. W. 1011.

66. *Whitney v. Briggs*, 92 Misc. (N. Y.) 424, 156 N. Y. Suppl. 1107. See also *King v. Cline* (Cal. App.), 194 Pac. 290; *Young v. Phillips*, 202 Mich. 480, 168 N. W. 549.

**Sec. 888. Conditional sales—right of vendee to maintain action for injuries.**

In case of an injury to a motor vehicle sold under a conditional contract of sale, the vendee has the right to maintain an action against a third person for injuries to the machine.<sup>67</sup>

**Sec. 889. Conditional sales—retaking the machine by vendor.**

The conditional vendee is generally entitled to possession of the machine so long as he performs the contract.<sup>68</sup> Upon default in the payment of the purchase price of a vehicle sold under a conditional contract of sale, the vendor is entitled to recover possession of the machine.<sup>69</sup> And an assignee of the contract may have the same privilege.<sup>70</sup> The vendee will not

**67.** *Brown v. New Haven Taxicab Co.*, 92 Conn. 252, 102 Atl. 573; *Carter v. Black & White Cab Co.*, 102 Misc. (N. Y.) 680, 169 N. Y. Suppl. 441; *Downey v. Bay State St. Ry. Co.*, 225 Mass. 281, 114 N. E. 207; *Stotts v. Puget Sound Traction. Light & Power Co.*, 94 Wash. 339, 162 Pac. 519. "The right of the vendee, as against third parties, may be likened to that of a bailee, and we see no reasons why the same rules should not apply, especially when we consider the several statutes relied on by defendant. . . . The theory of the law being that the bailee being bound to restore the property or answer for its value, the action is maintained for the benefit of the bailor and bars a subsequent action by him. We think the analogy is complete. While having no element of title, the conditional sales vendee is bound to keep the property secure, and to pay its value to the vendor. The *quantum* of the title is the same in the vendor as in the bailor, and the want of title is the same in the vendee as in the bailee. The liability of the trespasser is the same, his only concern being that he shall not be put to the hazard of two recoveries. He is amply protected

by the very statutes cited by appellant. Under them he can bring in the vendor and make him answer to the complaint. Under the Code system, every action may be said to be an action on the case. Either party or the court, upon its own motion, has ample power to bring in all available parties." *Stotts v. Puget Sound Traction. Light & P. Co.*, 94 Wash. 339, 162 Pac. 519.

**Insurance.**—The conditional vendee has an insurable interest in the property. *Baker v. Northern Assur. Co.* (Mich.), 183 N. W. 61.

**68.** *Manor v. Dunfield*, 33 Cal. App. 557, 165 Pac. 983; *Adams v. Anthony*, 178 Cal. 158, 172 Pac. 593.

**Replevin** is a proper remedy to recover the property. *Aarons v. Dougherty* (Fla.), 84 So. 918.

**69.** *McArthur Bros. Co. v. Hag'shara* (Ariz.), 194 Pac. 336; *Haskett v. Hartwick* (Cal. App.), 191 Pac. 553; *Studebaker Bros. Co. v. Witcher* (Nev.), 195 Pac. 334; *Haworth v. Jackson* (Oreg.), 178 Pac. 926.

**Waiver of security.**—See *Whidden v. Davidson* (Miss.), 83 So. 178.

**70.** *Western Lumber Exch. v. Johnson* (Wash.), 188 Pac. 388.

be in default until after a complete delivery is made of the property.<sup>71</sup> Such improvements and repairs as the vendee may have made to the machine during his possession thereof will inure to the benefit of the vendor,<sup>72</sup> but severable and distinct equipment attached to the machine by the vendee may remain his property.<sup>73</sup> It has been held that knowledge on the part of the vendor that the purchaser, who was the operator of a newspaper, intended to give the machine away in a contest, did not estop him from retaking the machine from the winner of the contest.<sup>74</sup> Where, under a contract of this nature, the seller obtained possession of the car because of such a default and refused to surrender it until the amount of payments due had been paid and brought suit for the balance of the price agreed upon, it has been held that the buyer will be allowed, on a counterclaim for wrongful detention, a recovery only for such detention from the time of the commencement of such suit, the possession of the seller not being wrongful until that date.<sup>75</sup> The statutes in some States require the vendor upon retaking the machine to follow a prescribed procedure and sell the property to foreclose the rights of the vendee; and it is sometimes provided that, in case the vendor fails to follow the procedure, the vendee can recover the payments he has made on the machine.<sup>76</sup> The vendor cannot retake the machine and then recover the contract price from the purchaser; upon the retaking of the property, the consideration therefor fails.<sup>77</sup> Conditional sale contracts are sometimes drawn so as to permit the vendor to retake the property if he deems himself insecure.<sup>78</sup>

71. *Parker v. Funk* (Cal.), 197 Pac. 83.

72. *Clarke v. Johnson*, 43 Nev. 359, 187 Pac. 510; *Blackwood Fire & Vulcanizing Co. v. Auto Storage Co.*, 133 Tenn. 515, 182 S. W. 576.

73. *Clarke v. Johnson*, 43 Nev. 359, 187 Pac. 510.

74. *Watkins v. Curry*, 103 Ark. 414, 147 S. W. 43.

75. *Chase & Co. v. Kelly*, 125 Minn. 317, 146 N. W. 1113.

76. *Freeman v. Engel*, 102 Misc. 472, 168 N. Y. Suppl. 1014.

77. *Russell v. Martin*, 232 Mass. 379, 122 N. E. 447; *Alexander v. Mobile Auto Co.*, 200 Ala. 586, 76 So. 944.

78. *Hines v. Pacific Car Co.* (Wash.), 188 Pac. 29.

**Sec. 890. Lien for injuries caused by machine.**

A statute giving one injured through the operation of a motor vehicle a lien on the machine, next in priority to the lien for State and county taxes, has been sustained as constitutional,<sup>79</sup> although the machine was used without the owner's consent or knowledge,<sup>80</sup> and even though the machine may have been stolen.<sup>81</sup> Such statutory lien may be made superior to a chattel mortgage not given until after the passage of the statute.<sup>82</sup> It may pursue the machine, although it has passed into the hands of an innocent purchaser without notice of the injury.<sup>83</sup>

79. *Matter of McFadden*, 112 S. Car. 238, 99 S. E. 838; *Denny v. Doe* (S. Car.), 108 S. E. 95. And see *Merchants' & Planters' Bank v. Brigman*, 106 S. C. 362, 91 S. E. 332, wherein it was said: "Motor vehicles are a new and comparatively a modern means of locomotion. They are unquestionably dangerous, and can and do destroy property, kill and maim people as much as locomotives and engines and cars on railroad tracks. The only difference being that railways are operated on tracks owned by them where no one else has the right as a matter of right to travel, and motor vehicles are operated on highways where the public generally has the right to travel. The railroads are generally able to respond in damages for any damages willfully and negligently inflicted by them. As to the owners of motor vehicles, such as automobiles, it is a different proposition. There is a distinction in law as to the liability and measure of damages as to a common carrier for hire and a private carrier for hire. If the common carriers killed and maimed as many people and destroyed as much property under similar circumstances

of negligence and willfulness as the automobile and other motor vehicles there would be great indignation and large damages awarded. . . . The legislature had the right in the exercise of police power to guard its citizens and the public generally by passing a law in a measure that protects them from negligence, carelessness, and recklessness of persons driving dangerous machines, and the proviso making the machine that inflicted the injury liable for the damages and providing attachment of the same is not taking property without due process of law, but is passed in the best interest of the public. The act of the legislature only gives the right to make the machine liable, and not the owner of the machine, unless the owner was in the machine."

80. *Denny v. Doe* (S. Car.), 108 S. E. 95.

81. *Ex parte Maryland Motor Car Ins. Co.* (S. Car.), 108 S. E. 260.

82. *Merchants' & Planters' Bank v. Brigman*, 106 S. C. 362, 91 S. E. 332.

83. *Tate v. Brazier*, 115 S. Car. 337, 105 S. E. 413.

## CHAPTER XXXII.

## EVIDENCE.

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### Sec. 891. Judicial notice — nature of automobile.

The courts will take judicial notice that an automobile may be driven at a high rate of speed;<sup>1</sup> and that it is a large and sometimes noisy machine which, frequently when in operation, emits an offensive odor.<sup>2</sup> The courts also take notice of the increasing number of trucks in populous communities and of the danger to pedestrians therefrom.<sup>3</sup> It is also a matter of common knowledge that they can be stopped within a few feet if they are driven slowly,<sup>4</sup> and that they can be run over smooth ways where there is little or no street traffic much more easily, safely and quickly than over rough roads or where their progress is delayed by the presence of other vehicles or by the receiving or discharging of passengers from street cars.<sup>5</sup> The courts also take cognizance of the fact that motor trucks are operated or propelled by gasoline engines or motors, which by the use of gasoline produce their own energy or motive power.<sup>6</sup> Under a statutory provision requiring courts to take judicial notice "of the significance of all English words and phrases," a court will assume judicial knowledge of an automobile, its characteristics, and the con-

1. *People v. Schneider*, 139 Mich. 673, 12 Det. L. N. 32, 69 L. R. A. 345, 103 N. W. 172. 5 Ann. Cas. 790, where in the court says: "We may take judicial notice that many of these automobiles may be driven at a speed of at least forty miles an hour. Driven by indifferent, careless, or incompetent operators, these vehicles may be a menace to the safety of the public."

**Foot rails.**—The existence of foot rails so constructed as to permit passengers to entangle their legs therein, is not a matter of common knowledge. *Hedges v. Mitchell* (Colo.), 194 Pac. 620.

2. *People ex rel. Busching v. Ericson*, 263 Ill. 368, 105 N. E. 315.

3. *Consumers Co. v. City of Chicago*, 208 Ill. App. 203.

**Majority of vehicles.**—The courts may take judicial notice that the overwhelming majority of vehicles that occupy the streets of our cities in recent times are motor vehicles. *Dice v. Johnson* (Iowa), 175 N. W. 38.

4. *Roberts v. Ring*, 143 Minn. 151, 173 N. W. 437; *Clark v. Jones* (Oreg.), 179 Pac. 272.

5. *Mathewson v. Edison Elec. Illum. Co.*, 232 Mass. 576, 122 N. E. 743.

6. *Haddad v. Commercial Motor*

sequences of its use. As said by the Supreme Court of *California*: "We may assume . . . to have what is common and correct knowledge about an automobile. Its use as a vehicle for traveling is comparatively recent. It makes an unusual noise. It can be, and usually is, made to go on common roads at great velocity—at a speed many times greater than that of ordinary vehicles hauled by animals; and beyond doubt, it is highly dangerous when used on country roads, putting to great hazard the safety and lives of the mass of the people who travel on such roads in vehicles drawn by horses."<sup>7</sup>

### **Sec. 892. Judicial notice — law of the road.**

One of the matters which courts are required to know without proof, is the law of the road.<sup>8</sup>

### **Sec. 893. Judicial notice — municipal ordinances.**

Local municipal regulations are not generally within the knowledge of the courts, and they must be proved as facts by a party relying thereon.<sup>9</sup> Local courts are sometimes justified, however, in taking cognizance of regulations applicable within their jurisdiction.<sup>10</sup> And, on an appeal from the local court, the superior court may likewise assume knowledge of the regulation.<sup>11</sup> But even local courts do not in all States take notice of the local ordinances.<sup>12</sup>

Truck Co., 146 La. 897, 84 So. 197, 9 A. L. R. 1380.

7. *Ex parte Berry*, 147 Cal. 523, 82 Pac. 44.

Reduction of livery business by increase of automobile traffic, is a matter of common knowledge. *Hogan v. McCombs Bros.* (Iowa), 180 N. W. 770.

8. Section 243.

9. *People v. Treina*, 92 Misc. (N. Y.) 82, 155 N. Y. Suppl. 1015; *White v. State*, 82 Tex. Cr. 274, 198 S. W. 964.

Statutes may require courts to take judicial cognizance of certain ordinances. *Hart v. Roth*, 186 Ky. 35, 217 S. W. 893.

10. *City of Spokane v. Knight*, 96 Wash. 403, 165 Pac. 105.

11. *City of Spokane v. Knight*, 96 Wash. 403, 165 Pac. 105.

12. *People v. Treina*, 92 Misc. (N. Y.) 82, 155 N. Y. Suppl. 1015. And see section 82, as to the proof of ordinances.

**Sec. 894. Presumptions.**

In case of a collision between vehicles on the public highway, there is a presumption of negligence against the party who is on the wrong side of the highway at the time of the accident.<sup>13</sup> A presumption arises that the road law of another State is the same as that at common law.<sup>14</sup> And under the statutes of some jurisdictions, a presumption arises that one is guilty of negligence when he is violating the speed limit.<sup>15</sup> The courts frequently indulge the presumption that until evidence to the contrary is produced, a condition, having some degree of permanency, when once shown to exist, continues and has continued for some period of time. Thus, when it is shown that an automobile when received was in a certain condition, the courts presume that it was in the same condition when shipped from another State.<sup>16</sup>

**Sec. 895. Real evidence — parts of vehicle.**

In an action for a breach of a warranty in the sale of motors the admission in evidence of the several parts of the motors is largely a matter of discretion with the trial court, and unless such discretion is abused its admission will not constitute reversible error. Before parts are received in evidence the preliminary proof should show that they are substantially in the same condition that they were when such condition was material to the issue, or, if they had been broken, worn, altered or marred since such time, the court should require evidence to show in what particular they have been changed, the use to which they were put, and, if material, the test or circumstances under which they were broken or marred, and this whether they are introduced to prove a fact or for the purpose of illustration.<sup>17</sup> And, in an action for damages resulting to an automobile from a collision with another vehicle, it is proper to produce the radiator of the machine, where

13. Sections 267, 376.

14. *O'Donnell v. Johnson*, 36 R. I. 170 Mo. App. 64, 156 S. W. 62.

308, 90 Atl. 165.

15. Sections 321, 322.

16. *Kelly v. Times Square Auto Co.*

170 Mo. App. 64, 156 S. W. 62.

17. *Stayer Carriage Co. v. American, etc., Mfg. Co.*, 188 Ill. App. 634.



it is properly identified and shown to be in the same condition immediately after the accident.<sup>18</sup>

### Sec. 896. Real evidence — photographs.

In an action for injuries to an automobile, it is proper to receive in evidence a photograph of the machine in its damaged condition.<sup>19</sup> A photograph of one of the machines which collided is admissible, though, owing to its removal from the scene of the accident, its condition may not be exactly as at the time of the accident.<sup>20</sup> And, in an action against a railroad company for injuries to a motor vehicle, although a photograph of the vehicle is introduced in evidence, it is not necessarily reversible error for the court to exclude a photograph of the engine, for such a photograph could be of but slight help to the jury.<sup>21</sup> But it is held to be error to refuse to receive a photograph of the scene of a collision between a train and a vehicle.<sup>22</sup> And photographs of a defective highway may be received.<sup>23</sup> But it is not error to exclude a photograph of only a portion of the crossing, where it was taken from some distance to the side of the main line track and perhaps gives a misleading view of the situation.<sup>24</sup> It may be proper to permit the jury to view the scene of an automobile accident, or inspect the machine, but the matter is largely within the discretion of the court, and a reversal will not generally be had because the view was denied.<sup>25</sup>

### Sec. 897. Relevancy — in general.

It is a fundamental rule of the law of evidence that only such matters as are relevant to the issue shall be received.<sup>26</sup>

18. *Neel v. Smith* (Iowa), 147 N. W. 183.

19. *Laurisch v. Minneapolis St. P. R. & D. Electric Traction Co.*, 132 Minn. 114, 155 N. W. 1074.

20. *Young v. Dunlap*, 195 Mo. App. 119, 190 S. W. 1041.

21. *Laurisch v. Minneapolis St. P. R. & D. Electric Traction Co.*, 132 Minn. 114, 155 N. W. 1074.

22. *Boggs v. Iowa Central Ry. Co.*, 187 Ill. App. 621. See also, *Morrissey*

*v. Connecticut Valley St. Ry. Co.*, 233 Mass. 554, 124 N. E. 435.

23. *McCreedy v. Fournier* (Wash.), 194 Pac. 398.

24. *Stone v. Northern Pacific Ry. Co.*, 29 N. D. 480, 151 N. W. 36.

25. *Oberholzer v. Hubbell* (Cal. App.), 171 Pac. 436; *Spickelmeier v. Hartman* (Ind. App.), 123 N. E. 232; *Shortino v. Salt Lake & U. R. Co.*, 52 Utah, 476, 174 Pac. 861.

26. "Relevancy is a state of rela-

Thus, as a general proposition, the fact that the defendant in an automobile accident case is insured against liability by an indemnity company, cannot be shown by the plaintiff.<sup>27</sup> In an action for damages arising from the fright of a horse from an automobile, evidence of the vicious character of the horse may be received as bearing on the contributory negligence of the driver.<sup>28</sup>

### Sec. 898. Relevancy — conduct of accused.

In a criminal prosecution based on the wrongful operation of a motor vehicle, the conduct of the accused is a proper sub-

tion. Unless and until conditioned, it may well be regarded as a link connecting any given fact in point of time, with varying degrees of remoteness, with all other facts, prior or subsequent, and in all directions of space. In a state of nature, the existence of any given fact, according to general experience, renders probable, in a greater or less degree, the existence of a large number of other facts. Under the law of causation, the given fact is related, running backward, from effect to cause, to a large number of antecedent facts. Tracing forward into time, from cause to effect, it is relevant to a large number of subsequent ones. All time, prior or subsequent, is connected with the time of its occurrence. All space stands in definite relation to the location of its occurrence. Subjective relevancy, unconditioned, is in a similar position. The entire realm of mind is co-ordinated and related in much the same way as is the realm of matter. Any given act, in its mental or moral aspect, is the resultant of a large number of previous states of unconsciousness, the ramifications of which it is impossible to trace. In turn, it gives rise to consequences in the subjective mental conditions which cannot well be counted. To all of these psychological facts, prior or subsequent to itself, any artificially segregated act of conscious-

ness stands in some degree of relevance. Until its relations are conditioned by something which can direct thought along some given line of causation, or establish some fixed point as a goal toward which proof may verge, relevancy cannot be said to be either direct or indirect." Chamberlayne's *Modern Law of Evidence*, § 57.

**Hospital signs.**—Where in an action to recover for wrongful death alleged to have been caused by the excessive speed and carelessness with which the defendant's automobile was driven, the case was a close one on the facts, it was reversible error to admit evidence of the contents of hospital signs which were posted along the street at the place of the accident, warning travelers to "Walk Your Horses" and "Make No Unnecessary Noise," accompanied by statements of the court made in the presence of the jury that they might infer from the existence of the signs that the decedent, having seen them, might rely upon them as an assurance of safety, and also that the jury might infer that the defendant's chauffeur, having seen them, neglected to obey their mandate. *Falcone v. National Casket Co.*, 190 N. Y. App. Div. 651, 180 N. Y. Suppl. 455.

27. Section 836.

28. Section 544.

ject of inquiry. Thus, his flight after the accident may be shown. And it may be shown that after the accident he did not go to see the person injured.<sup>29</sup>

**Sec. 899. Relevancy — arrest of automobilist.**

In an action by a pedestrian injured by a collision with an automobile, the fact of the arrest of the defendant and that he was requested to take the plaintiff home in his machine, may properly be shown as part of the general transaction or for purposes of contradicting a party. And, when the arrest and acquittal of the defendant is shown on his own behalf, the plaintiff may ask him on cross-examination as to the offense for which he was tried.<sup>30</sup>

**Sec. 900. Relevancy — prior conviction.**

In an action against the owner of an automobile for causing the death of the plaintiff's decedent by frightening a horse that was being driven on a highway, causing it to run away and collide with a wagon in which the decedent was riding, thereby causing his death, the negligence charged was the failure to stop when warned that the automobile was frightening the horse. It was held, that evidence that the defendant had been convicted of exceeding the speed limits fixed by local ordinances in different places was not competent, as it had no bearing on the question of negligence involved; the violation of local ordinances not being evidence affecting moral character. While evidence of the commission of a crime may be admissible as bearing on moral character, the violation of local ordinances is generally not a crime, but only a lesser offense, which does not imply any moral turpitude.<sup>31</sup>

But evidence of prior convictions of a witness are admissible in some instances as bearing upon his credibility.<sup>32</sup>

29. *State v. Schaeffer*, 96 Ohio, 215, 117 N. E. 220.

30. *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876.

31. See *v. Wormser*, 129 N. Y. App.

Div. 596, 113 N. Y. Suppl. 1093.

32. *Van Goosen v. Barlum* (Mich.), 183 N. W. 8; *Brown v. Howard* (R. I.), 114 Atl. 11.

**Sec. 901. Relevancy — injuries as evidence of force of collision.**

In an action for injuries sustained from a collision with a motor vehicle, though particular injuries may be inadmissible as a basis for damage because they are not alleged in the complaint, they may be admissible to show the violence of the collision or the speed at which the vehicle was moving.<sup>33</sup> Similarly, when more than one person in an automobile is injured at a railroad crossing, in an action by one, the others may be permitted to state the injuries they received, as bearing upon the force of the train.<sup>34</sup> The distance which an automobile is pushed by a street car is thought to be some evidence of the speed of the car.<sup>35</sup>

**Sec. 902. Relevancy — discharge of chauffeur after accident.**

In an action against the owner of a motor vehicle for injuries received through its operation by a chauffeur, the fact that the owner discharged the chauffeur after the accident is not relevant.<sup>36</sup>

**Sec. 903. Relevancy — proof of mental state of party.**

In an action for injuries arising from an automobile accident, evidence of the business the occupants of the carriage were discussing just prior to the accident, may be received to show that the plaintiff was disturbed and disappointed, and hence might have been less careful about the management of his carriage than he would otherwise have been.<sup>37</sup> And evidence of the intoxication of the driver is generally competent.<sup>38</sup>

33. *Posner v. Harvey* (Tex. Civ. App.), 125 S. W. 356. See also, *Duprat v. Chesmore* (Vt.), 110 Atl. 305.

34. *Boggs v. Iowa Central Ry. Co.*, 187 Ill. App. 621.

35. *Northern Texas Tract Co. v. Smith* (Tex. Civ. App.), 223 S. W. 1013.

36. *Gillet v. Shaw*, 217 Mass. 59, 104 N. E. 719; *Buchanan v. Flinn*, 51 Pa. Super Ct. 145.

37. *Beckley v. Alexander*, 77 N. H. 255, 90 Atl. 878.

38. *Wigginton's Adm'r v. Rickert*, 186 Ky. 650, 217 S. W. 933.

**Sec. 904. Relevancy — care in selection of motor vehicle.**

In an action for damages to a plaintiff, who, while upon the sidewalk, was injured through a collision between a street car and defendant's auto truck, which, as the testimony showed, was driven in a zigzag manner across the street and back again in spite of the chauffeur's efforts to control it, evidence as to the character of the construction of the auto truck, that it had recently been purchased as a new machine, and that defendant had exercised the utmost care in its selection, was relevant and material on the question of defendant's negligence, and the exclusion of such testimony was reversible error.<sup>39</sup>

**Sec. 905. Relevancy — wheel tracks in highway.**

In an action for injuries from the frightening of a horse by an automobile, where one of the issues was the location of the automobile at the time of the accident, evidence may be received concerning wheel tracks in the highway after the accident, though they are not connected with the automobile in question, when the circumstances warrant the inference that they were made by the machine in question.<sup>40</sup>

**Sec. 906. Admissions and declarations — admissions by owner of liability.**

In an action against the owner of a motor vehicle for injuries occasioned by its operation, evidence of his admissions is received.<sup>41</sup> Thus, his subsequent admission as to the speed with which the machine was traveling on the occasion in question, may be proper on the issue whether the vehicle was

39. *Dulberger v. Gimbel Bros.*, 76 Misc. (N. Y.), 225, 135 N. Y. Suppl. 574.

40. *Maynard v. Westfield*, 87 Vt. 532, 90 Atl. 504.

41. *Salminen v. Ross*, 185 Fed. 997; *Rebbins v. Weed* (Iowa), 169 N. W. 773; *McKeever v. Ratcliffe*, 218 Mass. 17, 105 N. E. 552; *Eldridge v. Barton*,

232 Mass. 183, 122 N. E. 272; *Jolman v. Alberts*, 192 Mich. 25, 158 N. W. 170; *Smith v. Barnard*, 82 N. J. L. 468, 81 Atl. 734. See also *Link v. Fahey*, 200 Mich. 308, 166 N. W. 884.

**Opinion.**—An expression of an opinion by a party may be rejected. *Melter v. Week*, 186 Ky. 352, 217 S. W. 904.

violating a speed regulation.<sup>42</sup> In an action for injuries from a collision between a buggy and the defendant's automobile, the plaintiff has been permitted to show that after the accident the defendant said in substance he would pay for having the buggy or the rig repaired or fixed up.<sup>43</sup> But, it has been held proper to exclude evidence that the automobilist called on the injured person after the accident and urged her to go to the hospital, and stated that he had insurance on the machine and would pay all expenses.<sup>44</sup> But admissions of liability have been received, though they tended to show insurance.<sup>45</sup>

### **Sec. 907. Admissions and declarations — admissions by agent of defendant.**

As a general proposition, in an action against the owner of a motor vehicle for injuries occasioned from its operation, the owner is not bound by admissions of liability which have been made by the driver of the vehicle, and they are not ordinarily received as evidence against him.<sup>46</sup> Declarations of an alleged agent are not received to establish the agency.<sup>47</sup> The evidence, however, may be received in some cases for the purpose of contradicting the driver.<sup>48</sup>

### **Sec. 908. Admissions and declarations — *res gestae*.**

Evidence of a spontaneous exclamation made at the time of an automobile accident may be received in evidence as part of the *res gestae*.<sup>49</sup> Thus, in an action for injuries at a rail-

42. *Scragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706.

43. *Jolman v. Alberts*, 192 Mich. 25, 158 N. W. 170.

44. *Livingstone v. Dole*, 167 Iowa, 639, 167 N. W. 639.

45. *Ward v. DeYoung* (Mich.), 177 N. W. 213.

46. *Ballard & Ballard v. Durr*, 165 Ky. 632, 177 S. W. 445; *Frank v. Wright*, 140 Tenn. 535, 205 S. W. 434. And see section 654.

47. *Frank v. Wright*, 145 Tenn. 535,

205 S. W. 434. See also, section 654, as to the receipt of admissions made by the driver as bearing on the liability of the owner for the acts of the driver.

48. *Ballard & Ballard v. Durr*, 165 Ky. 632, 177 S. W. 445.

49. *Denver Omnibus & Cab Co. v. Krebs*, 255 Fed. 543; *Hedland v. Minneapolis St. Ry. Co.*, 120 Minn. 319, 139 N. W. 603; *Shore v. Dunham* (Mo. App.), 178 S. W. 900; *Reid Auto Co. v. Gorseczya* (Tex. Civ. App.), 144 S. W. 688; *Heg v. Mullen* (Wash.), 197

road crossing, testimony of witness that he exclaimed just before the accident, "Why don't they blow that whistle" was competent upon the issue whether any warning of the approach of the train was given.<sup>50</sup> And statements of the driver of an automobile made at the time of the collision, are generally received.<sup>51</sup> But statements made by a person other than the one sought to be bound thereby are not received, when they are made some time after the accident, and the elements of retrospection and deliberation may be thought to influence the statement.<sup>52</sup>

### **Sec. 909. Admissions and declarations — declarations of suffering.**

Declarations of an injured person made soon after an accident as to the pain with which he is suffering, may be shown. And a physician or attendant may testify to the injured party's statement as to his symptoms, ills, and the locality and character of his pain, when made for the purpose of medical advice and treatment, as such statements are made with a view to being acted upon in a matter of grave personal concern, in relation to which the injured party has a strong and direct interest to adhere to the truth.<sup>53</sup>

### **Sec. 910. Conclusions of witnesses.**

As a general rule a witness must testify to facts and not to conclusions or opinions in order that the jury may draw inferences from the evidence and conclusions from the facts presented. There are exceptions to this rule founded upon necessity, for the reason that the facts cannot be reproduced

Pac. 51; *Samuels v. Hiawatha Holstein Dairy Co.* (Wash.), 197 Pac. 24; *John v. Pierce* (Wis.), 178 N. W. 279.

50. *Terwilliger v. Long Island R. Co.*, 152 N. Y. App. Div. 168, 136 N. Y. Suppl. 733.

51. *Rhodes v. Firestone Tire & Rubber Co.* (Cal. App.), 197 Pac. 392.

52. *Loose v. Deerfield Twp.*, 187 Mich. 206, 153 N. W. 913; *Eline v.*

*Western Maryland Ry. Co.*, 262 Pa. 32, 104 Atl. 857; *McMillen v. Strathmann*, 264 Pa. St. 131, 107 Atl. 332; *Thomas v. Lockwood Oil Co.* (Wis.), 182 N. W. 841; *Frank v. Wright*, 140 Tenn. 535, 205 S. W. 434.

53. *Hayes v. Hogan*, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918 C. 715, Ann. Cas. 1918 E. 1127.

or depicted to the jury precisely as they appeared to the witness, and from the nature of the subject it is impractical for him to relate what he may have seen without supplementing his description with his conclusion. Under such circumstances a common observer, although not an expert, may testify to his opinion or conclusion regarding what he has seen.<sup>54</sup> In an action for injuries arising from the fright of horses from a motor vehicle; the defendant cannot be asked whether there was anything in the appearance of the horse or the position of the driver to indicate that the latter might lose control or that there was danger of trouble.<sup>55</sup> So, too, the witness cannot state whether he could have gotten farther from the carriage in passing it without getting on the street car track,<sup>56</sup> or whether there was anything present which would prevent a driver in seeing an obstruction in the road.<sup>57</sup> And, in an action for injuries to one struck by an automobile while alighting from a street car, it is not proper to ask what opportunity the plaintiff had to get out of the way of the automobile, or what he could have done to have avoided the injury.<sup>58</sup> And a statement may be received as to whether there was sufficient room for an automobile to pass to the right of other vehicles.<sup>59</sup> But it is proper to ask an observer of an accident whether an automobile struck a horse, for such a question calls for a fact, not a conclusion of the witness.<sup>60</sup> And the driver of an automobile may state that at a certain time he had his car under control.<sup>61</sup>

### Sec. 911. Opinions<sup>62</sup> — value.

A witness, after being properly qualified may give his opinion as to the depreciation or value of a certain motor

54. *White v. East Side Mill & Lumber Co.*, 84 Oreg. 224, 161 Pac. 969, 164 Pac. 736.

55. *Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236. See also, *Anders v. Wallace* (Ala. App.), 82 So. 644.

56. *Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236.

57. *Martin v. Kansas City* (Mo. App.), 224 S. W. 141.

58. *Levyn v. Koppin*, 183 Mich. 232, 149 N. W. 993.

59. *Shelly v. Norman* (Wash.), 195 Pac. 243.

60. *Zellmer v. McTague*, 170 Iowa, 534, 153 N. W. 77.

61. *Duprat v. Chesmore* (Vt.), 110 Atl. 305.

62. As to the opinion rule, generally, Mr. Chamberlayne says: "The



vehicle.<sup>63</sup> Or the value of an automobile body may be the proper subject of opinion evidence.<sup>64</sup> So, too, the value of repairs to a vehicle may be shown by the opinion of a qualified witness.<sup>65</sup> And, when relevant, evidence of a qualified witness may be received as the possibility of repairing a machine so

opinion rule has developed along rational and fairly scientific lines. It establishes the sense perception of the original observer as a primary grade of evidence. Where the original phenomena cannot, with satisfactory clearness, be placed before the jury or coordinated by them into a reasonable inference, the effect of these phenomena upon the mind of the witness may be introduced, under suitable conditions of necessity and relevancy, as secondary evidence. This is sensible and fairly scientific." Chamberlayne's *Modern Law of Evidence*, § 486. See as to estimates as to speed, 3 Chamberlayne's *Modern Law of Evidence*, § 2086.

63. *Mobile L. & R. Co. v. Harris Grocery Co.* (Ala. App.), 88 So. 55; *Gay v. Shadle* (Iowa), 176 N. W. 633; *Barshfield v. Vucklich* (Kans.), 197 Pac. 205; *Patterson v. Chicago, etc. R. Co.*, 95 Minn. 57, 103 N. W. 621; *Henderson v. Dimond* (R. I.), 110 Atl. 388.

"The owner of personal property is deemed competent to state his estimate as to its worth. He may give the value of his household furniture, including articles of clothing, or of the contents of the stable, carriages and similar articles. Such an owner may appraise his horses, cattle or other animals. If he has building materials, machinery, or the like, he may estimate as to what they are fairly worth. The owner, being competent to state the value of his property, naturally may estimate a change in the monetary worth of it. He thus becomes qualified to state an inference as to the damages, i. e., the diminution in value, caused by a speci-

fic inquiry." Chamberlayne's *Modern Law of Evidence*, § 2143.

"A witness especially qualified by skill and experience may state the value of personal property not fungible, i. e., possesses no established market price, and is available for exceptional uses. This may occur in case of animals, as where a valuable trotting horse is to be appraised. Machinery, new or second-hand, stands in the same position. The value of museum curiosities is equally a matter for the estimate of witnesses having special training and experience. Literary property can be satisfactorily valued only by one familiar with that form of art." Chamberlayne's *Modern Law of Evidence*, § 2155.

64. *Overall v. Chicago Motor Car Co.*, 183 Ill. App. 276.

65. *Mobile L. & R. Co. v. Harris Grocery Co.* (Ala. App.), 88 So. 55; *Holcomb Co. v. Clark*, 86 Conn. 319, 85 Atl. 376. "Prominent among matters in relation to value where the conclusion or judgment of the skilled witness is invoked is as to what would have been the probable value of property in the event of certain contingencies. Thus, in case of personal property, the qualified witness may testify as to an estimate of what would have been the value of animal or other chattel had a given event which actually occurred not have happened. In the same way, he may reverse his reasoning and give his estimate as to the value had a given fact which failed to occur actually have happened." Chamberlayne's *Modern Law of Evidence*, § 2169.

that it would operate properly.<sup>66</sup> The present owner or a past owner will generally be deemed qualified to give an opinion as to the value of a motor vehicle,<sup>67</sup> but other witnesses must be qualified as to their knowledge of value before they will be allowed to give an opinion on the subject.<sup>68</sup>

## Sec. 912. Opinions — safety of highway.

In an action against a municipality for injuries to an occupant of an automobile occurring by reason of an excavation in the highway, expert evidence cannot be received as to whether the highway at the place of the accident was reasonably safe for automobiles. The question of the construction and condition of a country highway is a subject which does not require expert testimony to enable a jury to decide as to whether it is reasonably safe for the passage of vehicles.<sup>69</sup>

66. *Wolff v. Hartford F. Ins. Co.* (Mo. App.), 223 S. W. 810.

67. *Patterson v. Chicago, etc., R. Co.*, 95 Minn. 57, 103 N. W. 621; *Egekvist v. Minnetonka, etc. Co.* (Minn.), 178 N. W. 238; *Midland Valley R. Co. v. Lawhorn* (Okla.), 198 Pac. 586.

68. *Patterson v. Chicago, etc., R. Co.*, 95 Minn. 57, 103 N. W. 621.

**Deterioration in value.**—In one case, where it was sought to admit the testimony of an attorney as to whether an automobile had deteriorated in value during a certain period, the court said: "One may own an automobile, or several of them in fact, and yet never acquire any knowledge of the mechanism thereof, nor what parts thereof are subjected to the greatest amount of wear and tear; nor would mere ownership of an automobile necessarily give one any knowledge of the relative value of a particular car at fixed dates; nor would the fact that one who had been the owner of several automobiles had ridden in a particular machine a number of times, without, more, throw any

light upon the question as to whether or not he possessed sufficient knowledge, skill, or information to qualify him as an expert upon such subject. Nor do we see how the added fact that one had been an attorney for different automobile concerns, and so "in that way keep in touch with the business," helps the situation.

We are of the opinion, and so hold, that the witness in question upon this showing should not have been permitted to testify as an expert on the question as to whether or not there was any deterioration in the value of the car between the time the policy was issued and the time of the loss." *Wolff v. Hartford F. Ins. Co.* (Mo. App.), 223 S. W. 810.

**A dealer** in a particular make of a truck is generally qualified to express an opinion of its value. *Kansas City, etc. Ry. Co. v. O'Connell* (Tex. Civ. App.), 210 S. W. 757.

69. *Loose v. Deerfield Twp.*, 187 Mich. 206, 153 N. W. 913.

**Sec. 913. Opinions — competency of driver.**

A witness should not be permitted to give his opinion as to the competency of a person to drive an automobile, as the jury is capable of drawing the proper inference from a statement of the facts.<sup>70</sup> Thus, one cannot be permitted to testify that one could drive a certain machine and operate the brake as effectively with his hands as with his feet.<sup>71</sup>

**Sec. 914. Opinions — defects in machine.**

A witness who is experienced in the running of motor vehicles, may give his opinion as to whether a machine is defective.<sup>72</sup> And whether it is safe and proper to operate a car under the conditions it was run is a question of fact for the jury and not a matter of expert opinion.<sup>73</sup>

**Sec. 915. Opinions — manner of collision.**

An expert witness, who has examined the breakage and the marks on a motor vehicle, may give his opinion as to the manner of the collision.<sup>74</sup>

**Sec. 916. Opinions — noise of machine.**

In an action for damages caused by the alleged frightening of a horse by an automobile, it has been held that a witness acquainted with the defendant's automobile may testify that it was exceedingly noisy and was the loudest machine that he ever heard.<sup>75</sup>

**Sec. 917. Opinions — identification of machine from track.**

A witness who has given special attention to the tracking of automobiles by the marks of their tires, may be allowed to give his opinion as to the identity of a machine which he has tracked.<sup>76</sup>

70. *Pantages v. Seattle Electric Co.*, 55 Wash. 453, 104 Pac. 629. See also *Jackson v. Vaughn* (Ala.), 86 So. 469; *Kelly v. City of Waterbury* (Conn.), 114 Atl. 530.

71. *Blalack v. Blacksher*, 11 Ala. App. 545, 66 So. 863.

72. *E. M. F. Co. v. Davis*, 146 Ky.

231, 142 S. W. 391.

73. *Reed v. Edison Elec. Illuminating Co.*, 225 Mass. 163, 114 N. E. 289.

74. *Young v. Dunlap*, 195 Mo. App. 119, 190 S. W. 1041.

75. *Fletcher v. Dixon*, 113 Md. 101, 77 Atl. 326.

76. *Beatty v. Palmer*, 96 Ala. 67, 71

**Sec. 918. Opinions — distance in which object can be seen.**

It may be proper to permit a witness, who is acquainted with the situation where an accident occurred, to testify as to the distance the driver of a vehicle could have seen the object struck.<sup>77</sup>

**Sec. 919. Opinions — distance in which machine may be stopped.**

When the evidence is relevant to the issue, expert witnesses may be allowed to give their opinions as to the distance within which a particular motor vehicle can be stopped when traveling at a given speed.<sup>78</sup> To justify an opinion on the subject, it must appear with reasonable clearness that the witness is referring to the same type of machine as is involved in the occurrence in question.<sup>79</sup>

Where a person was an eyewitness of an accident it was held that he was competent to testify as to about the distance in which an automobile such as defendant's, and going at the speed it was on the occasion in question, could be stopped, it appearing that he had had considerable experience in observing the speed of machines, had attended races, ridden in automobiles every day and read their speedometers, had been

So. 422. See also *Blalack v. Blacksher*, 11 Ala. App. 545, 66 So. 863; *White v. East Side Mill & Lumber Co.*, 84 Oreg. 224, 161 Pac. 969, 164 Pac. 736.

77. *Arkansas & L. Ry. v. Sanders*, 81 Ark. 604, 99 S. W. 1100.

78. *Hughey v. Lennox* (Ark.), 219 S. W. 323; *Crandall v. Krause*, 165 Ill. App. 15; *Foley v. Lord*, 232 Mass. 368, 122 N. E. 393; *Johnson v. Quinn*, 130 Minn. 134, 153 N. W. 267; *Young v. Bacon* (Mo. App.), 183 S. W. 1079; *Tucker v. Carter* (Mo. App.), 211 S. W. 138; *State v. Gray* (N. Car.), 104 S. E. 647. "A witness shown to be competent to do so may estimate within what distance an automobile traveling at a given rate of speed may

be brought to a stand." *Chamberlayne's Modern Law of Evidence*, § 2086. "Evidence as to the distance in which an automobile or a street car can be stopped is often very misleading; that presupposes that the party knows that he has to stop the car and is prepared with his hands upon the brakes for that purpose. In driving along when an emergency is created, it takes a moment for the human mind to grasp the situation, the cause and necessity for the stopping of the car, another moment to reach the levers to apply the brakes." *Iannone v. Webber-McLoughlin Co.*, 186 N. Y. App. Div. 594, 174 N. Y. Suppl. 580.

79. *Miller v. Eversole*, 184 Ill. App. 362.

with a rubber company in its repair department for several years, and that said company had left to his judgment all matters based on speed.<sup>80</sup> The distance within which a machine was stopped on a particular occasion after an accident may be taken into consideration in determining its speed.<sup>81</sup>

### **Sec. 920. Proof of speed of vehicle — opinion of driver.**

The chauffeur or driver of a motor vehicle is, perhaps, better qualified than other witnesses to give evidence as to the speed of the machine on a particular occasion.<sup>82</sup> On the other hand, it is to be noted that, in an action involving the speed at which he drove the machine, he is generally interested in the event of the action, and his personal bias may require a careful scrutiny of his testimony. The chauffeur or operator of an automobile, having control of the vehicle, is the custodian, so to speak, of the speed. This is an important consideration. His testimony should be especially valuable if it consists not merely of an expression of his judgment or opinion, but of what he actually did in the way of regulating the speed; since, in the latter case it might be necessary for the trier of facts to find him guilty of perjury if his testimony is not to be credited, and very strong evidence is always required to justify that severity. Where, for example, the chauffeur or operator is able to testify as to what he did in reference to shutting off the power, applying the brakes, or any other matter pertaining to the regulation of the speed, this should furnish, at least, strong corroborative evidence. Because the chauffeur is so closely in touch with the automobile's movements, courts should give great weight to his evidence, if it is truthful. It has been held proper to ask the chauffeur as to the highest rate of speed which could be made

80. *Scholl v. Grayson*, 147 Mo. App. 652, 127 S. W. 415. See also *Blado v. Draper*, 89 Neb. 787, 132 N. W. 410.

81. *Lorah v. Rinehart*, 243 Pa. St. 231, 89 Atl. 967; *Feyer v. Durbrow* (Wis.), 178 N. W. 306.

82. See *Bowes v. Hopkins*, 84 Fed. 767, 28 C. C. A. 524; *New York Transp. Co. v. Garside*, 157 Fed. 521,

85 C. C. A. 285; *Book v. Aschenbrenner*, 165 Ill. App. 23; *Livingstone v. Dole*, 167 Iowa, 639, 167 N. W. 639.

The driver of another car leading a procession of machines may state the speed of his machine as evidence of a following one. *Tucker v. Carter* (Mo. App.), 211 S. W. 138.

with the car where excessive speed was alleged as constituting the basis of the negligence.<sup>83</sup> The admissions of a chauffeur as to the speed of his vehicle on a given occasion, made outside of judicial proceedings, are not generally binding on his employer, though they may be used under some circumstances to contradict or impeach the evidence of such chauffeur.<sup>84</sup>

### Sec. 921. Proof of speed of vehicle — opinion of observer.

One who observes a vehicle in motion is generally entitled to give his estimate of its speed.<sup>85</sup> The general rule applies to street cars<sup>86</sup> and railroad engines,<sup>87</sup> as well as motor vehi-

83. *Goldblatt v. Broeklebank*, 166 Ill. App. 315.

84. *Loose v. Deerfield Twp.*, 187 Mich. 206, 153 N. W. 913.

85. *United States*.—*Porter v. Buckley*, 147 Fed. 140, 78 C. C. A. 138.

*Alabama*.—*Kansas City, e.c. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262; *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927.

*California*.—*Yohachi v. Bundy*, 24 Cal. App. 675, 142 Pac. 109.

*Connecticut*.—*Wolfe v. Ives*, 83 Conn. 174, 76 Atl. 256, 19 Ann. Cas. 752.

*Georgia*.—*Fisher Motor Car Co. v. Seymour*, 9 Ga. App. 465, 71 S. E. 764.

*Illinois*.—*People v. Lloyd*, 178 Ill. App. 66.

*Indiana*.—*Louisville, etc. R. Co. v. Jones*, 108 Ind. 551, 9 N. E. 476; *American Motor Car Co. v. Robbins*, 181 Ind. 417, 103 N. E. 641.

*Iowa*.—*Owens v. Iowa County*, 186 Iowa, 408, 169 N. W. 388.

*Kansas*.—*Himmelwright v. Baker*, 82 Kans. 569, 109 Pac. 178.

*Massachusetts*.—*Creedon v. Galvin*, 226 Mass. 140, 115 N. E. 307.

*Michigan*.—*Matla v. Rapid Motor Vehicle Co.*, 160 Mich. 639, 125 N. W. 708; *Harnau v. Haight*, 189 Mich. 600, 155 N. W. 563; *Faulkner v. Payne*, 191 Mich. 263, 157 N. W. 565.

*Minnesota*.—*Daly v. Curry*, 128 Minn.

449, 151 N. W. 274; *Dunkelbeck v. Meyer*, 140 Minn. 283, 167 N. W. 1034.

*Missouri*.—*State v. Watson*, 216 Mo. 421, 115 S. W. 1011.

*Nebraska*.—*Neidy v. Littlejohn*, 146 Iowa, 355, 125 N. W. 198.

*Oregon*.—*Everart v. Fischer*, 75 Oreg. 316, 145 Pac. 33, 147 Pac. 189; *Kelley v. Weaver*, 77 Oreg. 267, 150 Pac. 166, 151 Pac. 463.

*Pennsylvania*.—*Dugan v. Arthurs*, 230 Pa. St. 299, 79 Atl. 626.

*Vermont*.—*Brown v. Swanton*, 60 Vt. 53, 37 Atl. 280.

86. *United States*.—*Robinson v. Louisville R. Co.*, 112 Fed. 484, 5 C. C. A. 357.

*District of Columbia*.—*Eclaigton, etc., R. Co. v. Hunter*, 6 App. Cas. (D. C.) 287.

*Illinois*.—*Potter v. O'Donnell*, 199 Ill. 119, 64 N. E. 1026.

*Michigan*.—*Mertz v. Detroit Electric R. Co.*, 125 Mich. 11, 83 N. W. 1036.

*Nebraska*.—*Mathieson v. Omaha St. R. Co.*, 3 Neb. (Unoff.) 743, 92 N. W. 639.

*New York*.—*Fisher v. Union R. Co.*, 86 App. Div. 365, 83 N. Y. Suppl. 694.

*Ohio*.—*Toledo Electric St. R. Co. v. Westenhuber*, 22 Ohio Cir. Ct. Rep. 67, 12 Ohio Cir. Dec. 22.

cles. It is not necessary that the observer be skilled or have expert knowledge on the subject of speed of vehicles.<sup>88</sup> The comparative value, in such cases, of the estimate of expert and non-expert witnesses is for the jury.<sup>89</sup> To confine opinions on speed to experts, would be to deprive a litigant of the opportunity to prove his case, for it is but seldom that an expert witness is available who has seen the speed on the particular occasion.<sup>90</sup> But it is said that an observer's esti-

*Washington*.—*Sears v. Seattle Consol. St. R. Co.*, 6 Wash. 227, 33 Pac. 389.

See 3 Chamberlayne's Modern Law of Evidence, §§ 2088, 2039.

87. *Highland Avenue & B. R. Co. v. Sampson*, 112 Ala. 425, 20 So. 566; *Stone v. Northern Pacific Ry. Co.*, 29 N. D. 480, 151 N. W. 36.

88. *United States*.—*Denver Omnibus & Cab Co. v. Krebs*, 255 Fed. 543.

*Alabama*.—*Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927.

*Connecticut*.—*Wolfe v. Ives*, 83 Conn. 174, 76 Atl. 526, 19 Ann. Cas. 752.

*Georgia*.—*Fisher Motor Car Co. v. Seymour*, 9 Ga. App. 465, 71 S. E. 764.

*Illinois*.—*People v. Lloyd*, 178 Ill. App. 66.

*Indiana*.—*American Motor Car Co. v. Robbins*, 181 Ind. 417, 103 N. E. 641.

*Kansas*.—*Miller v. Jenness*, 84 Kans. 608, 114 Pac. 1052.

*Missouri*.—*State v. Watson*, 216 Mo. 421, 115 S. W. 1011.

*Nebraska*.—*Neidy v. Littlejohn*, 146 Iowa, 355, 125 N. W. 198.

*Oregon*.—*Kelely v. Weaver*, 77 Ore. 267, 150 Pac. 166, 151 Pac. 463.

*Pennsylvania*.—*Dugan v. Arthurs*, 230 Pa. St. 299, 79 Atl. 626.

"Any person of reasonable intelligence and ordinary experience in life may, without proof of further qualification, express an opinion as to how fast an automobile which has come under his observation was going at a par-

ticular time." *Dunkelbeck v. Meyer*, 140 Minn. 283, 167 N. W. 1034.

"An adult of reasonable intelligence and ordinary experience who observed the passing of an automobile just before an accident occurred is presumptively capable, without proof of further qualification, to give his opinion as to the speed of the automobile. An ordinary observer, acquainted with automobiles, but with neither practical nor technical knowledge of their construction or management, will be permitted to give his estimate as to the rate of speed at which a machine was proceeding at a given time. The sense of hearing is not sufficiently accurate in case of the ordinary observer to enable the latter to form a reliable opinion, by the use of that faculty alone, regarding the rate of speed at which an automobile is traveling. Similarity of experience makes the estimate of a motorman regarding the speed of one of these machines practically that of a skilled observer." *Chamberlayne's Modern Law of Evidence*, § 2086.

89. *Fisher Motor Car Co. v. Seymour*, 9 Ga. App. 465, 71 S. E. 764; *State v. Watson*, 216 Mo. 421, 115 S. W. 1011.

90. *Kelly v. Weaver*, 77 Ore. 267, 150 Pac. 166, 151 Pac. 463, wherein it was said: "Persons who are accustomed to operate automobiles and have observed their velocity as indicated by speedometers can generally, without looking at such registering instrument

mate is not much more than a guess, and that the results of a collision may furnish better evidence as to whether a vehicle was going too fast.<sup>91</sup>

### **Sec. 922. Proof of speed of vehicle — opinion of passenger.**

The fact that a witness was a passenger in an automobile does not render him incompetent to testify as to its speed,<sup>92</sup>

very accurately determine the rate of movement. So, too, police officers, a part of whose business is to apprehend violators of speed ordinances, from observing the movement of vehicles within a given distance when compared with the time required in passing over the intervening space, can very closely estimate the speed of an automobile by seeing it pass. Persons of the classes indicated are not always present at or immediately prior to a collision whereby an injury is inflicted that results in an action to recover damages for alleged negligence in operating an automobile, and while other adults may not have enjoyed such opportunities for observing the rate of speed of such machines, they are nevertheless competent to express opinions of that subject, and though their estimates may be conjectural, they are admissible, the weight and value of their testimony being for the jury to determine."

**Non-experts.**—"Their competency to express an opinion did not require them to possess technical or scientific knowledge. An intelligent person having a knowledge of time and distance is capable of forming an opinion as to the speed of a passing railroad train, a street car or an automobile. His conclusion is the result of a comparison with the speed of other moving objects of which he has knowledge by constant experience. There is no more reason why such a witness should not be permitted to testify to the speed of an automobile than to the speed of a car

riage or other vehicle which travels the public highways. His everyday experience gives him sufficient knowledge to form an intelligent judgment upon the subject. He simply compares the speed of one moving object with that of another with which he is made familiar by the daily affairs of life. Aside from any other sufficient reason, the necessity of the case requires that such testimony be admitted in trials involving the wanton and dangerous speeding of automobiles. To hold otherwise and to compel the production of expert testimony in such cases would in almost every instance defeat the ends of justice. An expert witness or exact measurement by a speedometer is seldom available to a party who has been injured by the reckless conduct of a person operating such a machine, and to require such evidence in order to sustain an action would be unreasonable and work palpable injustice. Absolute accuracy is not required in such cases to make a witness competent to testify to the speed of the machine." *Dugan v. Arthurs*, 230 Pa. St. 299, 79 Atl. 626.

**91.** *Maritsky v. Shreveport Rys. Co.*, 144 La. 692, 81 So. 253.

**92.** *Denver Omnibus & Cab Co. v. Krebs*, 255 Fed. 543; *Galloway v. Perkins*, 198 Ala. 658, 73 So. 956; *Goodes v. Lansing & Suburban Traction Co.*, 150 Mich. 494, 114 N. W. 338; *Hays v. Hogan*, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918 A. 715, Ann. Cas. 1918 E. 1127.



or as to the speed of the vehicle with which it collides.<sup>93</sup> A witness is not required to be an expert to be competent to testify to the speed of a train or other vehicle in which he was riding.<sup>94</sup> But it may be more difficult for an occupant to give an accurate estimate than for an outsider.<sup>95</sup> And it has been held to be improper to ask an occupant whether another car was going faster than the one in which he was riding.<sup>96</sup> Thus it has been held that passengers riding on a train are not competent to estimate from observation the rate of speed at which the train traveled.<sup>97</sup> But such evidence has been admitted.<sup>98</sup>

### Sec. 923. Proof of speed of vehicle — qualification of witnesses.

As is stated above, it does not require an expert witness to give an opinion as to the speed of an observed motor vehicle.<sup>99</sup> One who has timed automobiles is clearly a competent witness.<sup>1</sup> One who has frequently observed the passage of auto-

93. *Bianchi v. Millar* (Vt.), 111 Atl. 524.

94. *Galloway v. Perkins*, 198 Ala. 658, 73 So. 956.

95. "An estimate of the speed with which an animal, vehicle or other object is proceeding may properly be received from one qualified to give it. Often it is practically the only reliable evidence available. Its use is, therefore, in a measure, forced upon judicial administration. In many actions for personal injury or damage to property from alleged negligence, in which the element of an unreasonable rate of speed is said to have entered, the evidence of those best acquainted with the actual rate of motion is often subject to rational suspicion by reason of bias of self-interest. It has frequently been observed to be extremely difficult for a person upon a moving vehicle to estimate correctly the rate at which he is proceeding at a given moment. The engineer of the train, motorman of an electric car or chauffeur of an automo-

bile is seldom able to remember his exact rate of speed. The capability of a given observer to estimate accurately the rate at which a train of cars or other object is moving, may itself be the subject of an inference or conclusion. The inherent difficulties of proving an extremely transitory fact of so intangible a nature has warranted marked administrative concessions in this matter of making proof of speed." *Chamberlayne's Modern Law of Evidence*, § 2086.

96. *Seager v. Foster*, 185 Iowa. 32, 169 N. W. 681, 8 A. L. R. 690.

97. *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321.

98. *Johnson v. Oakland, S. L. & H. Electric R. Co.*, 127 Cal. 608, 60 Pac. 170; *Galveston, etc., R. Co. v. Wesch* (Tex. Civ. App.), 21 S. W. 62.

99. Section 921.

1. *Thomas v. Chicago & G. T. R. Co.*, 86 Mich. 496, 49 N. W. 547.

mobiles and other vehicles, and ridden in them, and made observations of their rate of speed, may give his opinion of the speed of the car at the time of the collision.<sup>2</sup> An occupant of a vehicle toward which an automobile is approaching, may ordinarily testify as to the speed of the machine.<sup>3</sup> And one who has been in the habit of meeting automobiles on the road for years, and has been driving horses all his life, and had ridden on railroad trains and observed the rate at which ordinary vehicles traveled, may give his opinion on the subject.<sup>4</sup> And one who has had an experience of twelve years as a motorman upon a street car is competent to state his opinion as to the rate of speed at which an automobile was traveling.<sup>5</sup> An adult of ordinary intelligence and experience is presumably capable, without proof of further qualification, of expressing his opinion as to the speed of a passing automobile which he observes.<sup>6</sup> Even the plaintiff who is struck by the machine has been allowed to express his opinion.<sup>7</sup> Additional requirements of sound mind and judgment have been suggested.<sup>8</sup> He should have some knowledge of time and distance in order to give a correct estimate of the number of miles per hour a vehicle is traveling.<sup>9</sup> But the evidence of a witness giving an estimate of speed will not necessarily be struck out, because he is unable to state the number of feet or rods in a mile.<sup>10</sup>

2. *Himmelwright v. Baker*, 82 Kan. 569, 109 Pac. 178. The court said: "Error is assigned upon the rejection of the plaintiff's testimony concerning the speed of the car at the time of the collision. He testified that the car was ten or fifteen feet from him when he first saw it; that it was running so fast he had no time to do anything, but that he tried to get away from it. He was then asked at what rate of speed it was running, and answered that it was fifteen miles an hour, but the answer was stricken out on the ground that it appeared that he did not have sufficient opportunity to form an opinion on the question of speed. The evidence was competent. An objection to such testimony goes to its weight rather

than to its admissibility."

3. *Shaffer v. Coleman*, 35 Pa. Super. Ct. 386. See also *Bianchi v. Millar* (Vt.), 111 Atl. 524.

4. *Faulkner v. Payne*, 191 Mich. 263. 157 N. W. 565.

5. *Hough v. Kobusch Automobile Co.*, 146 Mo. App. 58. 123 S. W. 83.

6. *Wolfe v. Ives*, 83 Conn. 174, 76 Atl. 526, 19 Ann. Cas. 752; *Daly v. Curry*, 128 Minn. 449, 151 N. W. 274.

7. *Merchants' Transfer Co. v. Wilkinson* (Tex. Civ. App.), 219 S. W. 891.

8. *Chicago, B. & Q. R. Co. v. Clark*, 26 Neb. 645, 42 N. W. 703.

9. *Chicago, B. & Q. R. Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708.

10. *Ward v. Chicago, St. P., M. & O. R. Co.*, 85 Wis. 601, 55 N. W. 771.

**Sec. 924. Proof of speed of vehicle — foundation for opinion.**

Where an estimate is made by a witness as to the speed of a passing automobile, the facts should be stated upon which the estimate is made, and in order to give his testimony any value it should be shown that the witness had adequate facilities for observing the automobile's movement.<sup>11</sup> And it should also be shown that the facilities for observing the speed were improved by the witness.<sup>12</sup> He should be close enough so that he can give a fair estimation of the speed.<sup>13</sup> It is not required that the witness has seen the machine travel for any considerable distance. Thus, one who first saw an automobile when it was from ten to fifteen feet from him should be permitted to give an estimate of its speed, the objection that he did not have sufficient opportunity to judge its speed going to the weight rather than the admissibility of the evidence.<sup>14</sup> And an observer having an opportunity to see a machine a distance of twenty feet, has been allowed to give an opinion on its speed.<sup>15</sup> The fact that the witness is able to state that the machine went a certain distance in a certain time, adds to the weight of his estimate of its speed.<sup>16</sup>

**Sec. 925. Proof of speed of vehicle — characterization of speed.**

When relevant to the issue, testimony that a vehicle went "fast,"<sup>17</sup> "very fast,"<sup>18</sup> or that its speed was "dangerous,"<sup>19</sup>

11. *Muth v. St. Louis, etc., R. Co.*, 87 Mo. App. 422; *Union Pac. R. Co. v. Ruyicka*, 65 Neb. 621, 91 N. W. 543.

12. *Mathieson v. Omaha St. R. Co.*, 3 Neb. (Unoff.) 743, 92 N. W. 639.

13. *Warruna v. Dick*, 261 Pa. 602, 104 Atl. 749.

14. *Dilger v. Whittier*, 33 Cal. App. 15, 164 Pac. 49; *Himmelwright v. Baker*, 82 Kan. 569, 109 Pac. 178; *Ottoby v. Mississippi Valley Trust Co.*, 197 Mo. App. 473, 196 S. W. 428. *Compare Wright v. Crane*, 142 Mich. 508, 106 N. W. 71.

15. *Harnau v. Haight*, 189 Mich. 600, 155 N. W. 563.

16. *People v. Lloyd*, 178 Ill. App. 66.

17. *Illinois Cent. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521. *Compare Whitney v. Sioux City*, 172 Iowa, 336, 154 N. W. 497; *Seager v. Foster (Iowa)*, 169 N. W. 681; *Warruna v. Dick*, 261 Pa. 602, 104 Atl. 749.

See, as to weight of testimony of observer, 3 *Chamberlayne's Modern Law of Evidence*, § 2095.

18. *Johnson v. Oakland, S. L. & H. Electric R. Co.*, 127 Cal. 608, 60 Pac. 170.

19. *Lockhart v. Litchenthaler*, 46 Pa. St. 151. But see *Alabama Great Southern R. Co. v. Hall*, 105 Ala. 599, 17 So. 176.

"high,"<sup>20</sup> "reckless,"<sup>21</sup> or "unusual,"<sup>22</sup> has been received.<sup>23</sup> In an action for personal injuries inflicted by an automobile, testimony that the automobile "ran fast," "ran very fast," "ran mighty fast" is not wholly incompetent because of its vagueness, particularly where appellant's evidence was to the effect that the automobile was "running slow."<sup>24</sup> It may be testified that the automobile was going at a certain estimate of speed as compared with other modes of motion; and a witness who was an observer may be permitted to testify that the machine was moving at a snail's pace, or no faster than a man walks, or faster than a man could run.<sup>25</sup> But, when it is sought to charge one for violation of a specific speed regulation, such a characterization of the speed is too indefinite for judicial action; under such circumstances the court must know the number of miles per hour which the machine was traveling.<sup>26</sup> So the fact that an automobile was exceeding the speed limit or was running at an excessive rate is not shown by testimony that it was running a good deal faster than a

20. *Black v. Burlington, etc., R. Co.*, 38 Iowa, 515.

21. *Galveston, etc., R. Co. v. Wesch* (Tex. Civ. App. 1893), 21 S. W. 62.

22. *Seragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706; *Johnson v. Oakland, S. L. & H. Electric R. Co.*, 127 Cal. 608, 60 Pac. 170.

In a prosecution for manslaughter evidence that the automobile was going unusually fast has been held admissible. *Bowen v. State*, 100 Ark. 232, 140 S. W. 28.

See 3 Chamberlayne's *Modern Law of Evidence*, § 2089.

23. "A witness qualified to speak may not state what is the specific speed of a railroad train or trolley car in distance traversed during a particular period. He may declare himself in some more general form of expression. Thus, he may give his opinion regarding a train or single car that it was going 'fast,' or very fast, although he cannot say how rapidly. Applying the standard of safety, he may speak

of a given rate of motion as 'dangerous,' 'high,' or even 'reckless.' Certain characterizations of speed, although general in form, have been held to involve so large an element of special knowledge or so great a proportion of reasoning as to require the technical training of a skilled witness. Thus, only such an observer can state that a moving object was going 'as fast as it could.' " Chamberlayne's *Modern Law of Evidence*, § 2088.

24. *Trzietatowski v. Evening American Pub. Co.*, 185 Ill. App. 451.

25. *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262.

26. *Diamond v. Weyerhaeuser*, 178 Cal. 540, 174 Pac. 38; *Livingstone v. Dole*, 167 Iowa. 639, 167 N. W. 639; *Priebe v. Crandall* (Mo. App.), 187 S. W. 605; *Yingst v. Lebanon & A. St. R. Co.*, 167 Pa. St. 438, 31 Atl. 687; *Karaffa v. Ferguson*, 68 Pitts. Leg. Journ. (Pa.) 109; *Starr v. Schenck*, 25 Mont. L. Rep. (Pa.) 18.

horse trots and went pretty fast.<sup>27</sup> And witnesses may not be permitted to state that the speed was "unreasonable," where that is the precise question to be determined by the jury.<sup>28</sup>

### **Sec. 926. Proof of speed of vehicle — estimate of speed from track.**

It has been held that a witness will not be permitted to give his opinion of the speed of an automobile upon a particular occasion, where he was not an observer, and the only information he has on which to base his estimate is the track of the machine on the pavement.<sup>29</sup> On the contrary, such evidence

27. *Zoltovski v. Gzella*, 159 Mich. 620, 124 N. W. 527, 24 L. R. A. (N. S.) 435.

28. *Colebank v. Standard Garage Co.*, 75 W. Va. 389, 84 S. E. 1051, wherein it was said: "Witnesses were asked to give their opinions whether the speed of the automobile was unreasonable. Their opinions that it was, were admitted in evidence over the objection of defendant. A bill of exceptions saves the point. Clearly it was error to admit such testimony. The witnesses might as well have been permitted to give their opinion as to whether defendant was negligent. Whether the rate of speed was reasonable or unreasonable was for the jury to say upon proof of facts and circumstances in that relation—not for any witness to say. It was an issue for the jury to determine upon evidence as to the surroundings and the actual rate of speed the automobile was making. Instead of introducing such evidence, so that the jury could express their own opinions therefrom, they were asked to take and use as their own the opinions of witnesses on a matter so closely related to the issue of negligence which they were trying that it was virtually the same thing. Witnesses cannot so be substituted for the

jury. It is like asking a witness to give his opinion from what he observed of an assault, as to which one of the parties was the aggressor. The witnesses might have given their opinions as to the miles per hour the chauffeur was driving the car. That was a matter not necessarily calling for expert opinion. They could enlighten the jury on that score, and thus enable the latter to say whether the rate was unreasonably fast and therefore negligent. But in reaching a conclusion on the question the jury should have been left free to exercise their own opinions on the facts and circumstances, regardless of the opinions of others."

29. *Nelson v. Hedin*, 184 Iowa, 657, 169 N. W. 37. And see *Everart v. Fischer*, 75 Oreg. 316, 145 Pac. 33, 147 Pac. 189, wherein it was said: "Another assignment of error rests upon allowing a young lady witness named Lottie Hatfield to give her opinion about the speed of the automobile. She did not see the vehicle in motion nor appear upon the scene until some time after the accident had happened. She testified, in substance, that behind it and in the direction from which the automobile came she observed two black streaks upon the pavement; and, having said in answer to a question, 'Well,

has been thought to be proper.<sup>30</sup> The distance which a certain car has skidded in the attempt to stop it, should furnish some basis for the opinion of an expert.<sup>31</sup>

### **Sec. 927. Proof of speed of vehicle — noise of machine.**

The noise made by a motor vehicle is not deemed a sufficient basis upon which he may predicate an opinion as to its speed.<sup>32</sup> Testimony as to the comparative amount of noise made by different makes of automobiles, based upon comparisons made by the witness, is held to be properly excluded where there is no proof of the condition of the machines with which the test was made.<sup>33</sup>

### **Sec. 928. Proof of speed of vehicle — conflict between opinion and surrounding circumstances.**

Where the facts show a conflict with an observer's estimate of the automobile's speed, the facts control. Estimates

I know pretty well about the speed,' she was asked if she would be able to approximate the speed of the car from the marks it left in stopping. She answered affirmatively and proceeded to say, 'I should judge from that about 30 miles an hour, by the depth of the burns.' It is insisted that it was error to allow her to give her expert opinion upon the speed of the automobile from the data presented. Conceding that it was a matter calling for opinion evidence, the conditions were not adequate grounds upon which any expert could form an estimate. The mere marks upon the pavement did not constitute a sufficient basis for that kind of testimony. The ultimate object of the inquiry on that point was the speed of the vehicle. It is reasonable that, if a very heavily loaded car with wheels rough locked were propelled along a pavement at a very slow rate of speed, marks would be left behind. Again, the condition of the tires and of the street as to being rough or even would influence the question. Naturally a

very smooth tire upon a very smooth surface, which, in turn, might be affected by a condition of dampness or frost, would result in but a faint marking. A variance in smoothness of either the tire or the pavement would produce different results. There was no testimony about any such conditions, or at least none of them were suggested to or mentioned by the witness. Consequently the foundation for expert testimony did not exist."

**30.** *Heidner v. Germschied* (S. Dak.), 171 N. W. 208; *Luethe v. Schmidt-Gaertner Co.*, 170 Wis. 590, 176 N. W. 63.

**31.** *Jackson v. Vaughn* (Ala.), 86 So. 469.

**32.** *Wright v. Crane*, 142 Mich. 508, 106 N. W. 71; *Harnau v. Haight*, 189 Mich. 600, 155 N. W. 563. See also *Campbell v. St. Louis & S. R. Co.*, 175 Mo. 161, 75 S. W. 86; *Robinson v. Louisville R. Co.*, 112 Fed. 484, 50 C. C. A. 357.

**33.** *Porter v. Buckley*, 147 Fed. 140, 78 C. C. A. 138.

of speed, as in cases of all other kinds of "opinion" evidence, must give way to testimony of cold matters of fact and legitimate inferences therefrom.<sup>34</sup> For example, where testimony to a high degree of speed is incompatible with the proved facts that the machine was stopped within a few feet, or a short distance, the latter evidence must prevail.<sup>35</sup> And an estimate of the low rate of speed must be overruled by proof of facts reconcilable only with high speed, such as the force of the impact of a machine,<sup>36</sup> or the considerable distance traversed by the machine despite efforts to bring it to a standstill.<sup>37</sup>

**Sec. 929. Proof of speed of vehicle — speed at one place as evidence of speed at another.**

The speed of a motor vehicle immediately before or after an accident may be received as evidence of its speed at the time of the occurrence.<sup>38</sup> While the fact that the automobile that injured a plaintiff was running twenty-five miles an hour a block and a half from the crossing does not generate any presumption of law, even *prima facie*, that it entered upon or passed over the crossing at a similar rate of speed, nevertheless it is clearly a fact for the jury to consider, as affording an inference of fact with respect to its probable speed and control when it very shortly thereafter reached and passed over the crossing.<sup>39</sup> But speed at a considerable distance from the point at issue, is no criterion, and is not generally received. The evidence of speed at another place may be aided

34. *Muster v. Chicago, M. & St. P. R. Co.*, 61 Wis. 325, 21 N. W. 223, 50 Am. Rep. 1414; *Stetterstrom v. Brainard & N. M. R. Co.*, 89 Minn. 262, 94 N. W. 882.

35. *Graham v. Consol. T. Co.*, 54 N. J. Law, 10, 44 Atl. 964; *Vogler v. Central Crosstown R. Co.*, 83 N. Y. App. Div. 101, 82 N. Y. Suppl. 485.

36. *Brennan v. Metropolitan St. R. Co.*, 60 N. Y. App. Div. 264, 69 N. Y. Suppl. 1025.

37. *Indianapolis St. Ry. Co. v. Bor-*

*denecker*, 33 Ind. App. 138, 70 N. E. 995; *Zolpher v. Camden & S. R. Co.*, 69 N. J. L. 417, 55 Atl. 249; *Hoppe v. Chicago, M. & St. P. R. Co.*, 61 Wis. 357, 21 N. W. 227.

38. *Wigginton's Adm'r v. Rickert*, 186 Ky. 650, 217 S. W. 933; *LaDuke v. Dexter* (Mo. App.), 202 S. W. 254; *State v. Welford*, 29 R. I. 450, 72 Atl. 396.

39. *Davis v. Barnes*, 201 Ala. 120, 77 So. 612.

by proof that the rate was neither accelerated or diminished in the interval.<sup>40</sup> Even if the evidence of speed at another place is not admissible, as it is a matter of common knowledge that the speed of an automobile may be greatly increased or decreased in a short distance, its admission or exclusion is not always reversible error.<sup>41</sup>

### Sec. 930. Proof of speed of vehicle — experiments.

On an issue of the speed of a motor vehicle at a particular occasion, evidence may be received of experiments made by experts as to the speed at which the vehicle could be driven.<sup>42</sup> The conditions existing at the time of the principal occurrence and at the time of the experiment should be substantially the same, but it is recognized that the identical conditions may not generally be created artificially.<sup>43</sup> But, if the conditions are so varying that the evidence will be of no assistance, the court may properly exclude testimony of the experiment.<sup>44</sup>

### Sec. 931. Proof of speed of vehicle — photo—speed—recorder.

In a case in *Massachusetts*, which was a prosecution for violation of the speed laws in the city of Boston, the government, in order to prove the speed of the automobile on the occasion in question, offered in evidence an instrument called a "Photo-Speed-Recorder," which had been used by the witness producing it to ascertain the speed of the automobile at the time of the alleged violation of the law. The instrument consisted of two similar photographic cameras, set side by side in the same box. It was so arranged that each camera took a picture with an exposure of approximately one hundredth of a second and was provided with a mechanism which

40. *Louisville, N. A. & C. R. Co. v. Jones*, 108 Ind. 551, 9 N. E. 476; *Tyrell v. Goslant* (Vt.), 106 Atl. 585. See also *Raybaum v. Phillips*, 160 Mo. App. 534, 140 S. W. 977; *Armann v. Caswell*, 30 N. D. 406, 152 N. W. 813. As to average speed for a certain distance, see *People v. Barnes*, 182 Mich. 179, 148 N. W. 400.

41. *Grand v. Kasviner*, 28 Cal. App.

530, 153 Pac. 243; *Miller v. Jenness*, 84 Kans. 608, 114 Pac. 1052. See also *Louisville Lozier Co. v. Sallee*, 167 Ky. 499, 180 S. W. 841.

42. *Fippinger v. Glos*, 190 Ill. App. 238.

43. *Fippinger v. Glos*, 190 Ill. App. 238.

44. *Beckley v. Alexander*, 77 N. H. 255, 90 Atl. 878.



automatically exposed one camera approximately one second after the other one. The apparatus was also provided with a chronometer of a stop watch variety. In order to use the apparatus for determining speeds the following rule was employed: The distance of any external object from the lens of a camera is as many times greater than the distance of the image on the photograph plate from the lens as the size of the object is greater than the size of the image. In order to show the correctness of this instrument the government offered to show that the witness had, previous to making such test, taken several photographs of objects at various distances, and had computed the distances in accordance with the foregoing rule, and that the distances so computed agreed with subsequent measurements made by him with a tape. The judge admitted the evidence, and it was held that the question whether evidence of experiments should be admitted depended largely upon the discretion of the trial judge, whose action in the exercise of this discretion would not be reversed unless plainly wrong. And evidence that the chronometer contained in the instrument had been compared by the witness with stop watches carried by two other witnesses and, also with the standard chronometer in the physical laboratory of the Massachusetts Institute of Technology, and had been found in each case to be accurate, was also held to be admissible and to justify the trial judge in submitting the question as to the accuracy of the chronometer to the jury.<sup>45</sup>

### **Sec. 932. Proof of speed of vehicle — speedometer.**

Evidence of the result indicated by a speedometer may be received on the issue of speed. And the fact that one giving an estimate of speed relies upon a speedometer which he observed, does not make his evidence incompetent as hearsay.<sup>46</sup> Such evidence may be preferred to opinion evidence.<sup>47</sup> Upon the question of the proof of the accuracy of a certain kind of speedometer, it is said that the fact that many police depart-

45. *Commonwealth v. Buxton*, 205 198 S. W. 964.  
Mass. 49, 91 N. E. 128.

47. *Rex v. Barker*, 47 Nova Scotia  
(Canada) 248, 12 D. L. R. 346.

46. *White v. State*, 82 Tex. Cr. 274.

ments in the different States make use of that particular speedometer in their official testing, would only prove the faith of the several departments in its accuracy or the efficiency of the salesmen in selling the speedometer, and is not a proper way to prove the fact of its accuracy.<sup>48</sup>

**Sec. 933. Proof of speed of vehicle — evidence under English law.**

Under the provision of the English Motor Car Act no person shall be convicted of driving an automobile over the rate of twenty miles an hour on the opinion of one witness as to the rate of speed, on the hearing of an information under this act, for driving an automobile on a public highway at a speed exceeding twenty miles an hour, a police sergeant proved that he placed a police constable at a certain point on the road and stationed himself on the same road at a distance of a quarter of mile from the constable; that when the automobile passed the constable the constable signaled to him, and he immediately started the second hand of his stop watch and stopped the same when the car passed him, and that the time taken by the car between the two points, as shown by the stop watch, was thirty-one and two-fifths seconds, or at the rate of twenty-eight miles an hour. The stop watch was produced in court and not objected to. The only evidence as to the rate of speed was that of the police sergeant, who gave evidence of the time as shown by his stop watch. The defendant was convicted. On appeal it was held that the evidence of the police sergeant was not evidence of his "opinion" merely, but was evidence of the fact recorded by his stop watch as to the time taken in traveling over the distance, and that, therefore, the defendant was not convicted "merely on the opinion of one witness as to the rate of speed" within the meaning of the section.<sup>49</sup>

**Sec. 934. Res inter alios acta — negligence on other occasions.**

Where the issue is the negligence of the driver of a motor vehicle upon a particular occasion, evidence is not generally

48. *State v. Buchanan*, 32 R. I. 490,  
79 Atl. 1114.

49. See *Plancq v. Marks* (K. B. D.),  
94 L. T. R. 577.

admissible to show acts of negligence of the driver upon other occasions.<sup>50</sup> Thus, on the issue of the speed of a motor vehicle on a particular occasion, it is improper to permit evidence of the speed with which it had been driven at other times.<sup>51</sup> Where the plaintiff in an action to recover for personal injuries caused by an automobile does not charge the defendant with exceeding the legal rate of speed, it is error to permit him to show that the defendant had been convicted of exceeding the speed limit on other occasions.<sup>52</sup> And, in a particular case involving a charge of negligence in the operation of a machine, it may not be shown that there are or have been other suits pending against the defendant for the negligent operation of his machine on other occasions.<sup>53</sup> But where one of the questions involved is the damage to an automobile in a collision, it may be shown that the plaintiff's machine has been in other accidents.<sup>54</sup> Where a defendant endeavored to show that there was no collision between his automobile and a vehicle and gave evidence that no marks were found upon his automobile after the accident, it was held that the plaintiff was entitled to show that the defendant earlier in the day collided with another vehicle, as it tended to show the possibility of a collision without leaving visible evidence of the fact, but the evidence could not be received as proof of general recklessness.<sup>55</sup> In an action against a county for injuries received from a defective bridge, evidence has been admitted to show other accidents at the same place, but limited in application to show the danger of the place.<sup>56</sup>

50. *Pugsley v. Tyler*, 130 Ark. 491, 197 S. W. 1177; *Luiz v. Falvey*, 228 Mass. 253, 117 N. E. 308; *Polmatier v. Newbury*, 231 Mass. 307, 120 N. E. 850. See also *Steinberger v. California Elec. Garage Co.*, 176 Cal. 386, 168 Pac. 570; *Barshfield v. Vucklich* (Kans.), 197 Pac. 205.

51. *Louisville Lozier Co. v. Sallee*, 167 Ky. 499, 180 S. W. 481; *Chilberg v. Parsons*, 109 Wash. 90, 186 Pac. 272.

52. See *v. Wormser*, 129 N. Y. App. Div. 596, 113 N. Y. Suppl. 1093.

53. *Re'd Auto Co. v. Gorsezya* (Tex. Civ. App.), 144 S. W. 683; *Mumme v. Sutherland* (Tex. Civ. App.), 198 S. W. 395.

54. *Weary v. Winton Motor Car Co.*, 198 Ill. App. 379; *Morrissey v. Connecticut Valley St. Ry. Co.*, 233 Mass. 554, 124 N. E. 435.

55. *Klein v. Burlington*, 138 App. Div. (N. Y.) 405, 122 N. Y. Suppl. 752.

56. *Coates v. Marion County*, 96 Ore. 334, 189 Pac. 903.

In a prosecution for stealing a vehicle, evidence of the theft by the defendant of other vehicles is not generally received,<sup>57</sup> though cases may arise when the evidence is admissible.<sup>58</sup> Thus, in a prosecution for receiving a stolen vehicle, as bearing upon the guilty knowledge of the accused, it may be shown that he has received and disposed of other stolen vehicles.<sup>59</sup>

### Sec. 935. *Res inter alios acta* — care after accident.

Subsequent repairs or precautions are not generally evidence of previous negligence, and hence it may not be shown that after an accident the driver drove the machine with greater caution.<sup>60</sup> And in an action against a garageman for the loss of a machine stored therein, evidence cannot be received to show precautions taken by the defendant after the theft to avoid future losses.<sup>61</sup>

### Sec. 936. *Res inter alios acta* — defects in other machines.

In an action by the purchaser of an automobile for breach of warranty in the sale thereof, the plaintiff cannot introduce evidence of other owners of the same model of machines and of the trouble they encountered in the operation of the ma-

57. Kolb v. State (Tex. Cr.), 228 S. W. 210; Hunt v. State (Tex. Cr.), 229 S. W. 869; Hunt v. State (Tex. Cr.), 230 S. W. 406.

58. See Dennison v. State (Ala. App.), 88 So. 211, wherein it was said: "While evidence of any other offense than that specifically charged is *prima facie* inadmissible, such evidence will be received, when necessary to prove the scienter or guilty knowledge, when an element of the offense charged; (2) when the offense charged and the offense proposed to be proved are so connected that they form part of one transaction; (3) when it is material to show the intent with which the particular act is charged as criminal was done, evidence of another similar act, though in itself a criminal offense may be given; (4) when it is necessary to

prove a motive for the criminal act imputed, and there is an apparent relation or connection between that act and other criminal acts committed by the accused; (5) when it is necessary to prove the identity of the offender, or of an instrument used in committing the offense; (6) there are also cases in which the accusation itself involves a series of acts which must be proved to make out the offense; (7) and cases in which the several offenses are all a part of the *res gestae*."

59. Parsons v. State (Ind.), 131 N. E. 381; People v. DiPietro (Mich.), 183 N. W. 22.

60. Desmarchier v. Frost, 91 Vt. 138, 99 Atl. 782.

61. Farrell v. Universal Garage Co., 179 N. C. 389, 102 S. E. 617.

chines, where similarity of the conditions under which the cars were operated was not shown.<sup>62</sup>

**Sec. 937. *Res inter alios acta* — habits.**

Where there are witnesses to an accident, it is held generally that evidence of the habits of a deceased as to the care usually exercised by him, is not admissible as bearing on the question whether he used proper care on the occasion in controversy.<sup>63</sup> Thus, in an action to recover for personal injuries sustained while riding in defendant's taxicab as a result of a collision between the taxicab and a street car, evidence of the practice of the driver of the taxicab prior to the accident as to observance of an ordinance is properly excluded, and the only proper inquiry in such case being what the driver did at the time and place of the accident, and it being immaterial what he did at other times.<sup>64</sup> But, in the absence of other evidence, as is the case when there are no living witnesses to the occurrence, evidence of the careful habits of the deceased is sometimes received.<sup>65</sup> A chauffeur will not be allowed to state the habits of pedestrians generally when suddenly confronted with an automobile.<sup>66</sup> The habits of a driver as to intoxication have been received, though isolated instances were excluded.<sup>67</sup>

**Sec. 938. *Res inter alios acta* — competency of driver.**

In an action for personal injuries sustained by plaintiff as a result of being struck by defendant's automobile, where one of the issues was the failure of defendant to employ a careful and skillful driver, and whether the driver employed lacked such qualities, evidence is competent as to the competency,

62. *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617.

63. *Noonan v. Mans*, 197 Ill. App. 103; *Chilberg v. Parsons*, 109 Wash. 90, 186 Pac. 272.

64. *Todd v. Chicago City Ry. Co.*, 197 Ill. App. 544. See also *Jordan v. Boston & M. R. Co.* (N. H.), 113 Atl. 390.

65. *Noonan v. Mans*, 197 Ill. App. 103; *Bush v. Brewer*, 136 Ark. 248, 206 S. W. 322; *Moore v. Bloomington, etc., R. Co.*, 295 Ill. 63, 128 N. E. 721.

66. *Holroyd v. Gray Taxi Co.*, 39 Cal. App. 693, 179 Pac. 709.

67. *Southern Traction Co. v. Kirksey* (Tex. Civ. App.), 222 S. W. 702.

reliability and reputation of the driver employed by defendant to drive his automobile at the time of the accident, since defendant cannot be heard to complain of evidence pertinent to the issues joined.<sup>68</sup> But, in an action by one injured through the operation of an automobile, the owner of the machine is not entitled to show that the chauffeur was usually careful.<sup>69</sup>

68. *Vos v. Franke*, 202 Ill. App. 133. N. W. 310. See also *Adler v. Martin*,

69. *Slack v. Joyce*, 163 Wis. 567, 158 179 Ala. 97, 59 So. 597.

## CHAPTER XXXIII.

### FORFEITURE OF VEHICLES VIOLATING LAW.

#### SECTION 939. Introductory.

- 940. Constitutionality of forfeitures.
- 941. Statutes authorizing forfeiture.
- 942. General construction of statutes.
- 943. Illegality of use of vehicle.
- 944. Protection of liens.
- 945. Rights of "innocent" owner.
- 946. Burden of proof as to innocence of claimant.
- 947. Procedure.

#### Sec. 939. Introductory.

Under the Volstead Act and other statutes relating to the enforcement of liquor laws, vehicles unlawfully carrying liquor are subject to forfeiture. Moreover, vehicles carrying game unlawfully killed,<sup>1</sup> or otherwise expediting violations of the law, may be condemned in an appropriate proceeding. The questions arising out of forfeitures of this character are considered in this chapter.

#### Sec. 940. Constitutionality of forfeitures.

The power of legislative bodies to authorize the forfeiture of motor vehicles engaged in a violation of the law, appears to be clear.<sup>2</sup> At common law, forfeitures abounded and were enforced for trivial offenses. Under modern statutes, without an infringement of constitutional rights, the interest of a mortgagee may be condemned for the act of the mortgagor;<sup>3</sup> the rights of a conditional vendor may be forfeited for the

1. *Gemert v. Pooler* (Wis.), 177 N. W. 1.

2. *Goldsmith-Grant Co. v. United States*, 41 Sup. Ct. 189; *Maples v. State* (Ala.), 82 So. 183; *Maek v. Westbrook* (Ga.), 98 S. E. 339; *State v. Killens*, 149 Ga. 735, 101 S. E. 911; *Skinner v. Thomas*, 171 N. Car. 98, 87 S. E. 976; *Robinson Cadillac Motor Car Co. v. Ratekin* (Neb.), 177 N. W. 337; *One Hudson Super-six Auto-*

*bile v. State*, 77 Okla. 130, 187 Pac. 806; *Landers v. Commonwealth* (Va.), 101 S. E. 778; *Gemert v. Pooler* (Wis.), 177 N. W. 1.

3. *State v. Peterson*, 107 Kans. 641, 193 Pac. 342; *State v. Stephens* (Kans.), 198 Pac. 1087; *Robinson Cadillac Motor Car Co. v. Ratekin* (Neb.), 177 N. W. 337. And see section 944.

violation by the vendee;<sup>4</sup> or the title of the owner may be divested, if one having possession of the machine through his consent uses the vehicle for the unlawful transportation of liquors.<sup>5</sup> A party may have a constitutional right to a jury trial in such cases, so that the statute, so far as it abridges such right may be unconstitutional.<sup>6</sup>

### Sec. 941. Statutes authorizing forfeiture.

As there is no serious constitutional question involved, it is a matter of statutory construction whether a motor vehicle shall be condemned for a violation of law. Unless there is statutory authority for the forfeiture, none can be decreed.<sup>7</sup> But, within the last few years a considerable number of such statutes have been enacted.<sup>8</sup> A State statute providing for the forfeiture of the liquors, vessels and "other property so unlawfully used," has been held to authorize the condemnation of an automobile in which liquors have been unlawfully transported.<sup>9</sup> A statute enacted before the general use of motor vehicles and providing for the forfeiture of "wagons" is not comprehensive enough to justify the forfeiture of motor vehicles.<sup>10</sup> A statute authorizing the seizure of the unlawful liquor and "bars, furniture, fixtures, vessels, and appurtenances thereunto belonging so unlawfully used," does not justify the seizure of an automobile unlawfully conveying liquors, as an automobile is not an "appurtenance" within the meaning of the statute.<sup>11</sup> The provisions of the Revised Statutes

4. Goldsmith-Grant Co. v. United States, 41 Sup. Ct. 189; H. A. White Auto Co. v. Collins, 136 Ark. 81, 206 S. W. 748. And see section 944.

5. Landers v. Commonwealth (Va.), 101 S. E. 778. And see section 945.

6. Keeter v. State (Okla.), 198 Pac. 866. See also Hoskins v. State (Okla.), 200 Pac. 168.

7. United States v. One Cadillac Eight Automobile, 255 Fed. 173; United States v. One Buick Automobile, 255 Fed. 793; United States v. One Ford Automobile, 259 Fed. 894.

8. State v. Raph, 184 Iowa, 28, 168

N. W. 259; One Moon Automobile v. State (Okla.), 172 Pac. 66.

9. State v. Davis (Utah), 184 Pac. 161; State v. Jensen (Utah), 184 Pac. 179.

10. United States v. One Automobile, 237 Fed. 891.

11. One Cadillac Automobile v. State (Okla.), 172 Pac. 62; Lebrecht v. State (Okla.), 172 Pac. 65; State v. One Packard Automobile (Okla.), 172 Pac. 66; State v. National Bank of Ardmore (Okla.), 172 Pac. 1073; Cox v. State (Okla.), 173 Pac. 445; One Hudson Automobile v. State (Okla.), 173



of United States, sections 3061, 3062, relating to the forfeiture of vehicles used in the importation of goods in violation of the custom laws, did not apply to liquors imported from another country in violation of the Wartime Prohibition Act.<sup>12</sup>

### Sec. 942. General construction of statutes.

In construing statutes relating to the forfeiture of vehicles, the courts are confronted by two theories, either of which may reasonably be adopted. On the one hand, there arises the general canon of construction that statutes are strictly construed against a forfeiture.<sup>13</sup> A court may, therefore, look upon the forfeiture with disfavor and refuse to extend the statute beyond the plain meaning of the language used. On the other hand the courts may be guided by the fact that persistent subterfuges are resorted to in order to violate liquor laws, and may consider the statutes as remedial of an existing evil and give them such a reasonable construction as will discourage illicit traffic. In fact, some of the State statutes require that they be liberally construed.<sup>14</sup> The courts will take judicial notice of the fact that in recent years there has been an increased use of automobiles for the transportation and distribution of intoxicating liquors.<sup>15</sup>

### Sec. 943. Illegality of use of vehicle.

The foundation of the proceeding for the forfeiture of a motor vehicle carrying intoxicating liquors, is the illegality of the transportation.<sup>16</sup> If the carriage of the liquors is not

Pac. 1137; *State v. One Ford Automobile* (Okla.), 174 Pac. 489; *Bussey v. State* (Okla.), 175 Pac. 226; *Cooper v. State* (Okla.), 175 Pac. 551; *First Nat. Bank of Roff v. State* (Okla.), 178 Pac. 670; *Sharpe v. State* (Okla.), 181 Pac. 293.

12. *United States v. One Ford Automobile*, 262 Fed. 374. See also *United States v. One Certain Automobile*, 242 Fed. 998.

13. *United States v. One Cadillac*

*Eight Automobile*, 255 Fed. 173; *Armington v. State* (Ga. App.), 100 S. E. 15; *Skinner v. Thomas*, 171 N. Car. 98, 87 S. E. 976; *State v. Johnson* (N. Car.), 107 S. E. 433.

14. *State v. Davis* (Utah), 184 Pac. 161; *Buchholz v. Commonwealth* (Va.), 102 S. E. 760.

15. *State v. Raph*, 184 Iowa, 28, 168 N. W. 259.

16. *Keeter v. State* (Okla.), 198 Pac. 866.

in violation of some statutory enactment, the proceeding necessarily fails.<sup>17</sup> If liquors are not found in the machine at the time of its seizure, and there is no proof that the machine had been used to carry liquors, it cannot be forfeited, merely because it belongs to a violator of the law or on a suspicion that it has been used in violation of the law.<sup>18</sup> Moreover, under some laws, the fact that liquors are found in the machine is not sufficient, in the absence of evidence to show that the machine has been operated with liquors therein.<sup>19</sup> But, if it is shown that the machine had been used for the unlawful conveyance of liquors, it is not always necessary that they be there at the time of its seizure.<sup>20</sup> The evidence of unlawful use may be circumstantial.<sup>21</sup> The statutory provisions, however, are generally very comprehensive. They may prohibit the transportation of intoxicating liquors whether or not the act is committed along a public highway.<sup>22</sup> Even an isolated instance of a violation of the law, may be sufficient to authorize a condemnation.<sup>23</sup> It is not necessary that the primary purpose of the use of the machine is the conveying of liquor; a forfeiture may be adjudged under some statutes, although it appears that the liquor was carried merely incidentally or was for the personal use of the occupants.<sup>24</sup> Even the carrying of a bottle of liquor in the pocket of an occupant of the vehicle may be sufficient to require the condemnation of the machine.<sup>25</sup>

#### Sec. 944. Protection of liens.

The lack of uniformity in the various statutes authorizing the forfeiture of vehicles used in unlawful traffic, causes the

17. *Frazier v. State* (Ala.), 82 So. 526; *Baldrige v. State* (Okla.), 194 Pac. 217; *Crossland v. State* (Okla.), 176 Pac. 944.

18. *Williams v. State*, 23 Ga. App. 567, 99 S. E. 54.

19. *Armington v. State* (Ga. App.), 100 S. E. 15.

20. *Williams v. State* (Ga. App.), 107 S. E. 620.

21. See *Doster v. State* (Ga. App.), 104 S. E. 642.

22. *State v. Merrill* (Ala.), 85 So. 28.

23. *State v. Stephens* (Kans.), 198 Pac. 1087.

24. *Crapp v. State* (Ga. App.), 98 S. E. 174.

25. *State v. Merrill* (Ala.), 85 So. 28.

courts to reach different results on such close questions as the rights of those holding liens on the vehicles.

They seem to agree that, if the holder of the lien has knowledge of the unlawful purpose for which the machine is to be used or if he participates in the wrongful act, his rights may be condemned.<sup>26</sup> Moreover, in some States it is required that the lienor show that he could not by the exercise of reasonable diligence have obtained knowledge or notice of the illegal use.<sup>27</sup>

The difficulty arises when the lienor is innocent of the wrong. In some States it is held that the forfeiture is absolute, and that the rights of a mortgagee<sup>28</sup> or conditional vendor<sup>29</sup> may be lost, although he does not participate in the unlawful act or has no knowledge of the purpose for which the machine is used by the possessor. In other States the rights of such a mortgagee<sup>30</sup> or vendor<sup>31</sup> are preserved, and the forfeiture is decreed subject to his claim. In such States the filing or recording of the mortgage or contract of sale, as required by the local statute, is not a prerequisite to the validity

**26.** *United States v. Sylvester*, 273 Fed. 253; *United States v. Kane*, 273 Fed. 275; *One Buick Automobile v. State (Ala.)*, 85 So. 739.

**Evidence.**—The reputation of the mortgagor as a "bootlegger" may be shown by the state as evidence bearing on the knowledge of the mortgagee as to the use to be made of the car. *State v. Crosswhite (Ala.)*, 84 So. 813.

**27.** *State v. One Five Passenger Paige Automobile (Ala.)*, 85 So. 276; *Flint Motor Car Co. v. State (Ala.)*, 85 So. 741; *State v. Crosswhite (Ala.)*, 84 So. 813.

**28.** *State v. Peterson*, 107 Kans. 641, 193 Pac. 342; *State v. Stephens (Kans.)*, 198 Pac. 1087; *Robinson Cadillac Motor Car Co. v. Rakekin (Neb.)*, 177 N. W. 337; *Pennington v. Commonwealth (Va.)*, 102 S. E. 758.

**29.** *H. A. White Auto. Co. v. Collins*, 136 Ark. 81, 206 S. W. 748.

**30.** *Maples v. State (Ala.)*, 82 So. 183; *Wise v. State (Ala.)*, 85 So. 266;

*Bowling v. State (Ala.)*, 85 So. 500; *Hoover v. People (Colo.)*, 157 Pac. 531; *Shrouder v. Sweat (Ga.)*, 96 S. E. 881; *Skinner v. Thomas*, 171 N. Car. 98, 87 S. E. 976; *One Hudson Super-six Automobile v. State*, 77 Okla. 130, 187 Pac. 806; *Boles v. State*, 77 Okla. 310, 188 Pac. 681; *Peavler v. State (Okla.)*, 193 Pac. 623; *Rouse v. State (Okla.)*, 195 Pac. 498; *Seignious v. Limehouse*, 107 S. Car. 545, 93 S. E. 193; *King v. Commonwealth (Va.)*, 102 S. E. 757.

**Mortgage not bona fide.**—If the mortgage was executed as an afterthought in an effort to save the car from the forfeiture proceedings, the rights of the mortgagee will not be saved. *Maples v. State (Ala.)*, 82 So. 183.

**31.** *State v. One Lexington Automobile (Ala.)*, 84 So. 297; *One Packard Automobile v. State (Ala.)*, 86 So. 21; *State v. Killens*, 149 Ga. 735, 101 S. E. 911; *White v. State (Ga. App.)*, 98

of the claim.<sup>32</sup> If the lien is sustained, the decree should not direct the delivery of the machine to such successful claimant;<sup>33</sup> the proper procedure is to sell the machine subject to the lien of the claimant,<sup>34</sup> or to direct the payment of the lien out of the proceeds of the sale. But, if the value is less than the amount of the mortgage on the vehicle, only the equity of redemption should be sold.<sup>35</sup>

Under the federal statute, Revised Statutes, section 3450, relating to forfeitures of vehicles removing liquor on which the tax had not been paid, the forfeiture was absolute and the rights of the lienors were not considered.<sup>36</sup> A similar construction has been placed on the Indian Appropriation Act of March 2, 1917, providing for the forfeiture of vehicles introducing intoxicants into Indian country.<sup>37</sup>

But under the National Prohibition Act, a limited discretion is allowed to the courts, and they are permitted to protect the right of innocent lienors.<sup>38</sup> The rights of the parties under the National Prohibition Act have been categorically stated as follows:

"The intent of the Congress, as disclosed in section 26, here under discussion, is clearly expressed. The conclusions respecting its interpretation are:

S. E. 171; *Armington v. State* (Ga. App.), 100 S. E. 15; *Naylor v. Simmons* (Idaho), 194 Pac. 94; *State v. Davis* (Utah), 184 Pac. 161.

32. *Shrouder v. Sweat* (Ga.), 96 S. E. 881; *Armington v. State* (Ga. App.), 100 S. E. 15. "While the registration of a mortgage for record is appropriate as evidence tending to show the *bona fides* of the transaction of which the mortgage is a part, yet such registration is not essential to the establishment of a *bona fide* "superior right" in the premises; but, on the other hand, the failure seasonably to file the mortgage for record is evidence, not conclusive of course, to be considered in determining the *bona fides* of the claimant's asserted "superior right." *State v. Crosswhite* (Ala.), 84 So. 813.

33. *State v. Crosswhite* (Ala.), 84 So. 813.

34. *Bowling v. State* (Ala.), 85 So. 500.

35. *Wise v. State* (Ala.), 85 So. 266.

36. *Goldsmith-Grant Co. v. United States*, 41 Sup. Ct. 189; *United States v. Mincey*, 254 Fed. 287; *United States v. One Saxon Automobile*, 257 Fed. 251.

37. *United States v. One Seven Passenger Paige Car*, 259 Fed. 641. Compare *United States v. One Automobile*, 237 Fed. 891.

38. *United States v. Brockley*, 266 Fed. 1001; *United States v. One Haynes Automobile*, 268 Fed. 1003; *United States v. Sylvester*, 273 Fed. 253; *United States v. Kane*, 273 Fed. 275; *Hudson-Oliver Motor Co. v. Vivian*, 116 Misc. (N. Y.) 104. See

“First—The seizure, forfeiture, and sale of vehicles is not absolute, as under section 3450 of the Revised Statutes, but is subject to the order of court after it has heard all the facts of each case.

“Second—An owner who transports intoxicating liquor illegally forfeits the intoxicating liquor and the vehicle and suffers a penalty.

“Third—A conditional vendor or a mortgagee, who allows the vehicle to be used for such unlawful purpose with his knowledge, or who gives his consent to the illicit transportation, shall also forfeit all interest in or his lien upon the vehicle.

“Fourth—A bona fide vendor or mortgagee, without having any notice that the vehicle was being used or was to be used for the illegal transportation of intoxicating liquor, shall be protected to the amount of his bona fide lien, as far as possible.

“Fifth—The owner of a vehicle, who loaned it to another, who, in turn, transported intoxicating liquor therein, is entitled to a return of the vehicle, where he had no knowledge of the purpose of the borrower, and no facts are shown which should have aroused his suspicion.

“Sixth—In the second and third instances, the vehicle shall be sold by the United States marshal at public auction, and after the costs are paid, as provided by law, then the balance of the proceeds of the sale shall be turned into the treasury of the United States.

“Seventh—In the fourth instance, after the bona fide lien and lack of notice or knowledge have been established, the vehicle shall be sold at public auction, and after the costs, as provided by law, have been paid, the United States marshal shall then pay, if possible, the amount of the bona fide lien in full to the proper person, and the balance, if any, shall be turned into the treasury of the United States.”<sup>39</sup>

also *United States v. Masters*, 264 Fed. 250, where the lien was not sufficiently established.

39. *United States v. Sylvester*, 273 Fed. 253.

**Sec. 945. Rights of "innocent" owner.**

As is shown in the preceding paragraph relating to the protection of liens on vehicles sought to be condemned, different results are reached in different jurisdictions as to the protection to be accorded *bona fide* liens. Similarly, different conclusions are drawn as to the condemnation of the title of an owner who is innocent of the unlawful use of the machine. In some states, if the owner permits another to use his machine, the machine may be forfeited, although he was not a party to the violation of the law and had no knowledge that the machine was thus to be used.<sup>40</sup> In other jurisdictions, an "innocent" owner is protected,<sup>41</sup> as is the case under the National Prohibition Act.<sup>42</sup> Thus, in some states, if the machine is used by a member of the owner's family without his consent for the unlawful transportation of liquors, it may be forfeited;<sup>43</sup> while in other states the innocence of the owner in such a case requires the return of the machine to him.<sup>44</sup> Again, in those states strictly enforcing such forfeitures, it is held that, if a chauffeur having possession of the machine through the consent of the owner unlawfully carries liquor therein, it may be forfeited although the use of the machine for that purpose is not within the knowledge of the owner, or

40. *United States v. Mincey*, 254 Fed. 287; *Landers v. Commonwealth* (Va.), 101 S. E. 778; *Pennington v. Commonwealth* (Va.), 102 S. E. 758; *Buchholz v. Commonwealth* (Va.), 102 S. E. 760.

41. *State v. Merrill* (Ala.), 85 So. 28; *Briscoe Motor Car Co. v. State* (Ala.), 85 So. 475; *Spratt v. Gray* (Fla.), 87 So. 760; *Griffin v. Smith* (Ga. App.), 99 S. E. 386; *Naylor v. Simmons* (Idaho), 194 Pac. 94; *Alldinger v. State*, 115 Miss. 314, 75 So. 441; *State v. Johnson* (N. Car.), 107 S. E. 433; *Peavler v. State* (Okla.), 193 Pac. 623; *Rouse v. State* (Okla.), 195 Pac. 498; *Hoskins v. State* (Okla.), 200 Pac. 168.

**Partner.**—The fact that the owner is a partner with the violator in the

taxi business does necessarily not require the condemnation of the vehicle. *Eckl v. State* (Ala.), 88 So. 567.

42. *United States v. Brockley*, 266 Fed. 1001; *United States v. One Haynes Automobile*, 268 Fed. 1003; *United States v. One Shaw Automobile*, 272 Fed. 491.

43. *Landers v. Commonwealth* (Va.), 101 S. E. 778.

44. *In re Gattina* (Ala.), 84 So. 760; *Mays v. Curry* (Ga.), 103 S. E. 458; *Gemert v. Pooler* (Wis.), 177 N. W. 1.

**Question of ownership.**—If a father buys a car for his son to use in the taxi business and the machine is registered in the name of the son, it may be forfeited although the father claims the ownership thereof. *Fearn v. State* (Ala.), 88 So. 591.

is even against his directions.<sup>45</sup> Under other statutes, the unlawful transportation by a chauffeur does not necessarily condemn the owner's rights, but the forfeiture will turn upon the knowledge or notice of the owner as to the violation of the law.<sup>46</sup> Similarly, if a vehicle is loaned or hired to another in good faith, without knowledge that the bailee intends to use it for the unlawful transportation of liquors, the owner is protected in some states;<sup>47</sup> in others, the vehicle may be forfeited against his protest.<sup>48</sup> If a passenger with liquors in his possession is carried in a taxicab, neither the owner nor driver of which has any knowledge of the liquors, the vehicle will not generally be forfeited,<sup>49</sup> though possibly the laws of some states may be broad enough to justify a forfeiture in such a case. But, under every statute so far construed by the courts, if the offender originally acquired possession of the machine through trespass or theft, the rights of the owner are not forfeited.<sup>50</sup> Where the machine has been stolen, even the conclusion of the condemnation proceedings and the sale of the machine to a third party, do not divest the true owner of his property.<sup>51</sup> If the owner is a party to the proceeding and is unsuccessful in his claim, he is concluded by the decree;<sup>52</sup> but, if he is not a party, he is not bound thereby.<sup>53</sup>

If the owner can be charged with knowledge or notice of the unlawful use of the vehicle, there is sufficient ground to justify

45. *United States v. Mincey*, 254 Fed. 287; *Buchholz v. Commonwealth* (Va.), 102 S. E. 760.

46. *Puckett v. State* (Ala.), 85 So. 452; *Land v. Hitt* (Ga.), 102 S. E. 136, confirming 101 S. E. 795; *Aldinger v. State*, 115 Miss. 314, 75 So. 441; *State v. Johnson* (N. Car.), 107 S. E. 433; *Hoskins v. State* (Okla.), 200 Pac. 168.

47. *United States v. Brockley*, 266 Fed. 1001; *Lang v. Hitt* (Ga. App.), 102 S. E. 136, confirming 101 S. E. 795; *Mays v. Curry* (Ga.), 103 S. E. 458; *One Buick Car v. State*, 77 Okla. 233, 188 Pac. 108.

48. *Pennington v. Commonwealth* (Va.), 102 S. E. 758.

49. *Aldinger v. State*, 115 Miss. 314, 75 So. 441.

50. *Briscoe Motor Car Co. v. State* (Ala.), 85 So. 475; *State v. Davis* (Utah), 184 Pac. 161; *Gemert v. Pooler* (Wis.), 177 N. W. 1.

There is no presumption that the person in charge of the machine acquired his possession by theft or other trespass. *Pennington v. Commonwealth* (Va.), 102 S. E. 758.

51. *Smith v. Spencer-Dowler Co.* (Ga. App.), 100 S. E. 651.

52. *State v. Merrill* (Ala.), 85 So. 28.

53. *Spratt v. Gray* (Fla.), 87 So. 760.

its forfeiture.<sup>54</sup> And, under the Volstead Act, the burden is upon the owner to remove any imputation that he negligently intrusted the vehicle to an employee or other person under circumstances from which a careful and prudent person ought to have foreseen that it was likely to be illegally used.<sup>55</sup> If the owner is warned that his employee had been unlawfully using the machine and he negligently fails to discharge him, the vehicle may be condemned, although the owner has no notice of the violation of the law.<sup>56</sup>

### Sec. 946. Burden of proof as to innocence of claimant.

It may be held in some jurisdictions that the burden is upon the State seeking to condemn a vehicle against the owner to show that such owner had knowledge or notice of the unlawful use of the vehicle.<sup>57</sup> But the view generally taken is that the finding of the intoxicating liquor in the vehicle makes a *prima facie* case against the owner though he was not present at the time, and the burden is then placed upon the owner to show his innocence of the transaction.<sup>58</sup> And, under the National Prohibition Act, it is thought that the burden is upon one claiming a lien on the vehicle to show that his lien was created without notice of unlawful use of the vehicle.<sup>59</sup> In *Alabama*, the burden is upon the owner to show, not only ignorance of the use of the car, but also that by the exercise of reasonable diligence he could not have obtained knowledge or notice of the illegal use and prevented the same.<sup>60</sup>

54. *Oakland Automobile v. State* (Ala.), 84 So. 839; *In re Igo* (Ala.), 84 So. 750.

55. *United States v. One Shaw Automobile*, 272 Fed. 491.

56. *Davenport v. State* (Ala.), 88 So. 557.

57. *Lang v. Hitt* (Ga.), 102 S. E. 136, confirming 101 S. E. 795; *Parks v. State* (Ga. App.), 104 S. E. 911; *Citizens' Trust Co. v. State* (Ga. App.), 107 S. E. 274.

58. *United States v. Burns*, 270 Fed. 681; *United States v. One Shaw Automobile*, 272 Fed. 491; *Aldinger v.*

*State*, 115 Miss. 314, 75 So. 441; *Peavler v. State* (Okla.), 193 Pac. 623; *State v. Davis* (Utah), 184 Pac. 161; *State v. Jenson* (Utah), 184 Pac. 179.

59. *United States v. Burns*, 270 Fed. 681.

60. *State v. One Lexington Automobile* (Ala.), 84 So. 297; *State v. Crosswhite* (Ala.), 84 So. 813; *State v. Merrill* (Ala.), 85 So. 28; *One Buick Automobile v. State* (Ala.), 85 So. 739; *Flint Motor Car Co. v. State* (Ala.), 85 So. 741; *Glover v. State* (Ala.), 88 So. 437.



# Sec. 947. Procedure.

Proceedings for the forfeiture of a motor vehicle used in violating the law are classed as proceedings *in rem*.<sup>61</sup> The procedure is generally outlined by the statute and is jurisdictional, not merely directory, and must be followed to divest the owner of his property.<sup>62</sup> The forfeiture of an automobile under the 26th section of the Volstead Law must be in strict pursuance of the terms thereof.<sup>63</sup> The proceedings are usually prosecuted by a petition in the name of the State against the offending vehicle,<sup>64</sup> though possibly in some states they may be prosecuted in the name of the prosecuting official.<sup>65</sup> A statute requiring further action on the part of the government within a prescribed time after the seizure of the vehicle may be construed as mandatory, so that the owner will be entitled to the return of the vehicle if such action is not timely taken.<sup>66</sup> The owner or one claiming an interest in the vehicle is permitted to intervene,<sup>67</sup> though the statute may prescribe a time within which his appearance must be made.<sup>68</sup> The right of intervention generally furnishes a claimant an adequate remedy at law, and he may not be entitled to main-

61. *United States v. Hydes*, 267 Fed. 470; *Mack v. Westbrook* (Ga.), 98 S. E. 339; *Keeter v. State* (Okla.), 198 Pac. 866; *Hoskins v. State* (Okla.), 200 Pac. 168; *Landers v. Commonwealth* (Va.), 101 S. E. 778.

62. *United States v. Hydes*, 267 Fed. 470; *Phillips v. Stapleton*, 23 Ga. App. 303, 97 S. E. 885.

63. *United States v. Slusser*, 270 Fed. 818, holding that the following elements are essential: "(1) That an officer of the law discover some person in the act of illegally transporting liquor in a vehicle. (2) The seizure of the liquor so transported or possessed. (3) The seizure of the vehicle and arrest of the person. (4) That the officer proceed against the person and retain the vehicle, unless redelivered to the owner, upon giving bond to return it to the custody of the officer on the

day of trial to abide the judgment of the court. (5) Conviction of the person and order of sale of the vehicle. (6) Distribution of the proceeds."

64. *Amendment of petition*.—See *Burgan v. State* (Ga. App.), 99 S. E. 636.

65. *Mack v. Westbrook* (Ga.), 98 S. E. 339.

66. *United States v. One McLaughlin Automobile*, 255 Fed. 217. See also *Phillips v. Stapleton*, 23 Ga. App. 303, 97 S. E. 885.

67. *Griffin v. Smith* (Ga. App.), 99 S. E. 386.

68. *One Packard Automobile v. State* (Ala.), 86 So. 21.

*Answer filed after statutory period but before judgment by default is entered, may not be dismissed.* *Fletcher v. State* (Ga. App.), 100 S. E. 718.

tain an equitable action to assert his rights.<sup>69</sup> But, if for technical reasons he cannot secure adequate relief in the proceeding, an equitable action may be maintained.<sup>70</sup> Replevin is not generally permitted as a remedy to recover possession of property in the custody of the law.<sup>71</sup> The claimant is not generally required to furnish a claim affidavit and claim bond;<sup>72</sup> nor is the officer having possession of the machine required to deliver possession of the machine to a claimant furnishing such papers.<sup>73</sup> But under the National Prohibition Act, the owner is entitled to the possession of the property upon delivery of a bond. Generally there must be a valid seizure of the machine, either at the time of the violation of the law or by virtue of a warrant subsequently issued.<sup>74</sup> And, if the seizure is not valid, the proceedings may fail.<sup>75</sup> Under the National Prohibition Act, an order for the sale of the offending vehicle seems to follow automatically upon the conviction of the owner; but the conviction does not preclude a remedy against the vehicle by way of libel.<sup>76</sup>

69. *Nesmith v. Martin* (Ga.), 98 S. E. 551.

70. *Shrouder v. Sweat* (Ga.), 96 S. E. 881.

71. *Allison v. Hern*, 102 Kans. 48, 169 Pac. 187. See also *Martin v. English* (Ga. App.), 98 S. E. 505.

72. *Griffin v. Smith* (Ga. App.), 99 S. E. 386.

73. *Bernstein v. Higginbotham* (Ga.), 96 S. E. 866.

74. *United States v. Hydes*, 267 Fed. 470; *Hoover v. People* (Colo.), 187 Pac. 531.

Seizure of vehicle about to enter Indian country.—*United States v. One Ford Five Passenger Automobile*, 259 Fed. 645.

Warrant.—Under some statutes, the seizure may be without a warrant. *One Hudson Super-six Automobile v. State*, 77 Okla. 130, 187 Pac. 806.

75. *United States v. Slusser*, 270 Fed. 818; *State v. Ford Touring Car*, 117 Me. 232, 103 Atl. 364.

76. *United States v. One Stephens Automobile*, 272 Fed. 188.

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